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Party autonomy in cross-border family relations

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ELTE Budapest, 24 February 2017

- Unification of substantive law in Europe
 - long-standing obstacles due to cultural diversity and different traditions of MS
 - some compromise reached via soft law (CEFL)
- Unification of private international law
 - easier way to go on international and EU level
 - core of the problem is to find the most appropriate connecting factor for applicable law / criteria for jurisdiction

- Party autonomy becomes a fundamental principle of EU family PIL, due to
 - increasing mobility within EU
 - more flexibility in substantive law
 - raise of human rights notions
 - raise of a right of self termination of a person
 - uncertainty in application of criteria of habitual residence

- Manifestation of party autonomy in family PIL
 - Choice of law (or *optio iuris*)
 - Choice of court
 - „Evasive mobility“

**INCIDENCE OF PARTY AUTONOMY
IN EU FAMILY PIL:**

CHOICE OF FORA – CHOICE OF LAW

Legislative procedure in EU leads to

- multispeed Europe
- sector specific regulations
- variations in application of criteria for jurisdiction / applicable law
- incompatibility of various regulations simultaneously applicable to a case

..... Varous scope of application
Multi-speed Europe

	TEMPORAL	GEOGRAPHICAL	MATERIAL	METHOD OF UNIFICATION
Reg. No. 2201/2003 (Brussels II A)	-as of 1.3.2005 -Croatia as of 1.7.2013	all MS of the EU, except Denmark	- divorce - legal separation - marriage annulment - parental responsibility	jurisdiction, cooperation, recognition, enforciability, enforcement
Reg. No. 1259/2010 (Rome III)	-as of 21.6.2012	-enhanced cooperation -I4 participating MS	- divorce - legal separation	applicable law

..... Varous scope of application
Multi-speed Europe

	TEMPORAL	GEOGRAPHICAL	MATERIAL	METHOD OF UNIFICATION
Reg. no 4/2009	-as of 18 June 2011 -for Croatia as of 1.7.2013.	-all MS of the EU, except Denmark - specific rules for UK	maintenance obligations	jurisdiction, cooperation, recognition, enforciability, enforcement
Hague protocol of 2007	-as of 18 June 2011 (provisional application in EU)	-international convention integrated to EU regulation!	maintenace obligations	applicable law

..... Varous scope of application
Multi-speed Europe

	TEMPORAL	GEOGRAPHICAL	MATERIAL	METHOD OF UNIFICATION
Reg. no. 2016/1103	-as of 29 January 2019	-enhanced cooperation -18 participating MS	matrimonial property	jurisdiction, applicable law, cooperation, recognition, enforciability, enforcement
Reg. no. 2016/1104	-as of 29 January 2019	-enhanced cooperation -18 participating MS	property of registered partners	jurisdiction, applicable law, cooperation, recognition, enforciability, enforcement

Delimitation among legal sources

with respect to regulations

- BIIbis – Maintenance
 - notion of “ancillary matter”
- CJEU A v B.
(C-184/14)

with respect to national law /
matters outside the scope of EU
regulation

- Representation
 - CJEU Gogova v Iliev
(Case C-215/15)
- Successions
 - CJEU Matouškova
(C-404/14)

How does the complexity of the system reflects to party autonomy issues?

- Prorogation of court in parental responsibility matters *Brussels IIa*
- Applicable law on divorce *Rome III*
- Prorogation of court in maintenance disputes
Maintenance regulation
- Applicable law on maintenance *Hague Protocol*
- Prorogation of court and applicable law for matrimonial property /registered partners property *MP/RP regulation 2016*

- Application of party autonomy in a typical family dispute settlement (divorce + maintenance + matrimonial property)
 - Prorogati fori for divorce not allowed
 - parties have a variety of fora's on disposal
 - Optio legi for divorce allowed
 - only for Rome III participating MS, otherwise depends on national law
 - Prorogatio fori for maintenance allowed (except child)
 - Optio legi for maintenance allowed
 - but only for states obliged by Hague protocol of 2007, otherwise depends on national law
 - Prorogatio fori for matrimonial property
 - only for states participating in MP/RP regulation, otherwise depends on national law
 - Optio legi for matrimonial property
 - only for states participating in MP/RP regulation, otherwise depends on national law

- Atomized approach of EU civil justice results with
 - mosaic of legal regimes to be applied in one case
 - various prescriptions on party autonomy, in respect of:
 - limitations ex ante
 - » Limited list of possible laws to opt for differs in regulations / problems with application of habitual residence / nationality / lex fori
 - » limitations that serve protection of weaker party
 - » assurance that we have a true consent via rules on informed / additional formal requirements on validity
 - » Capacity of a representative acting in a child related procedure – CJEU (L v M C-656/13;Googova C 215-15)

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- Limitations ex post
 - international mandatory rules
 - novelty of family home in property regime
 - public policy exception
- material validity rules
- formal validity rules

- autonomy of international couples –pro's
 - takes account of legitimate interests of cross-border couples
 - empowers European citizens to an enhanced participation in integration process
 - chosen legal systems is usually one familiar to parties
 - they are aware of prescribed rights and obligations
 - from an economic perspective spouses have calculated relevant costs of matrimonial property division /maintenance obligations

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- reduces legal uncertainty and unpredictability
 - if default rules would apply for any of the related matters (maintenance, divorce..) one faces complex variations of applicable law, cascade of connecting factors, layers of habitual residence etc.
- avoids forum shopping phenomenon
- party autonomy in the choice of law act as a remedy
 - it balances the lack of uniform approach to the conflict-of-law problems
- if autonomy is given in parallel for choice of court / choice of law it can result with application of domestic law
 - preferable for procedural efficiency

- attribute of fundamental rights
- informal choice is granted to European citizens with two nationalities, where a person can choose the nationality that would prevail (Garcia Avello)
- in respect of substantive law harmonization party autonomy in PIL could lead to convergence of laws
- optio iuris fosters competition among states
 - paradigm of regulatory competition implies lawmakers are forced to revise their laws to ensure they offer an attractive product (but it could lead to disappearance of legal traditions)

- autonomy of international couples –contras
- Regulations are not coordinated
 - parties can make choices on fora/law for maintenance; for a for parental responsibility but they cannot choose fora for divorce!
 - list of potential fora/law to be chosen is not parallel and does not corresponds through all of these regulations
- list of laws to be chosen
 - can deprive spouses of choosing applicable law that suits them most
 - in matrimonial property - if further choice of law for immovable is *lex situs*, *depeçage* is envisaged in matrimonial property settlement
- *optio iuris* of religious laws of Third countries with no equality of spouses
 - public policy is a safeguard of European human rights standards - CJEU Case C-281/15

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- adequate protection must be assured for

- rights of third persons who are involved in proprietary transactions
- financially weaker party

- in respect of substantive law harmonization

- it could freeze or promote differences among laws

- in majority of MS no legal culture to use choice of law exists
- if choice of law is employed under numerous legal sources without specialized counsel
 - person may end up with uncoordinated choices (egz. choice of different national laws in different context)
 - such multiple choices can imperil the balance achieved within one national family law system
 - such multiple choices can have negative effects on operation of the authority that is called upon to settle the case

INCIDENCE OF PARTY AUTONOMY IN EUROPEAN FAMILY RELATIONS

- REVIVAL OF VESTED RIGHTS THEORY?

- Human rights have become a generator of promotion of autonomy in cross-border family relations
- HR could promote „legal tourism“ (marriage tourism/ divorce tourism/birth tourism)
- creation of a law market - generation of European market of „family law products“?

Promotion of autonomy by major European courts

- ECHR acts a significant role / CJEU of minor influence
 - Wagner vs Luxembourg ECHR (international adoption)
 - Menneson vs France ECHR (international surrogacy)
 - Paradisso vs Italy ECHR (international surrogacy)

ECHR (personal name)

- Stjerna vs Finland, of 25.11.1994.,
no.18131/91
- Johansson vs Finland of 6.9.2007.
no.10163/02
- Ünal Tekeli vs Turkey of 6.11.2004.
no.29865/96

CJEU (personal name)

- C- 148/02, Garcia Avello, ECLI:EU:C:2003:539
- C- 353/06, Grunkin - Paul, ECLI:EU:C:2008:559
- C-438/14, Nabil Peter Bogendorff von Wolffersdorff protiv Standesamt der Stadt Karlsruhe, Zentraler Juristischer Dienst der Stadt Karlsruhe, ECLI:EU:C:2016:401

- Are benefits of party autonomy acknowledged by doctrine transposed to practice?
- Is the party autonomy prescribed with current EU PIL sufficient safeguard of European citizens?
- Is the labyrinth of interrelated EU acts applicable by international couples?
- Is the peculiar human rights promotion of autonomy aggressive towards national substantive family law?

THANK YOU FOR YOUR ATTENTION!

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