

**SHOULD WE STAY OR SHOULD WE GO IN?  
ADVANTAGES OF ENHANCED COOPERATION  
AIMED TO UNIFICATION OF CONFLICT-OF-LAWS RULES  
IN DIVORCE AND SEPARATION MATTERS  
(EU REGULATION NO 1259/2010)**

Piotr Mostowik\*, Elena Judova\*\*

Council Regulation No. 1259/2010, implementing enhanced cooperation in the area of the law applicable to divorce and legal separation was adopted on 20.12.2010<sup>1</sup> (“**Rome III Regulation**”). Poland did not take part in the final legislative activities, which constitute an example of the specific procedure of enhanced cooperation between certain Member States. The analysis of this Regulation, being an example of a broader phenomenon of the EU’s law-making in the area of private international law, and the issue of Poland’s future decision to “opt in” to this measure, are the main topics of the comments below.

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\* Jagiellonian University in Cracow.

\*\* Mateja Bela University in Banska Bystrica. This work was supported by the Slovak Research and Development Agency under contract No. APW-0754-07 and by Polish national Centre of Science under the decision No. DEC-2011/03/B/HS5/00546.

<sup>1</sup> O.J. 29.12.2010 L-343, at pp. 1–16.

## 1. International standards of substantive family law

The terminology of "international" or "European family law" is found in academic writings either to describe in shorthand comparative legal studies of the substantive laws of different states<sup>2</sup>, or to define the "non-substantive" legal issues concerning foreign relations – *i.e.*, conflict-of-laws rules of private international law, together with rules on international jurisdiction and the effectiveness of foreign judgments<sup>3</sup>. Comparative legal research sometimes leads to identifying the "common denominator" in various domestic laws, as well as the smallest differences between them, so as to be able to define the scope of potential compromise and possible future harmonization or unification of family law. For example, the activity of the Commission of European Family Law in recent years has resulted in comparative studies concerning the laws of EU Member States, and in publication of the model rules concerning key family law matters<sup>4</sup>. In fact, the domestic legislation of various countries on family

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<sup>2</sup> See T. Sokołowski, *Pojęcie europejskiego prawa rodzinnego* [The Notion of European Family Law], [in]: H. Cioch, P. Kasprzyk (eds), 'Z zagadnień prawa rodzinnego i rejestracji stanu cywilnego' [On problems of family law and matrimonial status registration], Lublin 2007, at pp. 14–17.

<sup>3</sup> See C. Mik, *Międzynarodowe prawo rodzinne Unii Europejskiej na tle ewolucji współpracy sądowej w sprawach cywilnych* [International family law of the European Union and the evolution of judicial cooperation in civil matters], [in]: L. Ogiełło, W. Popiołek, M. Szpunar (eds) 'Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana' [Legal Papers. Commemorative book dedicated to Professor Maksymilian Pazdan], Kraków 2005, at pp. 209–210; M. Supera, *Europejskie prawo małżeńskie – projekt nowelizacji reguł kolizyjnych* [European Marriage Law – draft amendments of conflict of law rules], 'Palestra' 2009, No. 9–10, at pp. 210–213 and P. Wiśniewski, *Rodzina w prawie pierwotnym Unii Europejskiej – stan obecny, perspektywy i postulowane kierunki rozwoju* [Family in primary law of the European Union – current status, prospects and trends postulated], [in]: P. Kasprzyk, P. Wiśniewski (eds), 'Prawo rodzinne w dobie przemian' [Family Law in Transition], Lublin 2009, at pp. 81–85.

<sup>4</sup> Detailed information can be found at [www.ceflonline.net](http://www.ceflonline.net). The head of Organizing Committee of Commission on European Family Law is Prof. Katharina Boele-Woelki. The effects of the Commission's activities are, for example, the following publications: K. Boele-Woelki, F. Ferrand, C. González Beilfuss, M. Jänterä-Jareborg, N. Lowe, D. Martiny, W. Pintens, *Principles of European Family Law Regarding Divorce and*

matters, including the issues of marriage and divorce, differs substantially. It concerns those areas of law that are definitely less susceptible to harmonization or unification at an international level than other civil law matters (such as, e.g., commercial ones) and which have been progressively regulated differently at the beginning of XXI<sup>st</sup> Century (e.g. the legal redefinition of sex, marriage and parentage)<sup>5</sup>.

It has proven difficult recently to find examples of a broad unification of substantive family law on an international scale, which would result in a direct, universal application of identical provisions in various states. Historically, the rules of personal matrimony were unified due to the application of religious laws. At present, we may consider the direct application of certain provisions of international agreements that are sufficiently precise to be directly applied, and do not require further implementation by domestic laws. The realistic potential scope to which it may be possible to achieve a broader international *consensus* would seem to be greatest as regards the issue of child protection, however such issues as natural parentage or adoption may constitute an obstacle in certain states to completing this process<sup>6</sup>.

Despite the ever-increasing process of globalization, harmonization of substantive family law on an international scale, meaning the adaptation of national law to the model laid down in appropriate conventions, has thus far only been achieved in respect of a few matters of general character. To the extent that it exists, such harmonization was brought about by the accession of States to international agreements drafted in the second half of the 20<sup>th</sup> century, which concern a much broader spectrum of human rights protection. Such agreements were drafted mainly under the auspices of the United Nations and the Council of Europe<sup>7</sup>. Certain

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*Maintenance Between Former Spouses*, Antwerpen 2004 and K. Boele-Woelki, F. Ferrand, C. González Beilfuss, M. Jänterä-Jareborg, N. Lowe, D. Martiny, W. Pintens, *Principles of European Family Law Regarding Parental Responsibilities*, Antwerpen 2007.

<sup>5</sup> E.g., United Nations Convention on Contracts for the International Sale of Goods of 1980 (Polish O.J. 1997, No 45, item 287).

<sup>6</sup> See United Nations Convention on the Rights of the Child of 1989 (Polish O.J. 1991, No. 120, Item 526) and European Convention on the Exercise of Children's Rights, adopted in Strasbourg in 1996 (Polish O.J. 2000, No. 107, Item 1128).

<sup>7</sup> Under Article 23 of International Covenant on Civil and Political Rights, adopted in New York in 1966 (Polish O.J. 1997, No. 38, Item 167): "1. The family is the natural

unified rules have recently been imposed by European Union legislation, which has gone beyond “pure economic” matters<sup>8</sup>.

Among the particular family law issues to have been harmonized by specific international instruments are: the rule of freedom to express the will to enter into marriage, the obligation to officially register marriage, the obligation to treat a child born out of wedlock equally to one born in wedlock, the standards governing the inter-State adoption of children and standards governing contact between parents and children<sup>9</sup>.

Pursuant to Articles 2 and 3(3) of the Treaty on European Union<sup>10</sup>, the Union is founded on the values of respect for human rights, including the rights of persons belonging to minorities, and the Union shall promote equality between women and men, solidarity between generations and protection of the rights of the child. What is surprising is that the Treaty makes no mention of promoting or protecting the family, and Article 7 of the EU's Charter of Fundamental Rights of 2000<sup>11</sup> describes the right to respect for family life in connection with the rights to respect for private life, home and communications, which are different in character.

It seems rather unlikely in the upcoming years that the unification or harmonization of substantive family law will progress on a regional or global scale, especially as regards the personal law related to marriage. The differences in this area of law can be seen even amongst the EU Member States, despite the European Union's aim to promote closer international

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and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognized. 3. No marriage shall be entered into without the free and full consent of the intending spouses”.

<sup>8</sup> See K. Boele-Woelki, *ZwischenKonvergenz Und Divergenz: Die CEFL-PrinzipienzumeuropäischenFamilienrecht*, *Rabels Zeitschrift* 2009, No. 2, at pp. 242–266.

<sup>9</sup> See Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, adopted in New York in 1962 (Polish O.J. 1965, No. 9, Item 53), European Convention on the Legal Status of Children Born out of Wedlock, adopted in Strasbourg in 1975 (Polish O.J. 1999, No. 79, Item 888), part II (obligatory) and III (optional) of European Convention on the Adoption of Children, adopted in Strasbourg in 1967 (Polish O.J. 1999, No. 99, Item 1157) and Convention on Contact concerning Children, adopted in Strasbourg in 2003 (under procedure of ratification by Poland, Polish O.J. 2009, No. 68, Item 576).

<sup>10</sup> O.J. 30.3.2010, C-83, at p. 13.

<sup>11</sup> O.J. 30.3.2010, C-83, at p. 389.

relations in areas that are not merely commercial but also – due to the free movement of persons – involve rights that are personal in character. The Member States have not thus far seriously considered the idea of transferring competences to regulate substantive family law to the EU's institutions, with the result that such areas remain within the domain of national legislators<sup>12</sup>.

Therefore the prevailing sources of family law in every country have been, and will continue to be, provisions of domestic origins. In a majority of cases, those sources will remain unharmonized at an international level. In European countries it is even possible to observe a reverse trend – e.g., the introduction of different regulations and procedures concerning civil partnerships, registration of homosexual marriages, and the grounds for divorce<sup>13</sup>. The diversity of family law can be seen in certain states even internally, within territorially differentiated legal systems (e.g., Catalonia has adopted a family code which differs from the law in other Spanish regions).

## 2. The idea of unified private international law

Given the abovementioned diversity of substantive family law and the absence of any realistic perspective for the unification or harmonization thereof in the foreseeable future, special importance should be given to the unification of "at least" the conflict of laws rules<sup>14</sup>.

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<sup>12</sup> According to the preamble of EU Charter of Fundamental Rights of 2000, the European Union respects the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States. Under Article 9 thereof, the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights. That means that, for example, treating unions between people of the same sex by national laws as marriages is neither prohibited nor required and this depends entirely upon national legislation.

<sup>13</sup> See D. Martiny, *Ehescheidung und nahehehlicher Unterhalt in Europa*, 'Electronic Journal of Comparative Law' 2004, Vol. 8, No. 3, [www.ejcl.org](http://www.ejcl.org).

<sup>14</sup> See report prepared by T.M.C. Asser Instituut, *Practical problems resulting from the non-harmonization of choice of law rules in divorce matters. Final report*, The Hague 2002, at pp. 6–10, T. Sokołowski, *Pojęcie europejskiego prawa rodzinnego*, at p. 19, C. Mik, *op. cit.*, at p. 224.

The application of the same private international rules should ensure that the same judgments are given by courts in different countries in similar cases (and even in the same case when jurisdiction is granted to the courts of several countries). The judgments would be the same because they would be based on the same – defined with the same connecting factors – substantive law of a given state. Academic writing stresses that it would be ideal if the unified or harmonized conflict of laws rules were applied in different countries. However, at present this is not the case, since private international law is, to a great extent, regulated by provisions of domestic origin that may differ between states.

It is worth remembering that divorce and separation matters were the subject of actions leading to international unification of conflict of laws rules at the beginning of the 20<sup>th</sup> century. One of the first conventions prepared under the auspices of the Hague Conference of International Private Law, dated 12.6.1902, was the convention on law applicable to divorce and legal separation. Poland ratified this international agreement in 1929, and was a party thereto until 30.5.1974<sup>15</sup>.

The idea of regional harmonization or unification of international private law, which would also affect Poland and be based on Poland's 1926 Act, was brought up at the congress of Slavic lawyers held in Bratislava in 1933, but it was not implemented<sup>16</sup>. Regional, multilateral conventions in Europe have, however, been successfully adopted by Scandinavian and Benelux countries.

Nowadays, a similar idea could be realized on a greater scale in a much easier way due to the existence of the European Union and its competences, which includes the adoption of regulations that are directly binding in Member States. The consequence of the EU's efforts to unify

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<sup>15</sup> As regards the lack of interest in joining even private international law rules concerning family law – see e.g. P. Nygh, *The Hague Marriage Convention — A Sleeping Beauty?* [in]: A. Borrás, A. Bucher, T. Struycken, M. Verwilghen (eds) 'E Pluribus Unum. Liber Amicorum Georges A.L. Droz', The Hague–Boston–London 1996, at p. 253.

<sup>16</sup> See A. Mączyński, *Próba ujednoczenia prawa prywatnego międzynarodowego państw słowiańskich* [An attempt to unify private international law of Slavic countries], [in:] S. Grodziski, D. Malec, A. Karabowicz, M. Stus (eds), 'Vetera novis augere. Studia i prace dedykowane Profesorowi Waławowi Uruszczakowi', [Studies and works dedicated to Professor Waław Uruszczak], Kraków 2010, Vol. II, at pp. 721–731.

conflict of laws rules concerning divorce and separation is Rome III Regulation, adopted on 20.12.2010<sup>17</sup>. Referring to the previous regulations on the law applicable in contractual and non-contractual obligations it could be named “Rome III”<sup>18</sup>.

Poland took no part in the adoption of the said instrument via the specific procedure of enhanced cooperation between certain Member States. The analysis of this regulation is an example of a broader positive phenomenon within the EU’s law-making activity, aiming to unify private international law. While discussing its provisions and the issue of Poland’s decision to opt-in to these uniform conflict of laws rules, attention should also be given to rules concerning international civil procedure. Given the practical coexistence of applying conflict of laws rules and rules on international civil procedure, it is necessary, while undertaking this analysis, to consider the results of the EU legislation which unifies jurisdiction and the recognition of foreign judgments in divorce and legal separation matters.

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<sup>17</sup> O.J. 29.10.2010, L-343, p. 1–16; D. Martiny, *Ein internationales Scheidungsrecht für Europa – Konturen einer Rom III-Verordnung*, in: *Internationales Familienrecht für das 21. Jahrhundert – Symposium zum 65. Geburtstag von Ulrich Spellenberg*, [in:] R. Freitag, S. Leible, H. Sippel, U. Wanitzek (eds.), München 2006, at pp. 119–135; A. Fiorini, *Rome III – Choice of Law in divorce: Is the Europeanization of Family Law Going Too Far?*, ‘International Journal of Law, Policy and the Family’ 2008, Vol. 22 (2), p. 178–205; Ch. Kohler, *Zur Gestaltung des europäischen Kollisionsrechts für Ehesachen: Der steinige Weg zu einheitlichen Vorschriften über das anwendbare Recht für Scheidung und Trennung*, ‘Zeitschrift für das Gesamte Familienrecht’ 2008/18, p. 1673; A. Sapota, *Rozwód i separacja w normach kolizyjnych prawa europejskiego* [Divorce and separation in conflict norm of european law], ‘Europejski Przegląd Sądowy’ 2010, No. 1, p. 28–31; P. Mostowik, *Rozwód w prawie prywatnym międzynarodowym Unii Europejskiej (de lege ferenda* [Divorce in private international law of the European Union]), [in:] ‘Prawo rodzinne w dobie przemian...’, p. 345–361; B. Campuzano Diaz, *Uniform Conflict of Law Rules on Divorce and Legal Separation via Enhanced Cooperation*, [in:] B. Campuzano Diaz, M. Czepelak, A. Rodriguez Benot (eds.), ‘Latest Developments in EU Private International Law’, Cambridge 2011, at pp. 23–47.

<sup>18</sup> Regulation No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (“Rome II”), O.J. 31.7.2007, L-199, at pp. 40–49, and Regulation No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (“Rome I”), O.J. 4.7.2008, L-177, at pp. 6–16.

### 3. Law applicable in divorce and separation matters under Rome III Regulation

The primary consequence of Poland's future adoption of Rome III Regulation would be to remove the negative effects of the currently binding systems of rules on jurisdiction, conflict of laws and recognition of foreign judgments. This is discussed below, while this part outlines the general approach of the Regulation and compares this with currently binding provisions of internal origin.

Three main aspects should be noticed when comparing uniform EU rules with the provisions of Poland's Private International Law Act 2011 ("**PIL 2011**")<sup>19</sup>. Firstly, a possibility would exist for spouses to choose the applicable law. Secondly, there would be a change in the order of connecting factors applied to indicate the law applicable. Thirdly, EU solutions described as forming a general part of private international law would entry into force.

The Rome III Regulation enables spouses to agree on the law applicable to divorce or separation issues, but this option is not unlimited (Article 5). Such a solution evidences the recent tendency to broaden the scope of matters in respect of which the applicable law may be designated by the parties themselves. It can be also seen in, for example, Article 14 of the "Rome II" Regulation and Article 8 of the Hague Protocol of 2007 concerning maintenance obligations, as well as in the assumptions for future EU legislation concerning inheritance and marital property regimes<sup>20</sup>. The spouses may first of all agree on the law of the country in which they are habitually resident at the time of concluding such an agreement or where they resided in the past, provided that one of

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<sup>19</sup> Ustawa z dnia 4.2.2011 prawo prywatne międzynarodowe [Private international law], Polish O.J. No. 80, Item 432.

<sup>20</sup> See M. Pazdan, *Autonomia woli w prawie prywatnym międzynarodowym – aktualne tendencje* [Autonomy of will in private international law], [in:] M. Pazdan, W. Popiołek, E. Rott-Pietrzyk, M. Szpunar (eds), 'Europeizacja prawa prywatnego', Warszawa 2008, Vol. II, at p. 139 and M. Czepelak, *Wybór prawa właściwego dla zobowiązań pozaumownych w rozporządzeniu rzymskim I* [Choice of law applicable to non-contractual obligations in Rome I Regulation], 'Kwartalnik Prawa Prywatnego' 2009, No. 2, at pp. 520–527.



them still resides in that country. They may also select as applicable the substantive law of the *forum*. This last option will *de facto* concern the law designated on the bases of the jurisdiction of the court hearing the matter and, more exactly, those jurisdiction bases which do not directly describe the option to choose provided by Article 5 (e.g., the habitual residence of one of the spouses, stated in Regulation no. 2201/2003 as the jurisdiction basis).

The option to choose the applicable law, which is limited to the catalogue provided in the regulation, should be viewed as positive. The spouses may be willing, especially in complicated international situations, to agree on this issue and to designate an applicable law other than that which would be indicated when applying objective connecting factors (*i.e.*, firstly, by applying the law of the country in which, at the moment the court is seized, the spouses habitually reside or in which they lived no earlier than a year before, or the law of the country of which they are nationals). The regulation includes the option to choose the law of the *forum*, which results in cohesion of both jurisdiction and applicable law, and in more efficient court proceedings based on the court's own law.

Where the spouses have not availed themselves of the option to choose the applicable law, the regulation firstly provides that the substantive law should be designated on the basis of the spouses' habitual residence (Article 8(a) and (b)). A divorce or separation is governed by the law of the state in which the spouses habitually resided at the moment the court became seized of the matter, or where they used to reside, provided that this was no earlier than a year prior to the court's seizure and that one spouse remains resident in that state. However, where no connecting factors exist on the basis of habitual residence, the regulation provides that the applicable law should be designated on the basis of the nationality of both spouses (Article 8(c)). If this also fails to provide a clear answer (*i.e.*, the parties are not nationals of the same state), the law of the state where the court is seized should be applied (Article 8(d)).

In comparison with the currently prevailing solution laid down in the PIL 2011, the regulation's approach features a "reversed order" of the objective connecting factors which determine the applicable law, as well as a "limited time" for taking into account the circumstance of the spouses'

habitual residence<sup>21</sup>. Article 52 of the PIL 2011 stipulates that the next step of the “cascade” – *i.e.*, where no connecting factor may be identified on the basis of the first criterion (the same nationality of both spouses) or the second criterion (habitual residence in the same state at the time when court proceedings concerning the divorce action were initiated) – the applicable law should be that of the state where, at the moment the court is seized, the spouses no longer habitually reside but where they last resided. This solution is broader than that found in the regulation, since it neither introduces an additional limitation that the previous habitual residence must have existed for at least one year prior to this, nor a requirement that both spouses currently reside in a given state<sup>22</sup>. The decision to adopt a connecting factor based on a common circumstance which existed in the past (*i.e.*, it no longer exists at the moment when the court is seized) as the circumstance determining the law applicable to divorce has received some criticism in academic writings<sup>23</sup>. However, criticism has been equally forthcoming in relation to a much more broadly defined connecting factor which is neither – contrary to that in the discussed regulation – limited by the one-year period, nor by current residence in that state.

The applicability of Polish law on the basis of objective connecting factors determined in the regulation would be broadened in comparison with the domestic provisions, in cases where the spouses are nationals

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<sup>21</sup> See M. Pazdan, *O potrzebie reformy polskiego prawa prywatnego i niektórych proponowanych rozwiązań* [On the need of reform of Polish private law and certain proposed solutions], ‘Kwartalnik Prawa Prywatnego’ 2000, No. 3, at pp. 501–522; *O potrzebie uchwalenia nowej ustawy – Prawo prywatne międzynarodowe* [On the need to adopt new Statute on private international law], ‘Zeszyty Prawnicze BAS’ 2009, No. 1, at pp. 29–46.

<sup>22</sup> The arguments against the recodification of Polish private international law were presented by A. Mączyński, *Kodyfikacyjne zagadnienia części ogólnej prawa prywatnego międzynarodowego* [Questions concerning codification of the general provisions of Private international law], [in:] A. Janik (ed.) ‘Studia i rozprawy, Księga jubileuszowa dedykowana profesorowi Andrzejowi Całusowi’, Warszawa 2009, at pp. 412–422; *Przeciwko potrzebie uchwalenia nowej ustawy – Prawo prywatne międzynarodowe* [Against the need to adopt new Statute on private international law], ‘Zeszyty Prawnicze BAS’ 2009, No. 1, at pp. 11–28.

<sup>23</sup> See A. Mączyński, *Sprawy rodzinne w projekcie nowej ustawy o prawie prywatnym międzynarodowym* [Family matters in draft Statute on Private international law], [in:] H. Cioch, P. Kasprzyk (eds), ‘Z zagadnień prawa rodzinnego i rejestracji stanu cywilnego’ [The issues of family law and matrimonial status registration], Lublin 2007, at pp. 101–102.

of the same foreign state but both habitually reside in Poland (or where they resided in Poland more than a year previously and one still resides in Poland). The entry into force of the Rome III Regulation would result in Polish law governing divorce matters where the spouses are nationals of the same foreign state and they reside in Poland, and where the spouses previously resided in Poland, but only one of them continues to reside in Poland and where the action was brought before a Polish court. According to the domestic provisions, in such cases the foreign law of the spouses' nationality is applicable.

The approach adopted in the regulation is justified by the "immersion" of the marriage, which is to be dissolved, into the Polish law system, and by the "concentration" of marital matters, including family and economic relations, in the state, where both spouses habitually reside. Such a solution is more comfortable for a Polish court, which would judge the matter, where those spouses are citizens of countries distant from Poland in terms of geography and culture.

When discussing the effects of re-ordering the objective connecting factors included in PIL 2011 with those contained in the discussed regulation, an example concerning a change in favour of the applicability of foreign law should be considered. This would occur where spouses, being Polish nationals, reside abroad in the same state (e.g., as in the case of joint immigration). A similar effect could be seen in a situation where Polish nationals resided abroad in different states for less than a year, prior to which they both resided in the same foreign state where one of the spouses still resides, but this would be less frequent. The regulation provides that in such cases the applicable law should be that of the foreign state. In accordance with the PIL 2011, Polish law should be applied in such a case, since the spouses' joint nationality is considered to be the primary connecting factor, whereas the regulation gives primacy to the law of the state in which they both reside. It is worth noticing that, in both aforementioned situations, the regulation enables the spouses to choose Polish law as the law of the forum (when the divorce proceedings take place in Poland) or their national law (in every other state participating in the regulation).

Furthermore, it should be stressed that the discussed change in the applicable law does not occur when the spouses, being nationals of the same state, habitually reside in different states (e.g., one of them

has emigrated from Poland for an extended period of time), but only to situations where both spouses share the same nationality and both reside in a foreign state. Only in this latter situation does the regulation state that the divorce matter should be governed by the law of that foreign state instead of national law (unless the spouses have chosen the national law to be applied). It may frequently occur in practice that the spouse(s) initiate divorce proceedings abroad rather than in Poland (so the applicable law will be designated in accordance with the rules on the conflict of laws prevailing in that foreign state). Therefore, the discussed “loss” as regards the non-applicability of Polish law may be illusory. The differences in the current legal situation, when compared to the solutions imposed by domestic provisions, would be seen in practice if the plaintiff decides to initiate proceedings in Poland despite the fact that the spouses are resident abroad. Such a decision is highly unlikely, since each spouse would presumably prefer to participate in proceedings before a court in the state of their current residence.

While describing Rome III Regulation, it is also necessary to discuss certain of the solutions found therein, which are considered to constitute a general part of private international law. They may in some cases influence the applicability of law in a manner different to the provisions of the PIL 2011.

Firstly it should be emphasized that, in accordance with Article 11 of the Rome III Regulation, the law designated is the substantive law, therefore *renvoi* (*Rückverweisung*) is excluded and there is no need to analyse foreign rules on the conflict of laws in order to check if they would also point to Polish law as the applicable law. Such a solution is coherent with certain academic suggestions<sup>24</sup>, as well as with the Hague conventions and “the Rome” regulations, which are binding in Poland. In practice, this results in an easier designation of the applicable law in comparison with the solution described in Article 5 of the PIL 2011, which includes the possibility of *renvoi*.

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<sup>24</sup> See critical remarks on allowing the *renvoi* – P. Mostowik, *O podstawach właściwości prawa polskiego* [On the grounds for applicability of Polish law], ‘Kwartalnik Prawa Prywatnego’ 2006, No. 2, at pp. 487–488; *Międzynarodowe prawo prywatne i postępowanie cywilne w dekadę po wejściu w życie Traktatu Amsterdamskiego* [Private international law and civil procedure – a decade after the entry into force of the Amsterdam Treaty], ‘Przegląd Sądowy’ 2010, No. 2, at pp. 59–60.

The regulation also includes a public policy clause (Article 12)<sup>25</sup>. The EU legislator allows a Member State court to “refuse” to apply the designated foreign law if it would be manifestly incompatible with the public policy prevailing in the state of the *forum*<sup>26</sup>. According to recital 25 of the preamble to the regulation, consideration of public interest should provide courts in the Member States with the opportunity in exceptional circumstances to disregard the application of a provision of foreign law where it would be manifestly contrary to the public policy of the forum. It is also said that:

“the courts should not be able to apply the public policy exception in order to disregard a provision of the law of another State when to do so would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which prohibits all forms of discrimination”.

The second sentence seems to be a kind of misunderstanding and excessive, since the decision to apply *ordre public* clause is taken from the perspective of fundamental legal principles binding in the state of the *forum* and, since such principles in EU countries also arise from the Charter of Fundamental Rights, which states *inter alia* that the treatment of unions between people of the same sex as equivalent to marriages shall be a question which depends on national legislation (Article 9). The regulation includes two detailed solutions concerning the issue of protecting the basic principles of the law of the *forum*, of which the first is the exemplification of the public policy clause (Article 10), and the

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<sup>25</sup> See K. Zawada, *Klauzula porządku publicznego w prawie prywatnym międzynarodowym na tle orzecznictwa Sądu Najwyższego w sprawach z zakresu prawa rodzinnego i spadkowego* [Public order clause in private international law in jurisprudence of the Supreme Court in family and inheritance matters], ‘Nowe Prawo’ 1979, No. 4, at p. 72; A. Mączyński, *Działanie klauzuli porządku publicznego w sprawach dotyczących zawarcia małżeństwa* [Operation of public order clause in matters concerning conclusion of a marriage], [in:] ‘Proces i prawo. Rozprawy prawnicze. Księga pamiątkowa ku czci profesora Jerzego Jodłowskiego’ [The procedure and the law. Legal papers. Commemorative book dedicated to Professor Jerzy Jodłowski], Wrocław–Warszawa 1989, at p. 162.

<sup>26</sup> See E. Łętowska, *„Multicentryczność” systemu prawa i wykładnia jej przyjazna* [Multi-centered legal system and interpretation conforming thereto], [in:] ‘Proces i prawo...’, at p. 1127–1147.

second is an explanation that, to a certain degree, there is no unified EU rule (neither negative nor positive), but the decision is left to the national legislator (Article 13). Pursuant to Article 10, the law of the *forum* shall apply where the law applicable would make no provision for divorce or would not grant one of the spouses equal access to divorce or legal separation on grounds of their sex (*e.g.*, women)<sup>27</sup>.

Article 13 is to some extent also related to the need to ensure that foreign applicable law does not violate the public policy of the *forum*. In accordance with that article, the Rome III Regulation shall not impose any obligation on the courts of such a state to pronounce divorce if the law of that state does not provide for divorce (in such a case, the court may be left to pronounce a separation where this is permitted by the designated law, as may be the case in respect of Malta, which has opted-in to this regulation). The regulation imposes no obligation on the courts to pronounce divorce in the event that the law of the forum treats the marriage as invalid (*in fact* there is no legal relationship to be dissolved in such a situation, so the abovementioned provision is at least obvious, if not an example of *superfluum*)<sup>28</sup>.

Both of the aforementioned detailed rules concerning public policy may, given the applicability of the general public policy clause which is to be used in accordance with the fundamental values in every Member

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<sup>27</sup> An alternative solution allowing spouses to choose the applicability of the law of the state of last residence or common nationality law is presented by T.M. de Boer, *Unwelcome foreign law: public policy and other means to protect the fundamental values and public interests of European Community*, [in:] A. Malatesta, S. Bariatti, F. Pocar (eds), 'The external Dimension of EC Private International Law In Family and Succession Matters', Milan 2008, at pp. 305–307. It should be supported because it would lead to the application of law "more closely connected" with the case than would be achieved by applying the *lex fori*.

<sup>28</sup> This last situation may apply, for example, to homosexual partnerships registered in certain Member States as marriages. Recital 26 in the preamble to the regulation reads as follows: "Where this Regulation refers to the fact that the law of the participating Member State whose court is seized does not deem the marriage in question valid for the purposes of divorce proceedings, this should be interpreted to mean, *inter alia*, that such a marriage does not exist in the law of that Member State. In such a case, the court should not be obliged to pronounce a divorce or a legal separation by virtue of this Regulation"; see also K. Boele-Woelki, *For Better or for Worse: The Europeanization of International Divorce Law*, 'Yearbook of Private International Law' 2010, Vol. XII, at pp. 39–41.

State, be deemed unnecessary, but for different reasons. Under Article 10, a unified substantive rule may be interpreted providing that the equal treatment of spouses in their marriage is demanded, which is a basic rule in the legal systems of all the Member States, and which triggers the public policy exception. Whereas Article 13, in the part concerning the pronouncing of a divorce where the marriage was not valid on the basis of the law of the *forum*, contains an issue whose appearance in the application of the conflict of laws rules concerning a divorce (not the marriage itself, which is excluded from the regulation under Article 1(2) (b)) may be doubtful. The issues of concluding a marriage and the existence thereof are subject to the private international law of domestic origins. The introduction of Article 10 to the regulation has somewhat political origins and was intended to eliminate doubts presented, for example during the debates in the European Parliament and while preparing the final text of the regulation at the Permanent Representatives Committee by the European Council (Coreper) in November 2010<sup>29</sup>. It should be stressed, however, that in this provision the European legislator confirms that the question of marriage validity and of recognizing the effects of, for example, homosexual marriages should be not unified at an EU level but, rather, left to national legislators<sup>30</sup>.

#### **4. The perspectives of the Slovak Republic and Czech Republic**

The status of family law in the Slovak Private International Law, codified by Act no 97/1963 Coll. of laws on Private International Law

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<sup>29</sup> See report prepared by T.M.C. Asser Instituut, *Practical problems resulting from the non-harmonization of choice of law rules in divorce matters. Final report*, The Hague 2002, at pp. 9–17, 44; T. Zwiefka, *Draft Report on the proposal for a Council regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation*, 26.10.2010, Committee on Legal Affairs, 2010/67(CNS), at p. 28.

<sup>30</sup> This justifies the idea of introducing detailed provisions into Polish law given the likelihood of problems arising in practice – see in particular the opinion of T. Sokołowski, druk senacki nr 1111, Kancelaria Senatu, OE-168, February 2011, at pp. 26–31. The opinion of sufficient role of *orde public clause* was presented by M. Pilch, *Związki quasi-matrzeńskie w polskim prawie prywatnym międzynarodowym* [Quasi-matrimonial relations in Polish private international law], *Państwo i Prawo* 2011, No. 2, at p. 93.

and International Civil Procedure<sup>31</sup> (hereinafter referred to as the Private International Law Act) of 4.12.1963, has long been characterized by the predominance of the connecting factor of nationality. A notable retreat from this criterion has occurred during the last ten years, given the influences of various international treaties to which the Slovak Republic acceded during this period and Slovakia's accession to the EU. As regards certain other legal issues, changes were provoked by the need to resolve various practical problems involving legal situations with foreign elements. Generally, this covers the following areas: the establishment of parenthood, parental responsibility, inter-country adoptions, and maintenance obligations.

Nevertheless, in the area of matrimonial relations, namely matrimonial property regimes (Art. 21) and divorce and marriage annulment (Art. 22), the common nationality of spouses remains a decisive criterion. It is permissible to use Slovakian law as the *lex fori* (the law speaks namely about the use of Slovakian law), if spouses do not possess the same nationality (Art. 22, Sec. 1, second sentence), or the law of common nationality does not permit divorce, or does so only in extremely difficult circumstances (Art. 22, Sec. 2).

Only extreme situations justified the application of Slovakian law on the basis that this prevents discrimination between spouses that would otherwise exist if the law of nationality of one particular spouse were to be accorded primacy (the previous legal regime gave primacy to the national law of the husband) and the fact that the Slovakian courts will decide in the matter only if jurisdiction is defined, either based on the fact that one of the spouses is a Slovakian citizen, or at least one of the spouses has lived in the Slovak Republic for a longer period (Art. 38 of Private International Law Act)<sup>32</sup>.

The Private International Law Act *de facto* favoured a spouse holding Slovakian nationality because, where the spouses did not hold the same nationality and a Slovakian spouse initiated divorce proceedings before a Slovakian court, the court applied the Slovakian law. In the latter case,

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<sup>31</sup> Its formal title is: Act on Private International Law and Procedure – Zákon o medzinárodnoprávesúkromnom a procesnom.

<sup>32</sup> Z. Kučera, L. Tichý, Zákon o mezinárodnímprávosoukromém a procesním. Komentář. Praha: Panorama, 1989, ISBN 80-7038-020-9, at p. 164 *et seq.*



Slovakian law was applied as the law of the habitual residence (domicile) of one of the spouses. It was irrelevant whether or not the spouses previously had their common habitual residence there.

The greatest deficiency of this legislation is the fact that, where the spouses hold different citizenships, it does not seek a law common for the spouses but, rather, opts for Slovakian law as the law with which only one of the spouses has a closer relationship. This offers considerable scope for forum shopping. According to the new Czech Act on Private International Law no. 91/2012 Coll. of 25.1. 2012, which enters into force on 1.1.2014, the law of the State in which the spouses have their common habitual residence is applicable, where the spouses do not share a common nationality at the time proceedings are initiated. Only if the spouses have neither a common nationality nor a common place of habitual residence will Czech be applied as the *lex fori*.

None of the above alters the fact that, following accession to the EU, jurisdiction is determined predominantly by Regulation (EC) No 2201/2003 of 27.11. 2003 Concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, Regulation Brussels IIa. The jurisdiction of the Slovakian courts may, according to the Brussels II.a Regulation, also be based on the fact that the defendant is habitually resident in the Slovak republic or that the claimant was habitually resident in the Slovak republic for at least one year prior to the application or, being a Slovakian national was habitually resident in the Slovak republic at least six months prior to the application. In all of these situations, Slovakian law is applicable unless the spouses share a common nationality.

Conversely, spouses sharing a common foreign nationality, but having lived for many years in Slovakia, have no chance to get divorced under Slovakian law, although in this situation it would appear to be faster (at least from the procedures for obtaining information concerning the content of foreign law) and more practical, especially in the case of so-called exotic laws, meaning non-European laws (e.g. Chinese or Vietnamese).

The 'Rome III' Regulation builds primarily on the law of the state where the spouses have their common habitual residence and which should reflect the real situation of the spouses. This law is applied even 1 year following a change in the spouses factual situation, provide that one

of them still remains in the country. The regulation also allows spouses to agree to use their common citizenship, which can be expected especially in the case of spouses who live and work abroad but wish to return to Slovakia. Such cases are not exceptional in Slovakia. Slovakian citizens often go to work in other EU countries, they often get married abroad and give birth to their children in their host countries, but after some time they tend to return and settle down in Slovakia.

Another problematic point of the existing Slovak provisions could be the conversion of legal separation into divorce. There are no special conflict rules for these questions in the Slovakian legislation. In such cases, the conflict rules for divorce are applied *mutatis mutandis*. If the Slovakian court is supposed to decide on the conversion of legal separation into divorce, where the spouses seeking such conversion do not hold the same nationality, the Private International Law Act requires the application of Slovakian law. However, Slovakian law does not recognize and has no rules governing the institution of legal separation<sup>33</sup>. The Rome III Regulation refers in these cases to the law on the basis of which the separation was pronounced. If this law does not permit the conversion, the law defined on the basis of Art. 8 is applied. If this law also does not permit such conversion, it may be decided according to the law of the forum.

The rules of the Regulation allow the application of the law of the forum whenever the applicable law determined either according to the parties' choice of law or according to the conflict rules of the Regulation itself would not allow the divorce or would not give the spouses equal access to divorce or separation. In this way, the possibility for spouses to divorce according to Slovakian law, in situations when the applicable foreign law is not favourable for them and which is provided for by the Slovakian Private International Act in Article 22, Sec. 2, remains.

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<sup>33</sup> Separation and so-called divorce from bed and board as institutions of matrimonial law existed in the law of the Slovak Republic until 1949, however, the difference between them was merely formal. More about content and effects see in Šošková, I.: Právnaúpravazrozkuky a rozvoduodstola a lože v medzivojnovomobdobína Slovenskuvosvetlej udikatury. In: Notitiae Novae Facultatis Iuridicae Universitatis Matthiae Beli Neosolii, Roč. XII.–XIII, Banská Bystrica: Právnickáfakulta Univerzita Mateja Bela, 2007, ISBN 978-80-80-83-42, at pp. 229–247

Nothing in the Rome III Regulation obliges the court of a participating state to decide about divorce of persons of the same sex – Art. 13 of the Regulation. Since this Regulation does not concern the sensitive issue of homosexual marriages, another possible barrier vis-à-vis the Slovak Republic and the Regulation is eliminated. In Slovakia, this issue still polarizes society and probably, as recent attempts to legalize any form of same-sex cohabitation have proven, any Europe-wide attempts to regulate such issues would be politically unacceptable.

## **5. Practical disadvantages of non-uniformity of conflict of laws rules in Member States**

Unified rules on jurisdiction of courts in the EU Member States and mutual rules of recognition of judgments divorce and separation cases were initially subject to Council Regulation No 1347/2000 (“Brussels II”) which, as of 1.3.2004, has been replaced with Regulation No 2201/2003 (“Brussels IIa”)<sup>34</sup>. In international divorce or separation cases, it supersedes the application of domestic law (such as the fourth book of the Polish Civil Procedure Code) and any international agreements between EU countries, if the defendant is habitually resident within the territory of a Member State or is a national of such a state<sup>35</sup>. Pursuant to Articles 3 and 4 of the “Brussels IIa” Regulation, “potential” jurisdiction may be given to courts of several Member States. The competent courts are not only the courts of the state in which the defendant habitually resides but, alternatively, the courts of the state where – subject to additional conditions, such as the duration of the period of residence or nationality – the plaintiff habitually resides and, moreover, the courts of the state of which both spouses are nationals, independently of their habitual residence. Additionally, in

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<sup>34</sup> Council Regulation (EC) No 2201/2003 of 27.11.2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, O.J. 23.12.2003, L-338, at pp. 1–29. See J. Ciszewski, *Europejskie prawo małżeńskie i dotyczące odpowiedzialności rodzicielskiej. Komentarz* [European law on marriage and family responsibility. A Commentary], Warszawa 2004, at p. 15; T. Kruger, *Civil Jurisdiction Rules of the UE and their Impact on Third States*, Oxford 2008, at pp. 90–100.

<sup>35</sup> See Articles from 6 to 7 of “Brussels IIa” Regulation.

a divorce case, jurisdiction may also be exercised by the courts of the state where a separation had been earlier declared<sup>36</sup>.

Once an action has been initiated in any of those states, the courts of the remaining countries lose their "potential" jurisdiction, *i.e.*, proceedings in the same case before courts of other states may neither be simultaneously initiated nor continued (Article 6)<sup>37</sup>. Given the alternative structure of jurisdictional bases, it can be said that the situating of divorce proceedings when several of the aforementioned conditions have been met (*e.g.*, spouses who are Polish nationals that used to live in Germany but separated over a year ago, with one of them moving to France) will *de facto* depend on the action undertaken by the plaintiff initiating the divorce proceedings, *i.e.*, on his or her "choice" of jurisdiction.

Irrespective of the plaintiff's "choice" of jurisdiction (*i.e.*, irrespective of which Member State the action is brought in), the divorce judgment will be effective in all other Member States, including Poland. The "Brussels IIa" Regulation provides for the recognition of foreign judgments *ipso iure*, *i.e.*, without the need to follow any kind of additional recognition procedure (Articles from 21 to 23). Such an effect also concerns situations where the court had based its jurisdiction on rules other than those included in the "Brussels IIa". They are also not dependent on the application by the court of the conflict of laws rules leading to such a designation of the applicable law as would have taken place according to private international law prevailing in the state where the judgment is to be recognized. Herein, we deal with a universal rule of the "automatic" effectiveness of divorce and separation judgments given by the court of one of the Member States in the remaining Member States.

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<sup>36</sup> The ground of jurisdiction have been commented upon in detail by K. Weitz, *Jurysdykcja krajowa w sprawach małżeńskich oraz w sprawach dotyczących odpowiedzialności rodzicielskiej w prawie wspólnotowym* [National jurisdiction in matrimonial matters and in cases concerning parental responsibility in Community law], 'Kwartalnik Prawa Prywatnego' 2007, No. 1, at pp. 87–95.

<sup>37</sup> See K. Weitz, *Zawisłość sprawy przed sądami państw członkowskich w sprawach małżeńskich oraz sprawach odpowiedzialności rodzicielskiej w prawie wspólnotowym* [Lis pendens in Member States courts in matrimonial and parental responsibility proceedings in Community law], [in]: H. Cioch, P. Kasprzyk (eds), 'Z zagadnień prawa rodzinnego i rejestracji stanu cywilnego' [On family law and matrimonial registration], Lublin 2007, at pp. 238–243 and 245–253.

This effect may be blocked if special proceedings confirm that the judgment will not be recognized, but this will be quite rare in practice. Foreign divorce judgments cannot be subject to verification of the substance of the matter, and a refusal to recognize may only be based on any of the exceptional circumstances described in Article 22 of the “Brussels IIa” Regulation. This may be justified with a detailed violation of the right to defense – *i.e.*, in the case of a judgment given in default, in the case where the defendant has not received the particulars of claim in a sufficient time and manner as to allow for due preparation of a defense, unless he has explicitly agreed with the judgment. In order to “stop” the effects of a foreign judgment, the public policy clause may also be used, provide that recognition of a judgment would be contrary to the public policy of the Member State where such recognition was sought. The regulation *de facto* limits the possibility of Member State courts availing themselves of this general clause by stipulating that it may not be used to question the jurisdiction of the court that issued the judgment, or that recognition of a judgment may not be refused merely because, in the given circumstances, a divorce would not be allowed under the law of the state where recognition of the judgment was sought<sup>38</sup>.

The rules on jurisdiction, conflict of laws and recognition of foreign judgments, applied in a given international divorce case, create a system of “communicating tubes”, that interact and coexist in practice<sup>39</sup>. In the present legal framework of Member States, there is “a gap of common conflict of laws’ rules” between the unity of jurisdiction rules and the uniformity of rules on recognition of foreign judgments. Irrespective of the state in which the divorce proceedings take place, the effects of the divorce judgment “move freely” to the other Member States. Negative consequences may arise from such a wide acceptance of foreign judgments, in relation to possible alternative jurisdictions of courts in other Member States, where the conflict of laws rules are not the same.

Given the option to “choose” the competent jurisdiction set forth in the “Brussels IIa” Regulation (and taking into consideration an easy way to establish the bases of jurisdiction), as well as the possible application

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<sup>38</sup> See Articles 24 and 25 of the „Brussels IIa” Regulation.

<sup>39</sup> See examples discussed by A. Mączyński, *Rozwód w prawie prywatnym międzynarodowym* [Divorce in private international law], Warszawa 1983, at pp. 7–13.

of differentiated domestic rules on the international jurisdiction of courts in certain cases, potential jurisdiction may be exercised by the courts of several countries. Each of those courts, when ruling on a divorce matter, will issue a judgment based on the applicable law indicated by its own, non-harmonized private international law rules, which differ from other states as regards their detailed provisions and general part. This would lead to different substantive legal systems providing the bases for a divorce judgment. Accordingly, the judgments issued by each of the competent courts may be different in the same matter. However, each of those judgments will “move freely” to other countries and be effective there *ipso iure*. In other words where, in the same actual circumstances, the courts of three Member States could be competent – the first court because of the defendant’s habitual residence, the second one due to the defendant’s habitual residence lasting more than one year, and the third one because of the spouses’ common nationality. In the first Member State, the conflict of laws rules would indicate that the divorce matter should be governed by law A, in the second state that law B is applicable and in the third country that the same matter would be judged in accordance with law C. The judgments issued by each of these three courts may be substantially different, but their effects would be required to be recognized in all EU states.

Such coexistence of the EU’s international civil procedure rules and domestic private international law rules *de facto* encourage each spouse to initiate divorce proceedings as soon as possible. “At the expense” of the defendant, it *de facto* promotes the plaintiff who may thus influence the ruling in his or her favour, because the plaintiff, *e.g.*, expecting a more favourable judgment based on the law A (as opposed to judgments based on laws B or C) may engage in “forum shopping” and hurriedly file for divorce before the court of the first state. Such behaviour, which allows the plaintiff to somehow arrange for a more favourable applicable law, “at the expense” of the defendant, is not easily prevented within the current legal framework. The plaintiff “legally” avails himself of the structure of an alternative international jurisdiction of courts, and of the *ipso iure* effectiveness of foreign divorce judgments, in connection with the absence of unified conflict of laws rules<sup>40</sup>.

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<sup>40</sup> Recital 9 of the preamble – added during the final stage of legislative activities – provides that the regulation should serve to “prevent a situation from arising, where

Such an effect may only rarely be prevented with the application of the public policy clause that may trigger a “rejection” of an applicable law which would be contrary to the public policy of the *forum*<sup>41</sup>. This will not occur in the case of “usual differences” between the laws. In practice a “subsidiary” difference between the legal solutions offered in different legal systems may frequently be more favourable for the plaintiff.

The “forum shopping effect” in divorce proceedings would not occur in the event of the uniformity of conflict of laws rules in every Member State, which is possible upon the accession of all Member States to the Rome III Regulation.

## **6. Different scopes of “Brussels IIa” and “Rome III” Regulations – the issue of marriage annulment**

The conflict of laws rules included in the Rome III Regulation have a narrower scope of application than those found in the “Brussels IIa” Regulation. They do not cover marriage annulment but merely the dissolution of marriage through divorce or separation. Accordingly, a “matrimonial matter” within the meaning of the “Brussels IIa” Regulation means divorce, separation or annulment of marriage, while the provisions of the discussed regulation concern only divorce and separation. Given such a difference, the legislative technique in adopting two separate regulations instead of merely amending Regulation 2201/2003 should be assessed positively. In fact, the key factor which “forced” this was a lack

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one of the spouses applies for divorce before the other one does, in order to insure that the proceeding is governed by a given law, which she or he considers more favourable to his or her interests”.

As regards the meaning of forum shopping, see M. Jänterä-Jareborg, *Marriage Dissolution in an Integrated Europe – The 1998 European Union Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters* [Brussels II Convention], ‘Yearbook of Private International Law’ 1999, Vol. I, at pp. 8–10; B. Fuchs, *Ujednocenie prawa na płaszczyźnie międzynarodowej a zagadnienie forum shopping* [Law unification on the level of international law and the question of forum shopping], [in:] L. Ogieńko, W. Popiołek, M. Szpunar (eds.), *op. cit.*, at pp. 407–408 and 412–414.

<sup>41</sup> Article 12 of the „Rome III” Regulation.

of compromise among all the Member States as regards amendment of the “Brussels IIa” Regulation<sup>42</sup>.

Such a narrower subjective scope should probably be associated with a “non-independent” treatment of matters of marriage annulment, which is based on its usual connection within conflict-of-laws rules with the matter of concluding a marriage which is supposed to be annulled (*i.e.*, adoption of an assumption similar to that included in Article 50 of the PIL 2011, which says that the law applicable to such annulment should be the same as the law governing conclusion of the marriage)<sup>43</sup>. The subject of marriage conclusion, including the “capacity” of so called matters or similar matters in particular Member States may provoke disagreements and political disputes, which, most likely, have given rise to fears as to the possibility of reaching a *consensus* in the issue of the conflict of laws rules, and have led to the reluctance of the EU institutions to regulate such issues in the future.

It seems, however, that such an approach is groundless. Accepting the assumption that the dissolution of marriage should be governed by the same law by virtue of which it was concluded should not obstruct the normative expression of a “non-independent” solution in the said regulation. Similar rules – which alone do not *de facto* designate the applicable law but which provide within their scope of application for an extension of the law applicable in other connected matters – are a solution that is well known in international private law. For example, in relation to obligations due to unjustified benefits, Article 10(1) of the “Rome II” Regulation stipulates that the applicable law can be designated on the basis of the conflict of laws rules concerning the relation which is subject to those obligations (*i.e.*, to a great extent, the conflict of laws rules from outside this normative act). Likewise, Article 8 of the Hague Convention on alimony obligations<sup>44</sup> stipulates that the maintenance obligation between spouses following divorce or marriage annulment should be

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<sup>42</sup> See P. McEleavy, *The Brussels II Regulation: How the European Community has moved into Family Law*, “The International and Comparative Law Quarterly” 2002, at pp. 883–908.

<sup>43</sup> See A. Mączyński, *Rozwód w prawie prywatnym międzynarodowym*, Warszawa 1983, at pp. 49–52.

<sup>44</sup> Polish O.J. 2000, No. 39, item 444.



governed by the law governing the divorce or marriage annulment (i.e. matters regulated in the states being parties to this convention, being laws of domestic origins).

However matters concerning marriage annulment are, alongside those concerning divorce or separation matters, in the European Union subject to “Brussels IIa” unified rules on jurisdiction and the mutual recognition of judgments. This fact, should speak in favour of the need to fill the “conflict of laws” gap in the EU regulation, given the need to prevent forum shopping and a “rush to a more favourable court” (on similar grounds as discussed in relation to divorce or separation matters above). A genuine filling of the “conflict of laws gap” would not be merely an explanation that such matters are governed by the law applied to conclusion of the marriage but, rather, “an independent” conflict of laws rule. It could cover, without fear of political doubts or disputes, the marriage in a scope understood in the same way in all Member States. This would mean adopting EU rules on the conflict of laws concerning marriage of a man and a woman, while – given the absence of any *consensus* among the Member States – other matters (i.e., beyond the common understanding of marriage) would remain the subject of domestic rules of private international law. Such a proposed solution would, of course, not constitute a negative approach of the EU legislator as regards solutions allowed in some Member States (both states that allow, for example, homosexual marriages, and countries that prohibit such a legal construction). This should be viewed as the EU legislator “refraining from occupying the field” in these matters and thus leaving them for domestic regulation, as is proposed in Article 9 of the EU’s Charter of Fundamental Rights. It is a natural approach that the definitions and terms used in instruments intended for introduction in various states shall have an independent meaning which differs from each state’s individual domestic legislation.

For example, non-contractual obligations arising by virtue of a violation of privacy and rights relating to personality, including defamation, are excluded from the scope of the “Rome II” Regulation on the law applicable to non-contractual obligations (Article 1(2)(g)). Such a legal solution does not, of course, mean that citizens of Member States are not protected from such violations, nor that there are no domestic conflict of law rules dealing with these issues, but rather that the Member

States reached no compromise on unified conflict of laws rules and decided to exclude such matters from the scope of the regulation, which enabled the adoption of unified rules covering many other important non-contractual matters. It could be even said that an important condition for effective actions leading to unifying of the law in different countries, for which the EU institutions are responsible, is to shape the future instrument in such a way as to make it widely acceptable among the Member States.

## 7. Final remarks

Introducing a restricted possibility for spouses to choose the applicable law in the discussed matters illustrates the increased scope of matters in respect of which the parties may influence the substantive law governing their relationships. It should be accepted, especially as regards the general possibility to agree on the applicability of Polish law whenever a Polish court is seized. The “reversed” order of connecting factors (residing in the same state, being nationals of the same state) should be evaluated neutrally. It causes practical consequences in cases when both spouses share the same nationality and live in the same country. The provisions of the Rome III Regulation, similarly to Poland’s PIL 2011, constitute an example of accepting the circumstances shared by both spouses as connecting factors, *i.e.*, their equal treatment in the area of private international law.

Following its entry into force in June 2012, the Rome III Regulation unifies the rules on the law applicable to divorce and separation matters, *i.e.*, it leads to the unification of private international law in the states that are, or become, bound thereby. Unity of the conflict of laws rules may be viewed as “a cure” for the afore-described “side effects” of the current regime of the “free movement” of foreign judgments in divorce and separation matters. Application of the same conflict of laws rules in the Member States will give rise to judgments based on the same applicable law (the substantive law designated by the same conflict of laws rules). Equally, it avoids the incentive to initiate the divorce or separation proceedings as soon as possible, thereby leading to “a rush to the court” to “choose” the state whose conflict of laws rules will lead to the choice of an applicable law more favourable to the plaintiff.

Referring to what initially seemed to be a poetic oxymoron –the EU’s motto “United in Diversity”–it can be said that it perfectly suits the issues discussed herein. Given the diversity of national, substantive family laws in various Member States, it is necessary to “harmonize” (unify) the conflict of laws rules of private international law. Fulfillment of this objective, allowing for an international harmony of judgments, is now more realistic than ever before, given the competence of the EU’s institutions to adopt regulations on this matter<sup>45</sup>.

Access to the “Rome III” Regulation should seriously be taken into consideration by Poland.

The Slovak Republic would stand to gain more than it would lose after its accession to the Rome III Regulation. The law of each country tends to preserve the bond with its citizens through the application of the law of nationality, despite them having been long-settled abroad. The law of common habitual residence of spouses reflects their factual situation better and maintains coherence of the settlement of matrimonial relationships whereas, in divorce proceedings, related issues are often discussed, such as the issue of parental responsibility – according to the habitual residence of the child<sup>46</sup>, maintenance payments between former spouses– according to the habitual residence of the creditor<sup>47</sup>, or the division of common marital property – the first habitual residence of the spouses according to forthcoming European legislation<sup>48</sup>.

On the other hand, in appropriate cases and in the case of married couple’s interest, the Regulation does not tear these citizenship bonds and permits spouses to achieve the application of law of their nationality.

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<sup>45</sup> See. K. Siehr, *InternationalesPrivatrecht in der Europäischen Union*, [in:] L. Ogiegło, W. Popiołek, M. Szpunar (eds.), *op. cit.*, at. pp. 294–297; J. Basedow, *The Communitarisation of Private International Law – Introduction*, ‘Rabels Zeitschrift’ 2009, No. 3, at pp. 455–460; M. Czepelak, *Would we like to have a European Code of Private International Law*, ‘European Review of Private Law’ 2010, No. 4, at pp. 705–728.

<sup>46</sup> Article 16 of the Hague Convention of 19.10.1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

<sup>47</sup> Article 3 of the Hague Protocol of 23.11.2007 on the Law Applicable to Maintenance Obligations.

<sup>48</sup> Article 17 of the 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 final.

The fact that the Slovakian courts would apply the same law in the same situation, as the courts of the states with which there is the most active movement of persons and whose jurisdiction the Slovak Republic must respect within the EU, is also important.

During preparation of the Rome III Regulation, the Slovak Republic did not have serious reservations about the content thereof, nor about the adoption of common European legislation on the law applicable to divorces. The presented reservations related more to enhanced cooperation as a whole, but they were not radical. On the contrary, the Slovak Republic accepted that the adoption of a single instrument for divorces would have been beneficial to the current state of EU issues.

More serious reservations about the forthcoming Regulation were expressed by the Czech Parliament. During preparation of the original proposal for the Rome III Regulation from 2006<sup>49</sup> both chambers of the Parliament questioned the need for adoption of such legislation. Compliance of the proposed regulation with the principles of subsidiarity and proportionality was identified as controversial, and there were concerns that adoption of a uniform law for divorces could constitute a further step towards the transfer of exclusive jurisdiction in the area of family law from the Member States to the EU. Despite the fact that the Czech legal professions and the Ministry of Justice are inclined towards accession of the Czech Republic to enhanced cooperation in the field of divorces, the Parliament's position blocks the Czech Republic's access to the Regulation.

In the Czech Republic, the original Czechoslovak Act no. 97/1963 Coll. of laws on Private International Law from 4.12. 1963 unchanged in matters of divorce, having identical wording to the Slovak Act, remains in force. However, it will be replaced by the new Act on Private International Law no. 91/2012 Coll. from 22.3.2012 effective from 1.1.2014. Conflict of law rules for divorces in Article 50 are very close to those laid down in Polish legislation. Divorce is governed firstly by the law of the state of which both spouses are nationals. If they do not have the same nationality, the law of common habitual residence is applied and if the

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<sup>49</sup> Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters COM/2006/0399 final.

spouses do not have their habitual residence in the same state, the law of the Czech Republic is applied. If the applicable law did not allow the divorce, or only permitted divorce in extremely difficult circumstances, the divorce could be pronounced according to Czech law if at least one of the spouse held the nationality of the Czech Republic or had their habitual residence in that country.

The position of the Czech Republic as regards participation in enhanced cooperation in the area of the law applicable to divorces is more complicated than that of the Slovak Republic. Although the Ministry of Justice of the Czech Republic has stated that it would be desirable to have the same conflict law as in neighbouring states, with whose nationals Czech citizens are most likely to enter into a mixed-nationality marriage, and that the criterion of habitual residence can now be considered modern, reflecting the needs of widespread, contemporary free-movement of people<sup>50</sup> and, furthermore, that no criticism was made of the Regulation by the Czech legal professions, it is inconceivable to postulate the participation of the Czech Republic until the position of its Parliament changes.

However, the Slovak Republic also has no plans to accede to the enhanced cooperation because it is afraid of further fragmentation of the set of unified rules. Situations with a foreign element are regulated by numerous international conventions and an increasing number of regulations with precisely defined subject-matters. It is not easy for judges and lawyers to orientate themselves in such a labyrinth of legal materials. Although it is commonly perceived that legal instruments unifying conflict of laws rules give rise to fewer problems, comprising rules with universal applicability, regardless of the group of signatory states, the issue of Slovakia's access to the enhanced cooperation in the area of law applicable to divorces is not, regretfully, a current subject of interest of the Slovak government.

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<sup>50</sup> Framework position / Perspective for the Parliament of the Czech Republic, Č.j. 58/2010-MOC\_J, accessible at [www.senat.cz](http://www.senat.cz).