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European International Family Law

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I. Notion of European international family law

European international family law forms a part of private international law and refers particularly to the EU regulation of family law (international). Substantive family law in the European Union is not unified; rather, substantive law in the Member States varies. Private international law on the other hand has, for some time, become increasingly europeanized. More and more uniform European procedural rules and also choice of law rules have been introduced. This development initially started in family law with the aim of creating a unified European judicial arena on a procedural level, but has in the meantime been extended to the creation of choice of law rules. Family law considerably affects personal and economic interests of individuals. Therefore, increasing cross-border and multinational family relationships necessitates a unification of conflicts rules affecting family law and – though this is debated – may eventually necessitate unification of substantive family law in the EU. A certain degree of legal certainty in the interest of the citizens of the Union in international family law can, for the time being, only be achieved by a harmonization of conflict law rules and the rules on jurisdiction, mutual recognition and enforcement.

The development of an international European family law is time-consuming and faces specific difficulties. There are already peculiarities of legislative competence. The national, European and international spheres have to be coordinated. The content of European regulations has to be developed in view of divergent national concepts and traditions. Most of the proposals originate from the European Commission.

Family law in this sense encompasses core areas of law like matrimonial and child law (marriage; family). The divergent positions in the Union in respect of non-marital and same-sex relationships (cohabitation; same-sex relationships) lead, however, to a few grey areas. For example, the Rome I Regulation on international contractual obligations (Reg. 593/2008) excludes obligations arising out of 'family relationships' or out of 'relationships deemed by the law applicable to such relationships to have comparable effects' (Art. 1(2)(b)). According to the recitals, family relationships should cover parentage, marriage, affinity and collateral relatives. For relationships 'having comparable effects' to marriage and other family relationships, there is no Union law definition, and reference is made only to the law of the Member State in which the court is situated, i.e. the lex fori. However, with a Communication from the Commission to the European Parliament and the European Council of 2011 the Commission tries to bring legal clarity to property rights for all international couples[1]. It is

[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Bringing legal clarity to property rights for international couples (COM(2011) 125 final).

accompanied by a proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and another for a Council Regulation on the property consequences of registered partnerships[2]. These Proposals try to give a more comprehensive and modern answer.

II. European competence

A Union law regulation of international family law presupposes a valid legal basis in the EU Treaties. Legislative competence for a comprehensive uniform European substantive family law does not yet exist. Rather, the European Union is restricted to the regulation of cross-border family law related cases. The Treaty of Amsterdam introduced a competence for a 'gradual creation of an area of freedom, security and justice'[3], which encompassed measures in the area of judicial cooperation in civil matters having cross-border implications according to Art. 81 TFEU[4]. This concerns e.g. improvement and simplification of recognition and enforcement of decisions in civil and commercial cases, including decisions in extra-judicial cases (Art. 81(2)(a) TFEU) as well as the 'the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction' (Art. 81(2)(c) TFEU). Projects in family law as well are covered by this. Meanwhile, it is the prevailing view that not only rules on procedure are covered, but that a coordination of conflict rules by unification can also take place.

Like other European conflict rules the conflict rules in family law are also universally applicable to third countries. In addition, a Union law regulation of international family law generally conforms to the principles of subsidiarity and proportionality found in Union law (see Art. 5(3), (4) TEU). This depends, however, on the content of the proposed legal instrument.

Under the Treaty on the Functioning of the European Union (TFEU) there is a Chapter 3 on 'Judicial cooperation in civil matters'. In principle the ordinary legislative procedure of the European Parliament and Council is applicable (Art. 81(2) TFEU). However, there is a special procedure for measures concerning family law with cross-border implications. These measures must be decided by the European Council using the special legislative procedure (Art. 81(3) TFEU). The Council has to act unanimously after consulting the European Parliament (Art. 81(3)1 TFEU). The attribution of the proposals to the legislative procedures is more or less possible without problems. Belonging to family law in the sense of Art. 81 TFEU are, for example, matrimonial matters and parental responsibility.

According to a sub-exception of the exception in Art. 81(3) TFEU, the Council may, on a proposal from the Commission, adopt a decision determining those aspects of family law with cross-border implications which may then be the subject of acts adoptable by ordinary

[2] See infra IV 4.

[3] Art. 73m Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ 1997 C 340/1.

[4] Treaty on the Functioning of the European Union (TFEU). Consolidated versions of the Treaty on European Union (TEU) and of the Treaty establishing the European Community, OJ 2010 C 83/1.– Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, OJ 2007 C 306/1.

legislative procedure (Art. 81(3)2 TFEU). The Council must act unanimously after consulting the European Parliament (Art. 81(3)2 TFEU). Thus the national parliaments also play a role for this bridging clause in respect of family law. The proposal must be notified to them (Art. 81(3)3 TFEU). If a national parliament expresses its opposition within six months of the date of such notification, the decision cannot be adopted and there is no bridging (Art. 81(3)3 TFEU). The veto right of the national parliaments has no further influence, however. In the absence of opposition, the Council may adopt the decision.

III. Approaches in private international law

1. General part

The development of a European international family law faces the same problems as other European conflict rules. The impact of European primary legislation, particularly the fundamental freedoms, must not be forgotten. Increasingly, respect for the free movement of persons (Art. 21 TFEU) resulting from Union citizenship (Art. 20 TFEU) is of particular significance for choice of law questions and connections.

As far as classical conflict rules are to be created, a specific general part of European PIL is lacking, so that a uniform attitude to, for example, public policy or renvoi still has to be developed. In this regard, it can also be assumed that public policy will only play a small role. Considering that a choice of law and the habitual residence of the parties are widely advocated as appropriate connecting factors, the use of renvoi will probably not succeed.

2. Connecting factors

The development of a consistent system of connections for the conflict rules is difficult. In order to meet the factual connections of individuals with their respective environments, but also for practical reasons, habitual residence is currently the most important connecting factor. Proposals for an objective connection in European international family law generally take this as a starting point. Especially for spouses of different nationality, the law of their (last) common habitual residence is a governing consideration.

It is true that nationality is, to a large extent, still a decisive connecting factor in national conflict rules. And as yet, the European Court of Justice has not challenged the nationality principle as such. However, for European conflict rules nationality is unsuited as a primary connecting factor not only because of the need to avoid discrimination on grounds of nationality, but also in view of the growing mobility in the internal market. Nevertheless it represents a close connection and can, particularly in cases of a common nationality of the parties, be a connecting factor[5].

Moreover, an extension of party autonomy with a restricted choice of law is developing in family law matters and also in respect of personal status. For example the Rome III Regulation on divorce provides for such a choice of applicable law by the parties[6]. In this way

[5] For the absence of a choice of law see Art. 8 (1) (c) Rome III Regulation.
[6] See Art. 5 Rome III Regulation.

individuals can determine by themselves the legal system to which they have a close connection.

The difficulties for the development of a consistent approach can be seen in the Rome III Regulation[7]. According to this there is an application of the law of the forum where the law applicable pursuant to the general rules makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the forum shall apply (Art. 10 Rome III Regulation). On the other hand, Art. 13 Rome III Regulation takes differences in national law into account. The courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings are not obliged to pronounce a divorce by virtue of the application of this Regulation.

The single connections have to be suitable, e.g. in child law they have to serve the best interests of the child. At the procedural level, the proposals generally aim at a promotion of cooperation among the competent authorities.

3. Recognition of foreign legal acts

Especially with regard to the right to a name (law of names), it is discussed how far it would be possible, instead of an application of a specific legal order, i.e. a proper choice of law approach, to follow a simple recognition of the respective foreign regulation of names. Such a recognition rule would then make a separate connection of the single issue in a conflict of law rule superfluous. The recognition could relate to acts of public authorities, the creation of a legal status or in general also to legal situations.

This debate was spurred by the case of the Spaniard Garcia Avello, who, with his Belgian wife, I. Weber, and his two Belgian-Spanish children lived in Belgium. According to Belgian law the children received the name of the father - Garcia Avello - as their surname; a change of name was refused. However, Spanish custom is for children to take the first surname of each of their parents placing their father's first and their mother's second. According to the European Court of Justice's view Art. 18 TFEU (former Art. 12 EC) (discrimination (general)) and Art. 20 TFEU (former Art. 17 EC) (Union Citizenship) forbade the rejection of a change of name application for children with dual nationality where it is sought that the child bear the name which they would have had according to the law and the tradition of the second Member State (here: 'Garcia Weber' per Spanish law and custom). As a result it is considered discriminatory if the name cannot be changed according to the national law of the person[8] .

The ECJ followed this line of reasoning in a case in which a child of German nationality - born and primarily living in Denmark - was denied a dual surname by German authorities. Such a name was permissible under Danish law, but inadmissible under German law[9]. It is

[7] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ 2010 L 343/10.– For the basis of enhanced cooperation see Art. 20 Treaty on European Union and Art. 326 ff. Treaty on the Functioning of the European Union (TFEU).

[8] European Court of Justice Case C-148/02 – Garcia Avello [2003] ECR I-11613.

[9] European Court of Justice Case C-353/06 – Grunkin-Paul [2008] ECR I-7639.

true that the concept of nationality as such was not disapproved. The decisive argument of the court was, however, the free movement of EU citizens according to Art. 21 TFEU (former Art. 18 EC). EU citizens must not be discriminated against when they make use of their freedom to move and reside freely in another Member State. To bear a different name in the other Member State is a serious and disproportionate inconvenience. The German authorities therefore were not allowed, on application of German law, to refuse to recognize the surname of a child which had been determined and registered in another Member State in which the child was born and had been resident since birth.

IV. European regulations

1. In general

In the past, European international family law has been regulated solely by procedural laws. However, the enactment of regulations encompassing substantive law as well as procedural rules is growing.

2. Divorce

Moreover, the Brussels II*bis* Regulation (Reg. 2201/2003) on the jurisdiction and the recognition and enforcement of foreign decisions in matrimonial matters and in proceedings concerning parental responsibility is in force[10].

The enactment of the Rome III Regulation on the applicable law to divorce (2010) was only a limited success. Originally it was planned to insert provisions concerning the applicable law in the Brussels II*bis* Regulation. However, such a regulation failed due to the resistance of some Member States, particularly Sweden, where obtaining an 'easy' divorce is seen as a human right. To overcome this impasse, in March 2010, 10 Member States agreed to proceed, making use for the first time of the 'enhanced cooperation' mechanism contained in the EU treaties[11]. In cases of a common residence connection combined with a residence abroad, these provisions can lead to an application of a foreign law under which a divorce is not at all or only in a restricted manner possible.

3. Maintenance obligations

Procedure in international maintenance matters was originally covered by the Brussels I Regulation (Reg. 44/2001)[12]. Meanwhile also an independent regulation on international maintenance law has been developed[13]. The Maintenance Regulation concerns international law of civil procedure, particularly jurisdiction, recognition of judgments and cooperation of national authorities. Initially special European conflict of laws rules were also planned.

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[10] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ 2003 L 338/1.

[11] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L L 343/10 .

[12] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12/1.

[13] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ 2009 L 7/1.

However, according to the final version of the Maintenance Regulation, the applicable law on maintenance obligations is determined by the Member States, who must act consistently with the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (Art. 15 Reg. 4/2009)[14]. In this way a further fragmentation of international maintenance law has been avoided.

4. Matrimonial property law

Moreover, European conflict rules determining the applicable matrimonial property law are to be developed. Hitherto there is only a Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes[15] and another regarding the property consequences of registered partnerships also of March 2011[16]. Until the adoption of the Proposals these matters are dealt with according to the rules of the respective national Private international law.

V. International conventions

1. In general

The European Court of Justice has developed an external competence of the EU which flows from the internal competence of the Union: the Union can enter into external (international) agreements if it has already made use of its internal competences, adopts measures with the aim of implementation of Union policies, or if this is necessary for an achievement of a goal of the EU[17] . Therefore, there is an external competence of the Union if legal instruments are issued which are based specifically on Art. 81 TFEU.

The external competence of the EU is of an exclusive nature, insofar as an international agreement affects intra-Union provisions or intervenes in their scope. Then it is a matter for the Union to enter into external agreements with third countries or international organizations. Such an agreement may totally or only partially fall within the exclusive external competence of the EU. In the latter case it is a shared (mixed) competence between Union and Member States. Depending on the matter, it may only be a concurrent competence which also exists.

The European Court of Justice also holds that where common legal norms have been enacted, the Member States themselves are neither individually nor collectively entitled to enter into engagements with third countries which interfere with these norms. In such cases, the European Union has an exclusive competence for the conclusion of international treaties. Accordingly, the EU has to act externally in a uniform way.

2. Bilateral agreements of Member States

[14] Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, OJ 2009 L 331/9.
[15] Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM(2011) 126).
[16] Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships (COM(2011) 127).
[17] European Court of Justice Case 22/70 – Commission/Council [1971] ECR 263.

However, there still exists a need for bilateral agreements of Member States with third countries. Therefore, there is Council Regulation of 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations[18].

3. Hague Conference on Private International Law

Since 3 April 2007 the European Union is, as a regional organization, a member of the Hague Conference on Private International Law[19]. The European Union has deposited a declaration of competence specifying the matters in respect of which competence has been transferred to it by its Member States[20]. This concerns measures in the field of judicial cooperation in civil matters having cross-border implications especially insofar as necessary for the proper functioning of the European internal market (Art. 81 TFEU/61(c) and 65 EC). In 2007 the European Union has signed the Hague Maintenance Convention of 2007[21].

For the application between Member States, the procedural Brussels II*bis* Regulation in principle takes precedence over the international conventions that may be in play. However, this regulation takes precedence only over matters covered by the regulation. Substantive conflict rules are therefore generally not affected. It is intended that the existing conventions, particularly in respect of child abduction, are not totally set aside by the regulation but are instead supplemented by additional European rules of a further scope (see Art. 11 Brussels II*bis* Regulation).

Specific problems arise with regard to the ratification of the already-existing Hague Conventions. The UK-Spanish dispute regarding the application of the Hague Child Protection Convention in Gibraltar has blocked the entry into force of the Convention for most senior EU Member States for a considerable time. The Convention deals with matters which are also covered by the Brussels II*bis* Regulation, and so further reduces the competence of the Member States. The Council has in the meantime authorized the Member States to ratify the Convention.

Where the European Union and/or its Member States become contracting parties to a new Hague Convention, the question arises as to what the relationship between EU law and international conventions should be since they relate to the same matter. The anticipated legal

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[18] Council Regulation (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations, OJ 2009 L 200/46.

[19] Statute of the Hague Conference on Private International Law, OJ 2006 L 297/1 (Annex IV).

[20] Cf. Council Decision 2006/719/EC of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law, OJ 2006 L 297/1.

[21] Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.– Cf. Council Decision of 31 March 2011 on the signing, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, OJ 2011 L 93/97.

uncertainty which will ensue in practice as a result of duplicate regulation demands a determination of a rule on precedence.

4. Hague Maintenance Convention 2007 and Hague Protocol 2007

In the Hague Conventions there are already precautionary provisions. According to Art. 51(4) Hague Maintenance Convention of 2007, the Convention shall not affect the intra-Union application of instruments of a Regional Economic Integration Organisation for parties of the Convention. According to the Maintenance Regulation its provisions shall, in relations between Member States, take precedence over the conventions and agreements which concern matters governed by this Regulation and to which Member States are party (Art. 69(2)).

Within the European Union (with the exception of Denmark and the UK), the rules of the Hague Maintenance Protocol apply provisionally despite the fact that the Protocol itself has not yet entered into force[22].

5. Child protection

The Hague Convention on Protection of Children of 1996 deals with parental responsibility and protective measures for children[23]. Mostly the parts on applicable law and cooperation are of practical importance. For jurisdiction, recognition and enforcement the Brussels II*bis* Regulation takes precedence over the Convention.

6. Child abduction

The Hague Convention on Child Abduction of 1980 is a multilateral treaty, which seeks to protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return[24]. See also Art. 11 Brussels II*bis* Reg.

7. Protection of adults

The Hague Convention on Protection of Adults of 2000[25], in force from 1 January 2009[26], is covered only by the currently unexercised, concurrent competence of the EU and could therefore be ratified by the Member States – among others, Germany – without problem.

8. Other conventions

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[22] Council Decision of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, OJ EU 2009 L 331/17.

[23] OJ EU 2008 L 251/39. (Entry into force for Latvia 1 April 2003).– See Council Decision 2008/431/EC of 5 June 2008 authorising certain Member States to ratify, or accede to, in the interests of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law, OJ 2008 L 151.

[24] Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.– See http://www.hcch.net. In force for Latvia 1 February 2002.

[25] Convention of 13 January 2000 on the international protection of adults.– See http://www.hcch.net

[26] Contracting States are the Czech Republic, Estonia, Finland, France, Germany, Switzerland and United Kingdom (only Scotland).

In the field of civil status registration, several European treaties have been concluded under the supervision of the Council of Europe and the International Commission on Civil Status (CIEC).

VI. International law of civil procedure

1. Jurisdiction

Rules governing adjudicatory jurisdiction on maintenance matters can be found in the Maintenance Regulation (Article 3 - 14). For divorce (marriage) and parental responsibility, jurisdiction is laid down in the Brussels II*bis* Regulation (Article 3 - 20), according to which the habitual residence of the parties is mainly or even ultimately decisive. Family matters are generally not covered by the Brussels I Regulation (see the exclusion of status of natural persons and matrimonial property in Art. 1(2)(a) Brussels I).

2. Service and evidence

In principle the European regulations for service of documents[27] and taking of evidence[28] apply.

3. Recognition and enforcement of foreign judgments

Uniform rules for the recognition and enforcement of foreign judgments in matters relating to maintenance obligations are laid down in the Maintenance Regulation (Article 16 - 43), for matrimonial matters and parental responsibility in the Brussels II*bis* Regulation (Article 21 - 52). Special provisions are found in the Brussels II*bis* Regulation in respect of international child abduction (Article 11). Alongside the Hague Convention on Child Abduction of 1980, these rules try to secure the prompt return of wrongfully removed or retained children.

[27] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, OJ EU 2007 L 324/79.

[28] Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ EC 2001 L 174/1.