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CHOICE OF LAW IN INTERNATIONAL FAMILY AND SUCCESSION LAW

Abstract:

This article shows that the traditional institutional mandatory approach to family and succession law in recent years there have been developments towards the admission of choice of law in these fields of private international law and that the choice of law performed by parties has a very important role to play. It analyzes the admission of choice of law in conflict-of-law rules in the respective Czech legislation and EU regulations, concluding that the scope for choosing applicable law in the EU instruments is rather limited, however that it grants parties an option to designate the law that they feel most connected to and comfortable with and balances the lack of uniform approach to conflict-of-law rules across the EU regulations in the field of international family law.

Keywords:

Private international law, conflict of laws, choice of law, international family law, European family law, applicable law.

1 Introduction

Party autonomy, like equality of parties, represents one of the fundamental pillars of private law. In private international law, which deals with legal relationships beyond national borders, the principle of party autonomy is given effect by choice of law rules, empowering parties to designate the applicable law that is to govern their legal relationships (*optio iuris*); and by choice of international forum rules, empowering parties to designate which country or even which court is to solve disputes that might arise (*prorogation foris*). Apart from these two basic manifestations of party autonomy in private international law, there is a third, sometimes referred to as to ‘evasive mobility’. If no choice of law is permitted by legislation, enabling parties to escape the applicable law designated by default conflict-of-law rules, or if only a limited choice of law is permitted, there is still the possibility to escape the legal framework of one state - the domestic law - by travelling or moving to another jurisdiction whose legal system seems more suitable or less restrictive.

By means of choice of law rules the additional legal risks that international

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relations impose on parties can be considerably reduced. It makes it possible to opt out of the default rules set down by the legislator, and hence escape the legal system that would otherwise apply, if it does not offer satisfactory legal solutions to the life situations in question (both business and personal). The parties can influence which law is to govern their various activities, they look for and choose the law that suits them best. Choice of law reduces legal uncertainty and unpredictability, as parties choose the legal systems with which they are familiar and where they are aware of their rights and obligations. By performing a choice of law the forum shopping phenomenon can be effectively fought. However, *optio iuris* is not only a means of party autonomy available to individuals or a method of empowering citizens in fields that matter to them the most¹⁾, but it can also be perceived as a source of competition among states trying to attract foreigners to choose their legal system as applicable law²⁾, leading to the creation of a law market³⁾.

Choice of law has been widely recognized in respect of contractual obligations for a long time, imposing very few limitations on parties' choice. It has found its way into the field of non-contractual obligations too and over the last two decades seems to have definitely broken the ice in the field of family and succession law. A society's conception of the role of the family is one its most defining characteristics and no other area of law is subject to such a strong influence of tradition and culture as family law. This fact has shaped national family laws for centuries leading to deeply entrenched legal discrepancies among various states. Ongoing globalization, increasing mobility of people and flexibility in regard to their personal relationships undoubtedly represent a challenge to the traditional approach to conflict-of-law rules in these fields and make adaptation to modern conditions inevitable. Family law has always been perceived as in need of state protection and strict state regulation, often for the sake of protecting the weaker party to the legal relationship. This is an area which naturally gives rise to mandatory rules, where party autonomy has hardly any place. So it is no surprise that these characteristics have also applied to the regulation of international family law. However, in recent years there have been developments towards the admission of choice of law in international family law and in addition to that (at least in Europe) a supranational approach is slowly taking over. As analyzed further below, in international family and succession law choice of law performed by the parties has a very important role to play.

¹⁾ SMITS, JAN M. Beyond Euroscepticism: on the choice of legal regimes as empowerment of citizens. *Utrecht Law Review*. 2010, vol. 6, issue 3, pp. 68-74.

²⁾ MICHAELS, RALF. The New European Choice-of-Law Revolution. *Tulane Law Review*, 2008, vol. 82, no. 5, pp. 1607-1644.

³⁾ RIBSTEIN, LARRY E., O'HARA, ERIN. *The Law Market*, Oxford Scholarship Online, 2009, ISBN-13:978-0-19-531289-8.

2 Czech national law

In the Czech Republic private international law is regulated by an Act ⁴⁾ adopted back in 1963, which has had relatively few amendments since. As regards international family and succession relations, there is not a single stipulation in this Act that allows the parties any, even limited, choice of law. The traditional institutional mandatory approach to family and succession law reflected in the absence of choice of law rules fully corresponds with and mirrors the social and legal environment of the early 1960's when this Act was adopted.

The current extensive re-codification of civil law that is underway in the Czech Republic includes a recast of the private international law act (hereinafter only the "new PIL Act"). According to the Explanatory Report to the Bill, it was necessary to modernize the regulation to take account of the developing tendencies in the field of private international law and with respect to its compatibility with European law⁵⁾. The new PIL Act was adopted in January and will be effective from January 1, 2014.⁶⁾ For the first time it enables some choices of law in international family and succession matters, which is a substantial contrast to the total absence of this principle in the current national legislation. In the new PIL Act choice of law is an option when concluding agreements on matrimonial property regimes, in matters of maintenance and in matters of succession. The new PIL Act shows a remarkable shift towards admitting choices of law in Czech international family and succession law that has been strongly influenced by the developments in the legislation of the European Union. This shift demonstrates that modern legislation of a European country cannot possibly ignore or overlook the development and cannot avoid allowing choice of law into the sphere of international family and succession law, even if only – as in the case of the Czech new PIL Act – to a limited extent.

2.1 Matrimonial property

Under Article 49 Section 4 of the new PIL Act, a fairly wide spectrum of choice of law will be granted to parties when concluding agreements on matrimonial property regimes. The spouses will be able to choose between the *lex patriae* of one of the spouses, the law of habitual residence of at least one of them and the *lex fori*, i.e. Czech law (or in case of immovable property, the *lex rei sitae*).

The provision does not explicitly specify the decisive moment at which the connecting factor is to apply, but deducing from the preceding default conflict-

⁴⁾ Act No. 97/1963 Coll. of Laws, Act concerning private international law and rules of procedure relating thereto.

⁵⁾ Explanatory report to the Bill on International Private Law, General Part, sec. 2, p. 42., <http://www.psp.cz/sqw/text/tiskt.sqw?O=6&CT=364&CT1=0>.

⁶⁾ Act. No. 91/2012 Coll. of Laws, Act on Private International Law.

of-law rule it appears that it is the moment of execution of such an agreement that is relevant. A qualifying form of agreement (a notarial or similar deed) is required if agreements are concluded abroad. Even though it is not mentioned explicitly, *depeçage* is possible, as the new PIL Act includes an option to designate a different law to apply to immovable property.

2.2 Maintenance

In matters of maintenance, Article 49 Section 2 (regarding spouses) and Article 57 Section 1 (regarding parent-child relations) of the new PIL Act refer directly to the applicable regulation of the European Union⁷⁾ which enables parties to make a limited choice of law, as analyzed in more detail below in point 4.2.

2.3 Succession

In succession matters, a limited choice of law is granted to the testator for the first time. Pursuant to the Article 77 Section 4 of the new PIL Act the testator is entitled to incorporate a choice of law clause in his will, choosing either the law which is, at the time of making the will, the law of the state of his habitual residence or the law of the state of his nationality (*lex patriae*). The law thus chosen applies also to succession to immovable property. The Czech Civil Code recast reintroduces into the Czech civil law system the notion of agreements regarding a person's succession, and therefore the new PIL Act anticipates a limited choice of law governing such agreements. According to Article 77 Section 5 of the new PIL Act, parties to such an agreement (testator and the heirs) may determine the law which the testator, whose succession is involved, could have chosen in his will as described above. Habitual residence and nationality are the two respective connecting factors and the chosen applicable law can be the law of the state of habitual residence or nationality of each of the parties to the agreement, not only those of the testator. The provision does not specify the decisive moment for the application of the connecting factors, but it would be consistent with the principles relating to other forms of contractual choice of law for the relevant moment to be upon the execution of such agreement.

There is no explicit provision in the new PIL Act that would deal with *depeçage* or any later modification of choice of law.

2.4 Personal names

A conflict-of-law rule on names is a newly introduced provision in the new PIL Act. By Article 29 Section 3, the applicable law governing legal issues

⁷⁾ 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.

regarding the name of a person is the person's *lex patriae*. The provision does not grant any freedom of choice of law, but its wording implies a certain degree of party autonomy given the importance and impact that this matter can have on the status of a person in the society in which s/he lives⁸). The law of the state where the subject person has her/his habitual residence can be invoked and would then displace the default *lex patriae*.

3 Austrian national law

In Austria the international private law is regulated by the Private International Law Act adopted in 1978⁹) (hereinafter only the "PIL Act"). It allows choice of law in international family matters, but in two situations only: in the case of matrimonial property matters and in the case of property consequences of registered partnerships. The spouses, as stipulated in Section 19 of the PIL Act, are permitted a choice of law in regard to their property regime. It is rather surprising that there is no limitation of the law that spouses are allowed to choose as applicable to their matrimonial property regime. The spouses can choose any law they wish. Section 19 with its unlimited choice of law was drafted back in 1978 and was present in the PIL Act from the very day of its validity. An unlimited choice of law is also granted to registered partners in regard to their property matters as stipulated in Section 27c of the PIL Act that was introduced by amendment in 2009 when the Austrian Act on Registered Partnership was adopted¹⁰). The stipulation of unlimited choice of law in this provision contrasts with the proposed EU regulation on property consequences of registered partners¹¹) where no choice of law provision is foreseen, as noted in detail below in points 4 and 4.3.

4 European Family and Succession law

Since it became clear that European harmonization or unification of substantive laws, especially family laws, would hardly be a viable way (at least in the short term), unprecedented attention has been drawn to private international law. Unification of substantive law in Europe is a problem of long-standing and is especially problematic in the case of substantive family law, given the cultural diversity and different traditions of the member states of the European Union, on which they are not willing to compromise. Unifying conflict-of-law rules is a much easier way to go, countries do not have to deal with sensitive

⁸) Explanatory Report to the Bill, Special Part, p. 56.

⁹) International Privatrechtsgesetz, BGBl. Nr. 304/1978.

¹⁰) Eingetragene Partnerschaft-Gesetz, BGBl. I Nr. 135/2009.

¹¹) Proposal for Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of a registered partnership, COM(2011) 127 final.

issues of national substantive laws and so are readier to make concessions in order to achieve consensus. The growth of European private international law, overriding the provisions in the respective national private international laws, has been booming for at least the last 10 years, especially since Article 65 of the Treaty of Amsterdam¹²⁾, which came into force in 1999, extended the (then) European Community's competences into the field of judicial co-operation in civil matters.

Recently it has been especially international family and succession law that has been in the centre of the focus of the EU legislative work and the gradual intrusion of choice of law into the regulations on European family law has become very apparent. Contrary to the traditional approach of national legal systems, party autonomy has become a general principle of European family law. As Marzal Yetano has pointed out, a result of the increasing mobility of EU citizens, encouraged by their freedom of movement, has been that it was no longer sustainable to withhold choice of law from this traditionally mandatory field and individuals have been acquiring the power to choose applicable law.¹³⁾ However, the introduction of choice of law into European family and succession law is perceived by some authors to be motivated more by the political needs of integration and compromise, rather than by ideas of self-determination of the person¹⁴⁾. In all but one of the EU Regulations so far adopted or proposed in this area, parties are empowered to choose the law applicable to their family or succession relations. The exception is the proposed regulation regarding property consequences of registered partnership¹⁵⁾ published by the European Commission last year, in which there is no provision enabling the parties to choose the applicable law. According to the Explanatory Memorandum¹⁶⁾ to the proposed regulation, the conflict-of-law rule adopted determines, as the only alternative, the law of the state of registration as applicable. This is said to be because of the differences between the national laws and the fact that most of the member states' laws on registered partnerships do not offer the opportunity for a choice of law. By contrast, a choice of law is allowed to the parties in the case of divorce or legal separation, in the case of maintenance obligations and in the case of matrimonial property regimes. However, no unlimited choice of law is admitted at all: there are always restrictions concerning the object of the

¹²⁾ The Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Amsterdam, 2 October 1997.

¹³⁾ Marzal Yetano T.: The Constitutionalisation of Party Autonomy in European Family Law, *Journal of Private International Law*, vol. 6, no. 1, April 2010, pp. 155 – 193.

¹⁴⁾ JAYME E.: Party Autonomy in International Family and Succession law: New Tendencies, *Yearbook of Private International Law*, vol. 11 (2009), pp. 1 -10.

¹⁵⁾ *Op. cit. sub 11).*

¹⁶⁾ Explanatory Memorandum to the Proposal for Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of a registered partnership, Sec. 5.3.

choice. In all cases the limited range of options available to parties is based on alternative connecting factors.

4.1 Divorce and legal separation

In case of the law applicable to divorce and legal separation, the so-called *Rome III* regulation¹⁷⁾, which was adopted in December 2010 and which is applicable from June this year, provides for a limited choice of law by Article 5: the spouses may choose among four (or in case of different nationalities of the spouses, five) applicable laws: (a) the law of the state where they have their habitual residence at the time the agreement is concluded, (b) the law of the state where they had their last common habitual residence, in so far as one of them still resides there at the time the agreement is concluded, (c) the *lex patriae* of either spouse at the time the agreement is concluded, and (d) the *lex fori*. As Nynke Baarsma notes, to leave the parties with an unlimited choice of law could result in the application of exotic laws with which the parties have little or no connection¹⁸⁾.

The *Rome III* regulation applies to divorce and legal separation in cases that involve conflict-of-laws, but only among those member states of the European Union that participate in so-called ‘enhanced cooperation’¹⁹⁾. The adoption of European family law measures requires unanimity in the Council²⁰⁾, which means the member states have to find a compromise acceptable to all of them. Any member state can block the adoption of a regulation in this field and the lack of unanimity can then lead either to rejection of a proposal or – as happened in case of the law applicable to divorce and legal separation, the so-called “Rome III” regulation –, to the adoption of the regulation by only some member states, giving rise to enhanced cooperation which may very well be interpreted as creating a new division of Europe²¹⁾. It is not necessary to go far for an example: the Czech Republic has adopted a wait-and-see attitude, while Austria is a participating member state in this enhanced cooperation.

4.2 Maintenance

Since June 2011 the European Maintenance Regulation²²⁾ has been applicable. It applies to maintenance obligations arising from a family relationship,

¹⁷⁾ 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.

¹⁸⁾ BAARSMA, Nynke. Communitarisation of choice of law rules on divorce and termination of registered partnership, <http://www.rug.nl/gradschoolgsl/degree/phd/Paper%20Nynke%20Baarsma.pdf?as=pdf> accessed on 18.1.2012.

¹⁹⁾ Treaty on the Functioning of the European Union, Arts. 326-334.

²⁰⁾ *Ibid.* 19, Chapter III, Art. 81, Sec. 3.

²¹⁾ BOELE-WOELKI, Katharina. To be, or not to be: Enhanced Cooperation in International Divorce Law within the European Union. *Victoria University of Wellington Law Review*, 2008, vol. 39, pp. 779–792.

²²⁾ *Op. cit. sub 7)*.

parentage, marriage or affinity and it provides by Article 15 that conflict-of-law rules should be determined in accordance with the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations (hereinafter only the “Hague Protocol”). This Hague Protocol was prepared by the Hague Conference on Private International Law and was signed by the European Union²³), which, since 2007, has been a member of the Hague Conference as a Regional Economic Integration Organisation. This is the first time that the European Union has used a direct reference to an international treaty in its legislation in the family law field. The European Union has chosen a new method of legal regulation based on a combination of European law and an international treaty²⁴). It is still being applied in the European Union on a provisional basis pursuant to the Article of 4 (2) of the Council decision on the conclusion of the Hague Protocol as the Hague Protocol itself has not yet entered into force²⁵). The United Kingdom that has opted into the Maintenance regulation is not bound by the Hague Protocol, as choice of law rules other than the *lex fori* (including allowing a choice of law) were unacceptable from the British point of view²⁶).

The Hague Protocol grants a limited choice of applicable law to the parties, which is one of its main novelties as compared with the previous Hague Maintenance Obligations Conventions of 1956²⁷) and 1973²⁸). As Andrea Bonomi writes in the Explanatory Memorandum it corresponds to a strong international trend towards recognition of the freedom to choose applicable law, even in areas from which it was traditionally excluded²⁹). Pursuant to Article 8 of the Hague Protocol the maintenance creditor and debtor can choose (with some restrictions in Article 8 (4) and (5)) at any time (before the dispute or after it arises) between: (a) the *lex patriae* of either party at the time of the designation, (b)

²³) 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 (2009/941/EC).

²⁴) SEHLNÁLEK, David; TUROŇOVÁ, Jana. Nařízení o výživném a postavení mezinárodních smluv v Evropské unii (Council Regulation on Maintenance Obligations and the Position of International Treaties in the EU law, in Czech). *Právník*. 2010, vol. 3, pp. 233-250.

²⁵) http://www.hcch.net/index_en.php?act=conventions.status&cid=133 accessed on 19.1.2012.

²⁶) KARSTEN, Ian. The new Hague Convention on EU Regulation on Maintenance Obligations – an English Perspective. In Dagmar Coester-Waltjen, Volker Lipp, Eva Schumann, Barbara Veit (Hg.): *Europäisches Unterhaltsrecht, Die Bedeutung der Haager Übereinkommen und der UnterhaltsVO für das englische und deutsche Recht*, 8. Göttinger Workshop zum Familienrecht 2009, Göttinger Juristische Schriften, Universitätsverlag Göttingen, 2010, Band 8, pp. 47-55.

²⁷) Convention on the Law Applicable to Maintenance Obligations towards Children concluded on 24 October 1956, http://www.hcch.net/index_en.php?act=conventions.text&cid=37.

²⁸) Convention on the Law Applicable to Maintenance Obligations concluded on 2 October 1973, http://www.hcch.net/index_en.php?act=conventions.text&cid=86.

²⁹) BONOMI, Andrea. Explanatory Report to the Hague Protocol, p. 28.

the law of the state of the habitual residence of either party at the time of the designation, (c) the law designated by the parties as applicable or applied to their property regimes, and (d) the law designated by the parties as applicable or applied to divorce (or legal separation). Pursuant to Article 8 (2) of the Hague Protocol, the choice of law has to be made in writing (or by any medium the contents of which are accessible so as to be usable for future reference) and signed by the parties. This is to draw the creditor's attention to the importance of the choice performed. The *lex fori* can be designated by the maintenance creditor and debtor as applicable to maintenance obligations according to Article 7 of the Hague Protocol only for the purpose of particular proceedings in a contracting state, when made expressly in front of the respective institution.

As a safeguard to protect the weaker party the choice of law is not permissible in the case of maintenance obligations in respect of minors (under the age of 18) and in the case of adults who, by reason of impairment or insufficiency of their personal faculties, are not in a position to protect their own interests.³⁰⁾ Furthermore, the designated law shall not be applied if it would lead to unfair or unreasonable consequences for any of the parties, unless they were aware of such consequences at the time of the designation of the applicable law.

4.3 Matrimonial property regimes

The latest proposals in family matters presented by the European Commission in March last year concern the regulation of matrimonial property regimes (so-called Rome IV³¹⁾) and of the property consequences of registered partnerships³²⁾. As mentioned above in point 4, registered partners are not granted any choice of law by the European lawmakers, unlike spouses or future spouses, who, by Article 16 of the proposed regulation on matrimonial property regimes can choose as the applicable law between: (a) the law of the state of their habitual common residence, (b) the law of the state of the habitual residence of one of them at the time the choice is made, and (c) the *lex patriae* of either of them at the time the choice is made. According to the Explanatory Memorandum to the proposed regulation the option should be clearly regulated to prevent the choice of a law having little relation to the couple's real situation or past history, it must be based on the law of habitual residence or on nationality of one of the (future) spouses.

In the case of the habitual common residence as a connecting factor, unlike in the case of other connecting factors, the decisive moment for the application of

³⁰⁾ Article 8, Section 3 of the Hague Protocol.

³¹⁾ 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.

³²⁾ *Op. cit. sub 11).*

the connecting factor is not specified. For sake of consistency the decisive moment – presumably the time the choice is made – should be expressly stated in this case as well. As to the form of the choice of law, Article 19 of the proposed regulation envisages that it should be made in the same manner as that specified for a marriage contract by the chosen law or by the *lex loci actus*, provided at least that it is made expressly in a document dated and signed by both spouses. Additional formal requirements for a marriage contract stipulated by the law of the spouses' habitual common residence at the time of the choice must also be complied with

Article 18 of the proposed regulation then enables later modification of the choice of law made by spouses, but only by the substitution for the hitherto applicable law of the *lex patriae* of either spouse or of the law of the state of the habitual residence of either spouse at the time the choice is made. Unless spouses decide expressly to make such a change of applicable law retrospectively, it is effective only for the future.

4.4 Succession

In succession matters, new regulation was adopted this July and will be applicable from August 17, 2015.³³) Very little flexibility in the choice of law is granted to the testator by this proposed regulation. In accordance with Article 22 of the regulation the testator can only opt as an alternative to the default law of the state of the habitual residence for his national law, his *lex patriae*, at the moment of the designation or at the time of death. In spite of the fact that in succession matters, the national conflict-of-law rules of many member states of the European Union still connect to the testator's nationality, the new regulation uses habitual residence as the key and only default connecting factor. Allowing testators this limited choice of law brings a welcome counterbalance to the application of the law of the state of their habitual residence at the moment of their death that would apply by default if no choice of law had been made. It gives the testator who lives abroad but still has close family and cultural links to the state of his nationality the chance to opt for his or her own *lex patriae*. This degree of testators' autonomy will definitely increase legal certainty of the testator when planning her/his succession.

4.5 European Family and Succession Law – some conclusions

Generally, the scope for choosing applicable law in all the relevant European law instruments is very limited. European citizens can basically opt alternati-

³³) Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

vely for the *lex patriae*, the law of the state of habitual residence or the *lex fori* (except for succession matters, where the only choice is the *lex patriae* of the testator). There is, according to the present author's opinion, a combination of reasons for this limitation of choice: (a) the relative novelty of party autonomy in this area; (b) the still prevailing conviction that there must be a connection to the country of nationality or to the country of habitual residence³⁴); and (c) a potential fear that thanks to the universal character of the respective European regulations, an unlimited choice of law would lead to the application of exotic laws.

As shown above, the *lex patriae* and the law of habitual residence appear as alternative options, albeit with varieties and nuances, in the choice of law provisions of all the analyzed legal acts (except for succession matters, where the law of habitual residence is the default applicable law). It may be that the potential rivalry of the supporters of each of these traditional connecting factors has led, in the search for consensus, to the variety of alternative rules which have been examined.

Also, in the case of divorce and maintenance obligations, European citizens can always opt alternatively for the *lex fori* and thus achieve a welcome harmony of *ius* and *forum*. The application of the *lex fori* might (but does not necessarily have to) contribute to the faster and more economic conduct and outcome of the proceedings than in cases when national courts are confronted with, and sometimes overwhelmed by, an application of foreign law. The admission of the choice of the law of the *forum* might also be viewed as a concession to the common law countries, where courts characteristically apply their own domestic law to the exclusion of foreign law in matters of personal status and maintenance.

If parties do not take advantage of the party autonomy granted to them by the European legislator, whether for lack of knowledge or deliberately, the default conflict-of-law rules apply. Looking closely at the conflict-of-law rules across European family legislation, it becomes apparent that there is no unifying concept. Maybe this is simply because it was easier to achieve consensus on these issues taken in isolation than it would have been across a wider area of family law. When designing these conflict-of-law rules, the EU legislators have come up with lists of objective connecting factors in order of preference, building again on the two traditional key connecting factors: nationality and habitual residence. However, the schemes and the cascade's hierarchy of the various conflict-of-law rules stipulated in various regulations vary. If no choice of law is permitted or made, this rather confusing atomization might lead in practice to a number of unfortunate situations, where the existing variety of these rules,

³⁴) de GROOT, Gerard-René. Auf dem Wege zu einem europäischen (internationalen) Familienrecht. *Zeitschrift für Europäisches Privatrecht*. 2001, pp. 618-627.

sometimes with only subtle nuanced differences, will lead to different substantive laws being applicable to different aspects of the same problem³⁵).

Let us take as an example an international couple with two minor children seeking a divorce. This very common life situation consists of at least four aspects to which, if there is no choice of law performed by the parties, different conflict-of-law rules must be applied: the divorce itself, the matrimonial property regime, maintenance obligations between the spouses and towards the children, and custody of the children. In the worst case the diversity of the default conflict-of-law rules in the respective regulations could result in a situation where four different substantive laws would have to be applied. Let us imagine a simulated hypothetical situation of such a family break-up: and let us presume that all the mentioned European regulations are applicable in their current wording and among all member states of the European Union. Let us leave jurisdiction aside as identical European regulations would have to be applied to determine the applicable law irrespective of the court seized. The wife is a Czech national, the husband is Austrian, the couple got married and lived in France for a number of years, later moving to Madrid where the husband still works and lives. The wife moved with the children to Prague to her parents' house five months ago. No choice of law has been performed by the parties and the default conflict-of-law rules must be applied (see *Table II*). Their application leads to following governing laws:

Spanish law as the law applicable to divorce (pursuant to Article 8 (b) of the Rome III regulation, the law applicable to divorce is the law of the country where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seised, in so far as one of the spouses still resides in that state at the time the court is seised);

French law as the law applicable to matrimonial property (pursuant to Article 17 (1) a) of the Rome IV regulation proposal, the law applicable to the matrimonial property regime is the law of the country of the first common habitual residence after marriage);

Czech law as the law applicable to maintenance obligations (pursuant to Article 3 (1) of the Hague Protocol 2007 the law applicable to maintenance obligations is the law of the country of the habitual residence of the creditor (the wife and the children)); and

the *lex fori* as the law applicable to custody of the children (pursuant to Article 15 of the Hague Convention on the Protection of Children³⁶)). This

³⁵) FIORINI, Aude. 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, no. 2, pp. 178-205.

³⁶) Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children concluded on 19 October 1996, http://www.hcch.net/index_en.php?act=conventions.text&cid=70.

Hague Convention applies in all the four European countries in question. All of them have signed and ratified the Convention, in the Czech Republic it has been in force since 2002, in Austria, Spain and France since last year³⁷).

This hypothetical example should not only serve the purpose of demonstrating the lack of a unifying concept in the conflict-of-law rules but it should also draw attention to the fact that this lack of a unifying concept could be offset somewhat if there were party autonomy to choose the applicable law. If actively performed by the parties, choices of law can represent an easy escape from such a situation and its complexity.

In the simulated example, with the exception of the attribution of parental responsibility where no choice of law is admissible under the Hague Convention on the Protection of Children and with the exception of maintenance towards children where, in order to protect the weaker party, no choice of law is possible under the Hague Protocol, a single applicable law could have been designated by the parties within the limited scope of laws permitted by the respective choice of law rules (see *Table I*). Czech or Austrian law would have been a possible choice for all the remaining aspects of their international family relations. Czech or Austrian law as *lex patriae* of one of the parties would have been an available choice of law in the case of the divorce, the matrimonial property regime and the maintenance obligations towards adults. French law would have been available as the law of the habitual residence of one of the parties at the time of the designation in case of the matrimonial property regime and the maintenance obligations towards adults, and in case of divorce if the choice of law agreement was concluded when still living in France, as the law of common habitual residence of the spouses at the time the agreement is concluded.

As illustrated above, the current atomization of the adopted and proposed EU regulations in the field of international family law with its variety of conflict-of-law rules can lead to very complex legal situations. Party autonomy in the choice of law can act as a certain remedy, as it balances the lack of a uniform approach to the conflict-of-law problems. Choice of law has an irreplaceable role in international family and succession law as it represents a way of avoiding these complexities. It gives parties a much bigger degree of legal certainty and predictability and, even if the choice is only a limited one, it grants them an option to designate the law that they feel most connected to and comfortable with. On the other hand, parties who adopt a passive approach, failing actively to make their choice of law due to a lack of information or lack of correct legal advice, leaving the designation of the governing law to the judge, might find that their lives are even more miserable than the break-up of their family has presumably already brought about.

³⁷) http://www.hcch.net/index_en.php?act=conventions.status&cid=70 accessed on 19.1.2012

Table I

<u>CHOICE-OF-LAW RULES IN APPROVED AND PROPOSED EUROPEAN FAMILY LAW REGULATIONS:</u>		
DIVORCE/LEGAL SEPARATION	MAINTENANCE OBLIGATIONS	MATRIMONIAL PROPERTY REGIME
Regulation No. 1259/2010, Article 5	Regulation No. 4/2009, Article 7 and 8 of the Hague Maintenance Protocol 2007 (choice of law rules do not apply in cases stated in Article 8/3)	COM 2011(126) final, Article 16
the law of common habitual residence of the spouses at the time the agreement is concluded	the law of the habitual residence of either party at the time of the designation	the law of habitual residence of one of the spouses or future spouses at the time the choice is made
the law of the last common habitual residence , in so far as one of the spouses still resides there at the time the agreement is concluded		the law of the habitual common residence of the spouses (not admissible in case of change of applicable law pursuant Art. 18)
<i>lex patriae</i> of either spouse at the time the agreement is concluded	<i>lex patriae</i> of either party at the time of designation	<i>lex patriae</i> of either spouse or future spouse at the time this choice is made
<i>lex fori</i> .	<i>lex fori</i> for purpose of a particular proceeding in a given Contracting state only	
	the law designated by the parties as applicable or in fact applied to the divorce or legal separation	
	the law designated by the parties as applicable or in fact applied to their property regimes	

Table II

<u>CONFLICT-OF-LAW RULES IN APPROVED AND PROPOSED EUROPEAN FAMILY LAW REGULATIONS:</u>		
DIVORCE/LEGAL SEPARATION	MAINTENANCE OBLIGATIONS	MATRIMONIAL PROPERTY REGIME
Regulation No. 1259/2010 Article 8	Regulation No. 4/2009 Article 3 and 4 of the Hague Maintenance Protocol 2007	COM 2011(126) final Article 17
the law of state where the spouses are habitually resident at the time the court is seized; or, failing that	GENERAL RULE: the law of the state of the habitual residence of the creditor	the law of the state of the spouses' first common habitual residence after their marriage or, failing that,
the law of the state where the spouses were last habitually resident , provided that the period of residence did not end more than 1 year before the court was seized, in so far as one of the spouses still resides in that state at the time the court is seized; or, failing that	SPECIAL RULES (in cases of e.g. maintenance obligations of parents towards children): the law of the the law of the state of the habitual residence of the creditor or failing that <i>lex fori</i> or failing that the law of the state of their common nationality	the law of the state of the spouses' common nationality at the time of their marriage (does not apply if the spouses have more than one common nationality) or, failing that
the law of the state of which both spouses are nationals at the time the court is seized; or, failing that		the law of the state with which the spouses jointly have the closest links , taking into account all the circumstances, in particular the place where the marriage was celebrated
<i>lex fori</i>		