*Team Germany 2*

*Dorota Marianna Banaszewska & Paula Kopowski*

# The new Rome III Regulation: A cosmetic maintenance or a major refit in the area of the law applicable to divorce and legal separation within the European Union?

## A. Introduction

The family law systems of the Member States of the European Union (hereinafter: EU) might remind one of the unhappy families from the famous quote of Tolstoy - although they resemble one another to a certain extent, especially with respect to the general contours of legal institutions, they still have their own significant particularities and specificities. The differences are often far-reaching and concern such basic and crucial questions as the one of what a family or a marriage exactly comprises or what a divorce or a separation is. Bearing in mind a diverse range of legal concepts of the Member States in this regard, the interest of the EU in harmonisation of the family law is nowadays apparent and moreover justified by the fact that discrepancies concerning a family status may affect the right to free movement, one of the cornerstones of the internal market.[1] Free movement of workers also has an impact on their whole families. For instance marriages entered into in one Member State, may fail in another, and maintenance might have to be pursued in a third Member State. Hence, different jurisdictions may deal with these problems. Moreover, they might well have very different, or even incompatible, ideas about how these matters shall be resolved.[2] Therefore, although still in 1999 the European Court of Justice (hereinafter: ECJ) stated that family law belonged exclusively within the competence of the Member States, especially that "*(...) the Community legislature ha[d] no competence to lay down the rights of spouses in divorce proceedings (...)*",[3] the extension of the EU competence to include family law is a natural and expected consequence of an effort to diminish the aforementioned legal complexity faced by the EU citizens availing of their right to free movement and also reflects a growing focus on fundamental rights within the EU.[4]

This shift in the EU policy-making and legislature is well illustrated by the words of Vice-President Viviane Reding, the EU's Justice Commissioner, regarding the 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 (hereinafter: Rome III Regulation):[5] "*For the first time in EU history, Member States used the enhanced cooperation procedure to push forward with rules allowing international couples to select which country's law would apply to their divorce. People fall in love across borders, whatever their nationality, but Member States' courts have different ways of deciding which country's law applies to divorces. International couples need to be certain of the rules that apply in their situation – which is what the Regulation provides for. (...) The new rules will benefit hundreds of thousands of international couples and it is encouraging to see that more and more Member States are recognising this.*"[6] The Rome III Regulation constitutes indeed a new quality in the EU legislature since - after more than ten years of uncertainty and negotiations - the EU has made a decisive step towards the harmonisation of the law applicable to divorce through the activation of

[1] See: *Fiorini*, IJLPF 2008, p. 188.
[2] Compare: *Tinney* 2010, pp. 4 - 5.
[3] ECJ, Case C-430/97 (*Johannes v. Johannes*) 1999, ECR I-3475, para. 18.
[4] See: *Tinney* 2010, pp. 4 - 5.
[5] Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, Official Journal of the European Union, L 343/10, pp. 10-16.
[6] EU Press Release of 20th November 2012, http://europa.eu/rapid/press-release_IP-12-1231_en.htm, access date: 8th April 2015.

the enhanced cooperation mechanism for the very first time.[7] On the one hand, the fact that only some of the Member States decided to adopt the new rules might be seen as difficult to combine with the principle of the unity of the internal market and uniformity of the EU law. On the other hand, it can be evaluated as a useful tool to respond to the variable needs of numerous Member States.[8] This is however not the only controversy regarding the Rome III Regulation. Some have already asked a question of whether the regulation is not going too far;[9] others call it Rome III-"light" Regulation suggesting that its scope of regulation might be too limited.[10] This controversial, but still not sufficiently discussed, matter is of utter importance not only for the scholars bur also for the practitioners of law. Hence, the primary focus of this essay relates to the question of whether the Rome III Regulation constitutes only a cosmetic maintenance or a major refit in the area of the law applicable to divorce and legal separation within the EU: is it enough; is it too much or too little? Is it a step into the right direction or does the EU have other alternatives that shall be introduced? How does the regulation fit in the existing EU legal framework, especially what is its relationship to other regulations on jurisdiction in family matters? What are the consequences of the Rome III Regulation for the EU, its Member States, courts and tribunals and all the average Joes and Janes applying for divorce somewhere in one of the EU Member States? Will it lead to uniform solutions or is international harmony rather not to be expected? And last but not least, what shall and might be done better?

In order to answer the aforementioned questions, the present essay gives at the outset a brief overview of historical and legal background of the Rome III Regulation as well as of its scope of regulation and most important provisions. Subsequently, it deals with the question of what has been substantially reformed by the Rome III Regulation and what is the relationship between the Rome III Regulation and Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereinafter: Brussels IIa Regulation).[11] Finally, it presents a critical perspective on the substantive provisions of the Rome III Regulation and followingly encompasses some suggestions *de lege ferenda*.

## B. Background

The development of European conflict of laws rules in family matters began in 1998 with the adoption of the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice[12].[13] According to point 41 lit. a it is

[7] Compare: *McEleavy*, ICLQ 2010, p. 1143.
[8] *Ibid.*, p. 1146. See also: Mostowik, ZP 2011, pp. 10-11.
[9] See: *Fiorini*, IJLPF 2008, p. 178.
[10] Compare: *Niethammer-Jürgens* 2013, p. 37.
[11] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, Official Journal of the European Union, L 338/1, pp. 1 - 29.
[12] Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, Official Journal of the European Communities of 23rd January 1999, C 19/01, pp. 1 - 16.

necessary to examine the possibilities to draw up a legal instrument on the law applicable to divorce (Rome III) aiming to prevent forum shopping. Originally, the plan was to integrate new articles on the applicable law in case of divorce into the Brussels IIa Regulation.[14] The required consent could not be reached due to the resistance of numerous Member States.[15] Thereupon, for the first time, 14 Member States started an enhanced cooperation. The legal basis of the enhanced cooperation is article 20 of the Treaty on European Union (hereinafter: TEU)[16] and article 326 et sqq. of the Treaty on the Functioning of the European Union (hereinafter: TFEU).[17]

The Treaty of Amsterdam signed in 1997, in force since Mai 1st 1999, revealed the intention of the Member States to create a Union of Freedom, Security and Justice.[18] Therefore, the competence[19] in the field of judicial cooperation in civil matters was assigned to the European Community.[20] In this context, the leaders of the 15 Member States held a special meeting in Tampere in October 1999.[21] The European Council published the presidency conclusions[22] of the Tampere Summit in order to promote a policy of freedom, security and justice. This was followed by the Hague Program[23] in 2004, which was replaced by the Stockholm Program[24] in 2010, both set to continue working towards a stronger cooperation in justice and home affairs.[25] Nevertheless, one has to outline that the European Union still has no competence on substantive family law.[26]

## C. *Lex lata* compared to *status quo ante*: A critical look at the reform taken by the Rome III Regulation

Bearing in mind that the Rome III Regulation constitutes a new quality in the EU legislation in the field of law applicable to divorce and legal separation due to the fact that it provides a universal and common set of conflict-of-law rules for the participating Member States, it is necessary to have a closer look at its substantive provisions and to provide a critical evaluation thereof.

---

[13] *Winkler von Mohrenfels*, Festschrift von Hoffmann 2011, p. 530.
[14] *Ibid., p.* 532.
[15] *Ibidem*.
[16] Treaty on European Union, consolidated version, Official Journal of the European Union of 26th October 2012, C 326/13, pp. 13-45.
[17] Treaty on the Functioning of the European Union, consolidated version, Official Journal of the European Union of 26th October 2012, C 326/47, pp. 47-390.
[18] *Wagner*, IPRax 2010, p. 97.
[19] Article 61 lit. c, article 65 Treaty establlishing the European Community, since February 2nd 2009: article 81 TFUE.
[20] *Wagner*, IPRax 2010, p. 97.
[21] http://ec.europa.eu/councils/bx20040617/tampere_09_2002_en.pdf, p. 1, access date: 14th April 2015.
[22] Presidency Conclusions of the Tampere Summit, http://www.europarl.europa.eu/summits/tam_en.htm, access date: 14th April 2015.
[23] Communication from the Commission to the Council and the European Parliament - The Hague Programme: Ten priorities for the next five years The Partnership for European renewal in the field of Freedom, Security and Justice, COM/2005/0184.
[24] European Council, The Stockholm Programme - An open and secure Europe serving and protecting citizens, (2010/115 C/01).
[25] *Wagner*, IPRax 2010, p. 97.
[26] Compare: *Tinney* 2010, p. 3.

**1. Scope of regulation**

The Rome III Regulation does not contain jurisdiction rules. The jurisdiction rules belong to the *acquis communautaire* which shall not be affected by enhanced cooperation. As a result, the Rome III Regulation encompasses exclusively uniform conflict of laws rules.[27]

**(a) Material scope (*ratione materiae*) of the Rome III Regulation**

According to article 1 para. 1 of the Rome III Regulation, its provisions shall apply, in situations involving a conflict of laws, to divorce or legal separation. These two requirements have to be fulfilled cumulatively.

Therefore, the Rome III Regulation is applicable only if the divorce or legal separation has cross-border aspects, such as different nationalities or habitual residences of the spouses. The relevant moment to evaluate whether there is a cross-border element is, in general, the time when the competent authority is seized. However, the Rome III Regulation is also applicable if the cross-border element was present at the moment of choice of law, for instance if during the marriage one of the spouses had a foreign nationality or their habitual residence in a country other than the one where the divorce proceedings commence, even if at the time when the competent authority is seized the cross-border aspect does not exist anymore.[28] For instance if at the time of marrying a husband is German and a wife is Polish, but they have exclusively German nationality and live in Germany at time the divorce proceedings before a German court commence, it is possible that the German court applies Polish law if the spouses made a choice for Polish law to apply to an eventual divorce at the moment the wife still had Polish nationality (compare article 5 of the Rome III Regulation) and hence regardless of the fact that Poland does not take part in enhanced cooperation under the Rome III Regulation.[29]

The Rome III Regulation shall only apply to divorce or legal separation, that is, according to the wording of recital 10 of the Preamble of the Rome III Regulation, to dissolution or loosening of marriage ties. The annulment of a marriage is not covered (compare article 1 para. 2 lit. c)). Moreover, the ancillary matters, as listed in article 1 para. 2 of the Rome III Regulation, such as maintenance obligations, parental responsibility, the name of the spouses or the property consequences of the marriage, are also not covered by its substantive scope and follow, just like the annulment, the rules in force in each Member State.[30] An interesting and important question which has so far not been addressed by the scholars is the one of what the legal consequences are if the substantive law chosen by the parties provides that the court is *ex officio* obliged to decide on one of the aforementioned ancillary matters. Suppose a German court is applying Polish substantive law due to the choice by the parties. Under article 58 para. 1 of the Polish Family and Guardianship Code (hereinafter: KRiO)[31] the court issuing a divorce is obliged to also decide, and hence *ex*

[27] Compare: Note on the Proposal 2010, p. 13.
[28] Ibid., p 13 - 14. See also *Ansuh* 2014, p. 246.
[29] For the question of choice of applicable law by the parties - see below point C.3 (a).
[30] See: *Bałos*, SP 2012, p. 76.
[31] Kodeks rodzinny i opiekuńczy (Family and Guardianship Code), Dziennik Ustaw (Journal of Laws) of 1964, No. 9, Pos. 59.

*officio*, on custody and parental responsibilities towards minor children of the parties. The question that arises in this context is of whether the German court applying the provisions of the Rome III Regulation and - as a result of party autonomy - Polish substantive law is obliged to decide on this ancillary matter. In the opinion of the authors of the present essay article 1 para. 2 of the Rome III Regulation does not preclude the court to decide on the matters listed in it. On the contrary, in the above example the German court would be obliged to apply article 58 para. 1 KRiO and as a result decide also on custody and parental responsibilities. This is an inevitable consequence since the Rome III Regulation provides only a set of conflict of laws rules and does not include substantive provisions. Therefore, if the spouses designated Polish law as applicable to divorce and legal separation, the court is obliged to apply the Polish substantive law in its entirety. This may lead to certain discrepancies and hence lack of uniform outcomes of the court proceedings in the Member States participating in the enhanced cooperation. However, the harmonisation is not equal to uniformisation of law. Moreover, even in cases in which only national law is applicable the outcomes of the court proceedings might be different due to the judicial margin of appreciation and the scope for decision-making. This is inevitable and inherent to any process of application of law, and hence cannot actually be seen as a vice following from the substantive scope of the Rome III Regulation.

The most relevant question in this context is of how the term "marriage" is to be interpreted. According to recital 10, the interpretation of the notion "marriage" shall be consistent with the interpretation of the same term found in other European regulations on Private International Law.[32] It is generally agreed that the Brussels IIa Regulation and the term "marriage" under its provisions shall be interpreted autonomously.[33] Many commentators express the opinion that also the provisions of the Rome III Regulation shall be interpreted autonomously.[34] It is true that such interpretation is required in order to preserve the autonomy and unity of EU law. Its aim is to find a common meaning of a notion for all the EU Member States. [35] However, it is doubtful whether in case of the term "marriage" in the context of the Rome III Regulation a common ground can be found which actually calls into question the mere idea of the autonomous interpretation.

Namely, it is highly disputed whether the notion "marriage" also includes so called non-traditional forms of marriages.[36] It has been suggested that - since the Rome III Regulation only speaks of "spouses" - the dissolution of registered partnerships does not fall within its substantive scope.[37] Whereas this statement may hold valid, there are nevertheless some Member States that have included in their legal systems not only registered partnerships but also same-sex marriages, for instance The Netherlands, Sweden or Spain.[38] On the

[32] See: *Torga*, NiPR 2012, p. 549.
[33] *Torga*, NiPR 2012, p. 549. For the autonomous interpretation of the provisions of the Brussels IIa Regulation see: ECJ, Case C-435/06 (*Preliminary ruling under Article 267 TFEU from the Korkein hallinto-oikeus, Finland*) 2007, ECR I-10141.
[34] See: Althammer/*Althammer* Rome III, Initial Remarks (Vorbemerkungen) recital 10; *Winkler von Mohrenfels*, ZeuP 2013, pp. 702 - 703.
[35] Compare: *Winkler von Mohrenfels*, ZeuP 2013, pp. 702 - 703.
[36] *Torga*, NiPR 2012, p. 549; *Winkler von Mohrenfels*, ZeuP 2013, p. 703.
[37] Compare: Note on the Proposal 2010, p. 14.
[38] *Winkler von Mohrenfels*, ZeuP 2013, p. 703.

other hand, there are Member States that would not be particularly eager to accept the concept of same-sex marriages. Hence, the question of whether an autonomous definition of "marriage" involves or - to be precise - can involve same-sex marriages. Can one even speak of an autonomous definition if a consensus among the Member States cannot be reached? Or shall the definition be limited to the very core which all the Member States are willing to agree upon? There are already some voices in favour of inclusion of the same-sex marriages into the notion of marriage under the provisions of the Rome III Regulation.[39] Some commentators conclude from the second alternative of article 13 of the Rome III Regulation that the same-sex marriages are generally included in the definition of "marriage" under the Rome III Regulation. This results from the fact that article 13 of the Rome III Regulation relates to the validity of marriage for the purposes of divorce proceedings in the light of the differences in national law of Member States. Hence, it grants the courts of the Member States autonomy when deciding upon the validity of marriage, so that the Member States that do not accept the concept of same-sex marriage can rely upon this exception if necessary.[40] Nevertheless, the vast majority of the authors agree that the same-sex marriages are not included in the definition of "marriage" under the Rome III Regulation.[41] One of the arguments is that even Spain, which already introduced the concept of same-sex marriages into its legal system in 2005, did not mention the same-sex marriages during the negotiations of the provisions of the Rome III Regulation.[42] It is true that the agreement of participating States regarding the interpretation of a legal text is a very important factor and element of interpretation thereof. However, there is an even more convincing legal argument that the same-sex marriages are not (yet?) included into the definition of "marriage" under the Rome III Regulation and hence that the question of what shall be understood as marriage is actually a preliminary question and as such is to be answered by each particular Member State. Therefore, although it is true that the provisions of the Rome III Regulation are to be interpreted autonomously, there is no discrepancy between the requirement of the autonomous interpretation and the exclusion of the same-sex marriages from the material scope of the regulation. Moreover, the wording of article 13 of the Rome III Regulation rather confirms the aforementioned conclusion than the one of these commentators who suggest that it speaks for the inclusion of the same-sex marriages into the material scope of application. It is true that such interpretation of the Rome III Regulation can lead to very different results *in concreto* and to lack of unanimous solutions. However, it also guarantees flexibility and a margin of appreciation for the Member States that have different legal systems and often various deontological backgrounds. The latter ones constitute a necessary condition for many Member States to at all participate in enhanced cooperation.

Another highly discussed question in this context is the one of whether the private divorces are encompassed by the material scope of the Rome III Regulation. The private divorces, that is divorces which execution requires only a declaratory participation of the public authorities or courts, like a divorce of a

[39] Compare: *Torga*, NiPR 2012, p. 549.
[40] See: *Helms*, FamRZ 2011, p. 1766.
[41] *Winkler von Mohrenfels*, ZeuP 2013, p. 703.
[42] *Ibidem.*

Muslim marriage merely by husband's *talaq* or a Thai couple by a mere agreement, [43] are not mentioned in the Rome III Regulation. Some commentators argue hence that the private divorces are included in the material scope of the Rome III Regulation since they are not explicitly excluded.[44] This argument is however not very convincing from a logical and methodological point of view. Some authors quote recital 9 of the Preamble and argue taht the Rome III Regulation should create a comprehensive legal framework in the area of the law applicable to divorce and legal separation.[45] This is a valid consideration. Moreover, the possible discriminations, discrepancies or infringements upon basic rights could be avoided by applying of article 10 of the Rome III Regulation if this provision was an *ordre public* clause. However, the authors of the present essay consider article 10 of the Rome III Regulation for a mandatory overriding provision and not for an *ordre public* clause.[46] Moreover, there are States that allow divorces only before the public authorities like courts, for instance Germany (compare article 17 para. 2 *Einführungsgesetz zum Bürgerlichen Gesetzbuch*, Introductory Law to the German Civil Code, hereinafter: EGBGB[47] ). In their legal systems the recognition of private divorces is not a procedural question, but a question of applicable material family law since it regards the validity of a legal act. Therefore, the provisions of the Rome III Regulation are not applicable in these cases.[48] This shall be another argument why the private marriages are not included in the material scope of the Rome III Regulation. Otherwise, it can lead to practically difficult and legally ambiguous situations, like for instance a judgment of Higher Regional Court (*Oberlandesgericht*) of Munich of 1989 that required a husband to pronounce *talaq* before the court and as a result accepted it as a valid divorce.[49] This solution leads to mixing up of a private legal act with an act of public authority and merges two distinct legal orders. Such result is ambiguous, endangers legal certainty and shall be avoided.

**(b) Scope *ratione tempore***

The Rome III Regulation applies to the legal proceedings and party agreements under article 5 of the Rome III Regulation from 21st June 2012 (article 18 para. 1 of the Rome III Regulation). Under article 18 of the Rome III Regulation, effect shall also be given to an agreement on the choice of the applicable law concluded before that date, provided that it complies with Articles 6 and 7 of the Rome III Regulation.

**(c) Scope *ratione loci***

The territorial scope of application of the Rome III Regulation is limited to the territories of the Member States participating in the enhanced cooperation (compare recital 11). These are: Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania, Slovenia and from 22nd May 2014 Lithuania.

---

[43] *Ibidem.*
[44] Althammer/*Althamme*, Rome III, article 1, recital 7.
[45] Compare: *Winkler von Mohrenfels*, ZeuP 2013, p. 703.
[46] See below point C.3 (b).
[47] Einführungsgesetz zum Bürgerlichen Gesetzbuch, Bundesgesetzblatt I (German Journal of Laws Part I.) of 1994, p. 2494.
[48] See: *Winkler von Mohrenfels*, ZeuP 2013, p. 703.
[49] Oberlandesgericht (Higher Regional Court) of Munich, 9th May 1989, IPRax 1989, pp. 238, 241.

**(d) Universality**

According to article 4 of the Rome III Regulation the law designated shall apply whether or not it is the law of a participating Member State. Hence, it is possible to designate the law of a participating Member State, the law of a non-participating Member State or the law of a State which is not a member of the EU (compare recital 12).

**2. The *ordre public* clause under article 12 of the Rome III Regulation and the differences in national law (article 13 of the Rome III Regulation)**

**(a) *Ordre public* clause**

Article 12 of the Rome III Regulation is a classic general *ordre public* clause of Private International Law. According to article 12 of the Rome III Regulation, application of a provision of the designated law may be refused if such application is manifestly incompatible with the public policy of the forum. The primary consequence is a modified application of foreign law. The secondary consequence is the inapplicability of foreign law and the applicability of *lex fori* instead. [50]

**(b) Differences in national law under article 13 of the Rome III Regulation**

Article 13 of the Rome III Regulation constitutes an exception to choice of law under article 5 of the Rome III Regulation. The first alternative included in article 13 of the Rome III Regulation provides that the courts of a Member State, whose law does not provide for divorce, will not be obliged to pronounce the divorce. It is so called Malta exception since Malta used not to have a possibility of divorce in its legal system. However, all of the participating Member States, including Malta (since 2011), now know divorce, and hence this alternative has become obsolete. The second alternative provides that if the law of a participating Member State does not deem the marriage valid, there is no obligation on participating States to pronounce a divorce.[51]

**3. The refit**

**(a) The parties' autonomy, articles 5 -7 of the Rome III Regulation**

The parties' autonomy is the Private International Law's answer to private autonomy.[52] Only Germany, Belgium, The Netherlands and Spain knew a concept of parties' autonomy concerning the choice of applicable divorce statutes before the introduction of the Rome III Regulation, though the possibilities were limited.[53] Article 5 para. 1 of the Rome III Regulation provides four choices of law: the law of the state where the spouses are habitually resident at the time the agreement is concluded (lit. a) or the law of the state where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded (lit. b) or the law of the State of nationality of either spouse at the time the agreement is concluded (lit. c) or, the law of the forum (lit. d).

---

[50] See: Althammer/*Arnold*, Rome III, article 12, recital 25.

[51] Comapre: Althammer/*Tolani*, Rome III, article 13, recital 1 - 2. It has been widely discussed what is the consequence of the interpretation of second alternative of article 13 of the Rome III Regulation on the inclusion of the same-sex marriages in the material scope of application of the Rome III Regulation. Compare in this respect above point C.1 (a).

[52] Althammer/*Mayer*, Rome III article 5 recital 1.

[53] *Annex to the Green Paper on applicable law and jurisdiction in divorce matters*, p.8.

An agreement designating the applicable law may, according to article 5 para. 2 of the Rome III Regulation, be concluded and modified at any time, but at the latest at the time the court is seized. Article 16 of the Brussels IIa Regulation determines when the court is seized. In consequence, the question arises if the spouses may also designate the applicable law before the court during the proceedings. Article 5 para. 2 leaves the response to the law of the forum. The parties may choose the applicable law until the end of the hearing of the first instance in Germany, according to article 46 d EGBGB.

The existence and validity of an agreement on choice of law or of any term thereof shall be determined by the law which would govern it under the Rome III Regulation if the agreement or the term were valid, article 6 para. 1 of the Rome III Regulation. As article 11 of the Rome III Regulation excludes the possibility of a *renvoi*, the substantive law of the designated Member State is applicable.[54] The existence of the agreement concerns questions on the conclusion of the agreement, e.g. consent of the parties. The validity of an agreement concerns for instance the absence of intent. [55]

The agreement shall be expressed in writing according to Art. 7 para. 1 of the Rome III Regulation. It shall be dated and signed by both spouses. Any electronic communication meets the requirement of the written form as long as a durable record of the agreement is provided. It is not determined what form a signature shall exactly take. The mere existence of this provision leads nevertheless to the conclusion that the signature does not need to be handwritten in any circumstance. This problem might be solved by the ECJ.[56] Article 7 para. 2 of the Rome III Regulation provides an exception of the aforementioned principle. If the law of the participating Member State where the spouses have their habitual residence at the time the agreement is concluded, lays down additional formal requirements for this type of agreement, those requirements shall apply. In Germany, article 46 d EGBGB requires authentification of an agreement concluded by virtue of article 5 of the Rome III Regulation by a notary.

The aim of the Rome III Regulation was to create legal certainty and predictability for the spouses. [57] The strengthening of the parties' autonomy has brought this goal forward. They are now free to choose the law applicable to their divorce assumed they have a connection to the law they choose.[58] This is a reasonable delimitation to prevent the application of laws the parties do not have any connection with. [59]

Another goal was to prevent the "rush to court".[60] The Brussels IIa Regulation opened the possibility to *forum shopping* due to its concurrent jurisdiction.[61] In addition, the *lis pendens* rule as provided in article 19 of the Brussels IIa Regulation admonishes the court second seized to stay its proceedings until such time as the jurisdiction of the court first seized is established if two spouses bring in divorce proceedings in different Member States. The interest of the parties to see one particular court declare its jurisdiction is

[54] Althammer/*Mayer*, Rome III, article 6 recital 1.
[55] *Ibid.*, article 5 recital 3.
[56] *Ibid.*, article 7 recital 3.
[57] *Green Paper on applicable law and jurisdiction in divorce matters*, p. 3.
[58] *Devers*, Procédure n° 8-9, 2012, alerte 34.
[59] *Hau*, FamZR *2013*, p. 252.
[60] *Green Paper on applicable law and jurisdiction in divorce matters*, p. 6.
[61] *Helms*, FamRZ 2011, p. 1765.

usually due to the intention of seeing the law of this Member State applied. The substantive laws on divorce differ widely from Member State to Member State. While Sweden provides a fast and uncomplicated divorce where no ground is required in case of consent and no factual separation needed, Ireland requires a four-year separation period.[62] As now 15 Member States apply the same rules on the conflict of laws and the substantive law designated by those rules, the incentive to "rush to court" is reduced because no matter in which of the 15 Member States the action is filed first, the provisions on the conflict of laws and the law designated hereby are in general the same. Unfortunately, the Rome III Regulation only applies in 15 of the 28 Member States[63]. Consequently, there is still an incentive for *forum shopping*. Especially those Member States that systematically apply their domestic laws to divorce proceedings (UK, Ireland, Sweden, Finland, Denmark, Cyprus)[64] are not part of the enhanced cooperation. The countries that used to have a system of connecting factors before (e.g. Germany, Hungary, Austria, Portugal, Spain, Slovenia, Luxemburg) apply now the Rome III Regulation in order to designate the substantive law applicable.

**(b) Application of the law of the *forum* under article 10 of the Rome III Regulation**

Article 10 of the Rome III Regulation provides that if the law applicable pursuant to article 5 or article 8 makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the *forum,* that is the law of the court seized, shall apply. Article 10 of the Rome III Regulation is the most controversial of its provisions. This provision has been introduced due to a Spanish proposal and reflects the text of article 107 para. 2 lit. c) of Spanish Code Civil (*Código Civil*).[65] The reason was to ensure the participation of Scandinavian Member States in enhanced cooperation that oppose the application of the *sharia*, Muslim law, which they consider to be discriminatory with regard to women.[66]

The first alternative of article 10 of the Rome III Regulation has become almost obsolete as now all the Member States know divorce since its introduction by Malta in 2011[67] and only very few States, like Vatican or the Philippines, have an absolute prohibition of divorce in their legal systems.[68]

The second alternative of article 10 of the Rome III Regulation shall guarantee that the Member States applying the regulation provisions are entitled to exclude any discriminatory foreign divorce law that would be contrary to the provisions of their national law.[69]

It is highly discussed what the legal character of article 10 of the Rome III Regulation is - that is whether it is a mandatory overriding provision or an *ordre public* clause. This question is interesting not only for the scholars but also of high practical relevance since the overriding mandatory provisions set aside the provisions of the foreign material law that would be applicable due to the conflict of law rules of the Rome

[62] *Annex to the Green Paper on applicable law and jurisdiction in divorce matters,* pp. 14 - 15.
[63] http://europa.eu/about-eu/countries/member-countries/index_de.htm, access date: 11th April 2015.
[64] *Annex to the Green Paper on applicable law and jurisdiction in divorce matters,* p. 8.
[65] Código Civil, Real Orden de 29 de julio de 1889, Gaceta de Madrid de 30 de julio de 1889.
[66] Compare: *Winkler von Mohrenfels*, ZeuP 2013, p. 713.
[67] See above point C.2 (b).
[68] See: *Winkler von Mohrenfels*, ZeuP 2013, pp. 713 - 714.
[69] *Ibidem.*

III Regulation in their entirety. Instead the *lex fori* or *domicilii* is applicable at their place.[70] The *ordre public* clauses do not exclude the provisions of the foreign substantive law but they modify them in order to make them compatible with the rules of the legal order of the seized court; the inapplicability of designated foreign law is the last resort.[71] Hence, the question of whether article 10 of the Rome III Regulation is an overriding mandatory provision or an *ordre public* clause is of utter importance for all the courts applying the provisions of the Rome III Regulation as it has a direct impact on the applicable substantive law.

In its judgment of 19th September 2012 the Higher Regional Court (*Oberlandesgericht*) of Koblenz while applying the Rome III Regulation came to a conclusion that so called *khul*, the divorce for monetary compensation that is to be paid by a woman wanting to divorce her husband, is not contrary to the German *ordre public* and, as a result, applied the Egyptian law as substantive foreign divorce law. [72] Hence, the judges - without any detailed discussion of this question - applied article 10 of the Rome III Regulation as an *ordre public* clause.

Also most of the commentators speak of an *ordre public* clause in the context of article 10 of the Rome III Regulation.[73] Such a clause provides an assessment *in concreto*, whereas the assessment under an overriding mandatory provision is more abstract-general in its character - that is - relates to a foreign legal system as a whole and not to a particular provision or its application in a case at stake before a seized national court.[74]

An argument in favour of an understanding of article 10 of the Rome III Regulation as an *ordre public* clause is the fact that it would give a certain degree of flexibility to the seized national courts and hence allow them to find a most suitable solution *in concreto*. However, this understanding does not follow from the wording of article 10 of the Rome III Regulation or its aim.

On the contrary, the aim of article 10 of the Rome III Regulation, which includes establishing of a certain level of legal certainty and introducing of uniform standards of protection of basic rights, is an argument for understanding of article 10 of the Rome III Regulation as an overriding mandatory provision. The argument that such interpretation would be contrary to the basic rules of Private International Law or would be highly influenced by political assessments is not supported by any substantial proof.[75] Moreover, the decisive argument that article 10 of the Rome III Regulation is an overriding mandatory provision is the systematic one. Namely, the Rome III Regulation already contains an *ordre public* clause - the one of article 12. Therefore, it would not be plausible to conclude that one legal act contains two similar *ordre public* clauses.

---

[70] Compare *inter alia* article 16 of the Regulation (EC) 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), Official Journal of the European Union of 31.07.2007, L 199/40, pp. 40-49.
[71] See above point C.2 (a).
[72] Higher Regional Court (*Oberlandesgericht*) of Koblenz, 19th September 2012, 13 UF 1086/11, NJW 2013, p. 1377.
[73] See: *Hau*, FamRZ 2013, p. 254; *Helms*, FamRZ 2011, p. 1772.
[74] Compare: *Helms*, FamRZ 2011, pp. 1771 - 1772; *Winkler von Mohrenfels*, DMJV Speech 2013, p. 7, 9.
[75] See also: *Winkler von Mohrenfels*, DMJV Speech 2013, p. 10.

Nevertheless, it would be desirable and shall be highly recommended that the legal character of article 10 of the Rome III Regulation shall be clarified, and hence directly in the Preamble of the regulation in one of its recitals. Otherwise, one will have to await a clarification from the ECJ.

**4. Further Terms**

**(a) Primary factor of connection in absence of a choice of the law: habitual residence**

Before the Rome III Regulation came into force, the Member States based upon either the connecting factor of the nationality of the spouses or the habitual residence. [76] In the Rome III Regulation, the criterion of the habitual residence is provided for the choice of the law by the parties (article 5) as well as for the law applicable in absence of choice (article 8). The law applicable to divorce and legal separation shall be subject to the law of the State either where the spouses are habitually resident at the time the court is seized or where the spouses were last habitually resident provided that the period if the residence did not end more than 1 year before the court was seized if one of the spouses still resides in that State at the time the court is seized. Article 8 lit. c of the Rome III Regulation provides the criteria of the nationality of both spouses. Article 8 lit. d gives opportunity of application of the law of the forum. In contrary to article 5, the criteria set in article 8 are in a compulsory order[77], which is made clear by the choice of words "failing that". Consequently, the application of the law of the forum is the last possibility that limits but also reopens the "rush to court" problem.[78]

**(b) The question of multiple nationalities**

The regulation leaves the treatment of citizens with multiple nationalities to the national law of the Member States.[79] Neither article 5 lit. c nor Article 8 lit. c of the Rome III Regulation provides which nationality the spouses can choose. Recital 22 explicitly refers these cases to the Member States national law which shall be applied under the full observance of the European principles. The problem is that national laws often give priority to their own nationality or refer to the "effective" nationality.[80] In the light of requirement to interpret the national law in conformity with the EU law, multiple nationals should have a choice between either of their nationalities regardless the national regulations.[81] The jurisprudence of the EJC also follows that path.[82] Such provision is now explicitly included in article 22 of the Regulation (EU) No 650/2012 of the European Parliament and of the Council in matters of succession.

**(c) Exclusion of *renvoi* by Article 11 of the Rome III Regulation**

The law designated by the Rome III Regulation is always the law in force other than the rules of Private International Law. Consequently, the law identified is the law applicable to legal separation and divorce. This consolidates the predictability and judicial security for the parties in an important way. One

[76] *Annex to the Green Paper on applicable law and jurisdiction in divorce matters*, p.7.
[77] Althammer/*Tolani*, Rome III, article 8 recital 5.
[78] *Ibid.*, article 8 recital 13.
[79] *Helms*, FamRZ 2011, p. 1770.
[80] Althammer/*Mayer* Rome III, article 5 recital 19.
[81] *Ibidem.*
[82] ECJ Case C-148/02 (*Garcia Avello*), 2003, ECR I -11613.

exception is made in article 10 of the Rome III Regulation.[83] If the law designated by article 5 or 8 does not provide a possibility of divorce; the law of the forum shall be applied.

**5. Rome III Regulation und Brussels IIa Regulation - applicable law and jurisdiction**

The Brussels IIa Regulation settles conflicts between jurisdictions while the Rome III Regulation determines applicable law in divorce matters. Nevertheless, those regulations are closely linked.

**(a) The determination of a responsible court under the Brussels IIa Regulation**

Since 1 March 2005[84], the Brussels IIa Regulation applies to all Member States except for Denmark[85]. In terms of divorce, legal separation or marriage annulment, article 3 provides that jurisdiction shall lie with the courts of the Member State in whose territory the spouses are habitually resident, or were last resident if one still lives there, or the respondent is habitually resident or in the case of a joint application one of the spouses is habitually resident; the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question. Hence, the criteria are similar to those set in the Rome III Regulation. Thus, the criteria of the habitual residence is to be interpreted in the same way.[86] Article 8 to 10 of the Brussels IIa Regulation also refer to the criteria of the habitual residence in case of parental responsibility and child abduction.

**(b) The relationship between the Rome III Regulation and the Brussels IIa Regulation**

The responsible court designated by the Brussels IIa Regulation determines the applicable law to the case following the rules of Private International Law. In terms of divorce and legal separation a national judge applies the Rome III Regulation if a particular Member State participates in the enhanced cooperation. The court applies instead the countries' own rules. Provided that no other regulation[87] at the European level exists, the national judge shall apply the national private law with regard to all the matters with exception of divorce in order to determine the law applicable. In any case, the national judge applies the designated law. The advantage for the parties of the application of the provisions of the Rome III Regulation is obvious: they can easily predict which law will be applied to their case without special knowledge of the Private International Law of the Member State whose court is designated. This of course does not concern those Member states that do not take part in the mechanism of enhanced cooperation. That is why the temptation to "rush to court" has not been yet completely evicted.

[83] *Pietsch*, NJW 2012, p. 1770.
[84] Article 72 of the Brussels IIa Regulation.
[85] Recital 31 of the Brussels IIa Regulation.
[86] Althammer/*Mayer* Rome III, article 5 recital 10.
[87] For instance, the 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 takes provisions to the applicable law on a European level.

## D. *De lege ferenda*: what can and shall be done better and how

Bearing in mind the review clause contained in article 20 of the Rome III Regulation, which provides in its para. 1 that by 31 December 2015, and every 5 years thereafter, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of the Rome III Regulation, there are good chances that some of the vices of the Rome III Regulation will be corrected.

The fact that the participating Member States shall communicate to the Commission the relevant information on the application of the Regulation by their courts will moreover allow assessing what the practical problems with regard to the application of the Rome III Regulation are (article 20 para. 2 of the Rome III Regulation).

The following recommendations, based upon the analysis of the provisions of the Rome III Regulation, the discussion among the scholars and the jurisprudence, might constitute a contribution to a better application and to an effective review of the provisions of the Rome III Regulation.

### 1. Participation of all Member State necessary

The greatest achievement with regard to the Rome III Regulation is at the same time the weakest factor since the instrument of the enhanced cooperation is ambivalent. On the one side, it gives the opportunity to go further for those Member States that are able to find a common solution. On the other side, it does not solve all the problems. Thus, for the purpose of preventing *forum shopping* and to reach acceptable results it would be essential for all the Member States to participate. In order to illustrate this problem it is useful to have a closer look at the Commission's Green Paper.[88] Supposed a Polish husband is working in Finland. He has been married to his Polish wife for 20 years. His wife has stayed in Poland. After one year of working in Finland husband decides to get a divorce. He knows that the Finnish procedure is quick and simple compared to the Polish one. According to article 3 para. 1 lit a, bullet point 4 of the Brussels IIa Regulation, a Finnish court has jurisdiction over the matter. The Finnish conflict of law rules designate *lex fori* as applicable law. The divorce would be pronounced according to Finnish law even though the wife has no connection at all to Finland. There are two possible solutions of this situation. One could either limit the jurisdictional rules of the Brussels IIa Regulation by inserting a clause that would withdraw competence of the court seized according to article 3 para 1 lit a, bullet point 4 of the Brussels IIa Regulation in case of a common nationality of the spouses.[89] Or, preferably, Poland and Finland shall introduce into their legal systems the provisions of the Rome III Regulation. In this case, the aim of the Brussels IIa Regulation to provide easy access to justice would be maintained, all guaranteeing a predictable and homogenous result. The Polish and Finnish courts would, according to the Brussels IIa Regulation, both have jurisdiction. In case of absence of a choice of law, failing lit. a and b. of article 8 the Rome III Regulation, the applicable law would be the law of the State of which the spouses are nationals at the time the court is seized (lit. c). Polish

[88] *Green Paper on applicable law and jurisdiction in divorce matters,* p. 6.
[89] *Winkler von Mohrenfels,* Festschrift von Hoffmann 2011, p. 538.

and Finnish courts would apply Polish substantive law. Hence the Rome III Regulation shall become *acquis communautaire*.

**2. Inserting a clause on multiple nationalities**

For the reasons of clarification, it would be advisable to insert a clause opening explicitly the possibility for parties with multiple nationalities to choose or invoke each of them.

**3. Clarification of the legal character of article 10 of the Rome III Regulation**

There are very good reasons to interpret the article 10 of the Rome III Regulation as an overriding mandatory provision. Nevertheless, its legal character is highly disputed among the scholars and still not clear. The practical consequences are far reaching.[90] Therefore, for the reasons of legal certainty and predictability, the legal character of this provision shall be clarified and hence directly in the Preamble of the regulation in one of its recitals.

Although it can be expected that the ECJ will have to address this question at one point in time or another as it is highly probable that one of the national courts seized to pronounce a divorce according to foreign substantive law and applying article 10 of the Rome III Regulation will ask the ECJ for a preliminary ruling under Article 267 TFEU. The Higher Regional Court (*Oberlandesgericht*) of Koblenz in the above mentioned judgment[91] did not see the necessity to clarify the legal character of article 10 the Rome III Regulation while deciding whether the Egyptian *khul* is compatible with the values German *ordre public*. Nevertheless, the discrepancies in the jurisprudence of the national courts of the Member States applying the provisions of the Rome III Regulation are to be expected since the deontological outcomes in case of clashes between the core values of public legal orders of the EU Member States with the provisions of foreign legal orders, such as for instance *sharia*, can be extremely different. Whereas the German court, *Oberlandesgericht* of Koblenz was ready to a accept the application of *khul* and deemed it compatible with the values of the German legal system, it is highly probable that its counterpart in Sweden would not be that eager not only to evaluate it as compatible with the Swedish law, but even to apply the Egyptian law as a substantive material divorce law.[92] However, it has to be mentioned in this context that the clarification from the ECJ might come later than sooner leaving in the meantime a space for legal lacunas, ambiguity and not uniform outcomes and solutions.

All this could be avoided if the participating Member States were willing to explicitly clarify the legal character and the limits of article 10 of the Rome III Regulation. It is true that it is not always easy to achieve a consensus during the negotiations at the interstate level, as already shown during the negotiations of the provisions of the Rome III Regulation. Nonetheless, it is better for the reason of legal certainty, especially from the perspective of the national authorities applying law and the perspective of the ordinary

[90] See above point C.3(b).
[91] Ibidem.
[92] Compare above point C.3(b) on the inclusion of the Scandinavian States to the mechanism of enhanced cooperation.

EU citizens, if the law is clarified already in the law-making or respectively in the revision process, and not during its application by the courts.

**4. Specifying in a more detailed way of the material scope**

The understanding and the limits of basic notions that are encompassed by the material scope of application of the Rome III Regulation shall be clarified in order to avoid uncertainties and ambiguities. For instance, it would be desirable to explicitly clarify the question of whether the same-sex marriages shall be included into the definition of "marriage" under the Rome III Regulation. Although it does not seem very realistic that the Member States will be willing to obtain more precision in this regard as the ambiguity allows them to retain their - often very diverse - deontological values while participating in the enhanced cooperation in family matters. Whereas this flexibility is undoubtedly an advantage, one shall not forget that a certain degree of uniformity and legal certainty following directly from the legal provisions and not only their interpretation by scholars and courts is also required. This also regards the understanding of the notion "divorce" and the question of whether the private divorces shall be included in this notion - a further clarification would be required.

As shows the above presented example[93] of the Polish article 58 KRiO, it would be plausible to specify the relationship between the material scope of the Rome III Regulation and the substantive family law as designated law in case of the ancillary matters, such as parental custody or maintenance obligations. Since the Rome III Regulation provides only a set of conflict of laws rules, a set of guidelines for the courts and tribunals concerning for instance the question of whether they are obliged to decide on ancillary matters might be a helpful solution.

**5. Merger of the distinct legal acts in the area of family law into one legal act**

For the law practitioners as well as court and tribunals it would be plausible to merge the provisions of the Rome III Regulation, containing a set of the conflict of law rules, with the provisions of the Brussels IIa Regulation, containing the rules on jurisdiction and procedure. Such fusion would guarantee more transparency within the process of the law application and more uniformity with regard to interpretation and understanding of legal terms encompassed by the regulations.

## E. Conclusion

The possibility of a choice of law in the field of Private International Family law is a new and innovative move emphasizing the parties' autonomy.[94] The fact that the agreements in this regard can be concluded in court has to be assessed as a significant advantage for the parties. It guarantees smooth proceedings in cases of mutual consent. In absence of a choice of law the Rome III Regulation provides a reasonable list of connecting factors.

[93] Compare above point C.1(a).
[94] *Winkler von Mohrenfels*, Festschrift von Hoffmann, 2011, p. 535.

Bearing in mind the question asked at the outset that is the question of whether the Rome III Regulation constitutes a cosmetic maintenance or a major refit in the area of the law applicable to divorce and legal separation within the EU, one has to admit that - in law often as in life - the question cannot be answered just with a simple "yes" or "no". The answer of the authors of the present essay would be a "yes, but". Yes, in some points the Rome III Regulation does constitute a major refit. This relates *inter alia* to:

- the use of the enhanced cooperation procedure for the first time in this field;
- the consolidation of the parties' autonomy by introducing the possibility of choosing the applicable law;
- the connecting factor of habitual residence accentuating the parties relationship to a certain law,
- the application of the law of the *forum* under article 10 of the Rome III Regulation;
- the exclusion of *renvoi*.

As regards other matters, the Rome III Regulation is not that far-reaching and constitutes rather a cosmetic maintenance. Its main vice is the participation of only 15 Member States. Although thanks to the enhanced cooperation it is possible to offer the Member States a certain degree of flexibility and autonomy, the problems that existed before the introduction of the Rome III Regulation, including the lack of legal harmony and unanimous legal solutions, remain unsolved. Also the predictability and security of justice are not necessarily increased for all European citizens.

To conclude, it has to be stated that the EU, that was initially created to for economic reasons, has become an entity dealing with family law legislation. With the benefit of hindsight, one has to admit that it is a logical, unavoidable and moreover desired consequence while the European citizens benefit from a free movement of persons and services (article 21, 45, 56 TFEU). The scale of this phenomenon is not minor - a simple example to illustrate it: 27 % of the Erasmus alumni met their partner studying abroad,[95] which has led to the estimation that over one million "Erasmus babies" have been born since 1987.[96] This shows that the provisions of the Rome III Regulation have a major impact on life of the EU citizens. Hence, the inescapable conclusion that the lack of will and mutual consent of all Member States to introduce and apply the provisions of the Rome III Regulation might constitute a burden on mobility of European citizens and as a result infringe upon the internal market. Therefore, the authors of the present essay would like to ask, as a final remark, another question: what next? Are the EU Member States ready and willing to go a step further in their effort to harmonise the family law or are we to expect a stagnation in this area? The time will show.

[95] http://ec.europa.eu/education/library/study/2014/erasmus-impact_en.pdf, p. 137, access date: 15th April 2015.
[96] http://www.faz.net/aktuell/gesellschaft/eu-bericht-eine-million-erasmus-babys-13168591.html, access date: 15th April 2015.

**Bibliography**

**A. Literature**


1. *Althammer, Christoph (Hrsg.),* Brüssel II a Rom III, Kommentar zu den Verordnungen (EG) 2201/2003 und (EU) 1259/2010; cited: Althammer/*Althammer* Rome III, Althammer/*Arnold* Rome III, Althammer/*Mayer* Rome III; Althammer/*Tolani* Rome III; Althammer/*Weller* Brüssel IIa;
2. *Ansuh, Natalya Sergeyevna*, Коллизионное регулирование расторжения брака в Европейском Союзе: опыт для Беларуси, Международная конференция "Европейский Союз и Республика Беларусь: перспективы сотрудничества" (International conference "The European Union and Republic of Belarus: Getting Closer for Better Future"): сб. материалов. — Минск: Изд. центр БГУ, 2014, pp. 246 - 249; cited: *Ansuh* 2014;
3. *Bałos, Iga,* Prawo właściwe dla rozwodu i separacji według rozporządzenia "Rzym III" oraz nowej polskiej ustawy Prawo prywatne międzynarodowe, Studia Prawnicze. Rozprawy i Materiały, 1 (10) 2012, pp. 71 - 84; cited: *Bałos*, SP 2012;
4. Devers, Alain, Choisir la loi applicable au divorce et à la séparation de corps en vertue du règlement «Rome III », Procédure n° 8-9, 2012 alerte 34 ; cited: *Devers*, Procédure n° 8-9, 2012 alerte 34;
5. *Fiorini, Aude*, Rome III - Choice of Law in Divorce: Is the Europeization of Family Law Going Too Far?, International Journal of Law Policy and the Family 22 (2008), pp. 178 - 205; cited: *Fiorini*, IJLPF 2008;
6. *Hau, Wolfgang*, Zur Durchführung der Rom III- Verordnung in Deutschland, FamZR 2013, pp. 249 - 255; cited: *Hau*, FamZR 2013;
7. *Helms, Tobias*, Reform des internationalen Scheidungsrechts durch die Rom III-Verordnung, FamZR 2011, pp. 1765 - 1772; cited: *Helms*, FamRZ 2011;
8. *McEleavy, Peter*, Current Developments, Private International Law, International and Comparative Law Quarterly 59 (2010), pp. 1143 - 1158; cited: *McEleavy*, ICLQ 2010;
9. *Mostowik, Piotr*, Kwestie kompetencji Unii Europejskiej oraz warunków pomocniczości i proporcjonalności prawodawstwa unijnego na tle projektów rozporządzeń o jurysdykcji, prawie właściwym i skuteczności zagranicznych orzeczeń w majątkowych sprawach małżeńskich i partnerskich, Zeszyty Prawnicze Biura Analiz Sejmowych Kancelarii Sejmu 3 (31) 2011, pp. 9 - 41; cited: *Mostowik*, ZP 2011;
10. *Niethammer-Jürgens, Kerstin,* Internationales Familienrecht in der anwaltlichen Praxis. Ein Leitfaden, Frankfurt am Main 2013; cited: *Niethammer-Jürgens* 2013;
11. *Pietsch, Peter*, Rechtswahl für Ehesachen nach Rom III, NJW 2012, pp. 1768 – 1770; cited: *Pietsch*, NJW 2012;
12. *Tinney, Deirdre*, Family Law and the European Union: International Human Rights and Member State Diversity, Paper for CES Conference, 13th April 2010; cited: *Tinney* 2010;

13. *Torga, Maarja*, Party autonomy of the spouses under the Rome III Regulation in Estonia - can private international law change substantive law?, Nederlands Internationaal Privaatrecht 4(2012), pp. 547-554; cited: *Torga*, NiPR 2012;
14. *Winkler von Mohrenfels, Peter*, Die Rom III-VO, Teilvereinheitlichung des europäischen internationalen Scheidungsrechts, Zeitschrift für Europäisches Privatrecht 2013, pp. 699 - 724; cited: *Winkler von Mohrenfels*, ZeuP 2013;
15. *Winkler von Mohrenfels, Peter*, Die Rom III-VO und die Parteiautonomie, in: Grenzen überwinden-Prinzipien bewahren. Festschrift für Bernd von Hoffmann zum 70. Geburtstag, Bielefeld 2011, pp. 527-542; cited: *Winkler von Mohrenfels*, Festschrift von Hoffmann 2011;

**B. Case Law**

1. ECJ, Case C-430/97 (*Johannes v. Johannes*) 1999, ECR I-3475;
2. ECJ, Case C-148/02 (*Garcia Avello*) 2003, ECR I -11613;
3. ECJ, Case C-435/06 (*Preliminary ruling under Article 267 TFEU, Korkein hallinto-oikeus, Finland*) 2007, ECR I-10141;
4. Oberlandesgericht (German Higher Regional Court) of Munich, 9th May 1989, IPRax 1989, p. 238;
5. Oberlandesgericht (German Higher Regional Court) of Koblenz, 19th September 2012, 13 UF 1086/11, NJW 2013, p. 1377;

**C. Legal Acts**

**EU**

1. Treaty on European Union, consolidated version, Official Journal of the European Union of 26th October 2012, C 326/13, pp. 13-45;
2. Treaty on the Functioning of the European Union, consolidated version, Official Journal of the European Union of 26th October 2012, C 326/47, pp. 47-390; cited: TFEU;
3. Council Regulation (EU) No 1259/2010 of 20th December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, Official Journal of the European Union of 29th December 2010, L 343/10, pp. 10-16; cited: Rome III Regulation;
4. Council Regulation (EC) No 4/2009 of 18th December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, Official Journal of the European Union of 10th January 2010, L 7/1, pp. 1 - 79;
5. Council Regulation (EC) No 2201/2003 of 27th November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, Official Journal of the European Union of 23rd December 2003, L 338/1, pp. 1 - 29; cited: Brussels IIa Regulation;
6. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11th July 2007 on the law applicable to non-contractual obligations (Rome II), Official Journal of the European Union of 31st July 2007, L 199/40, pp. 40-49;

7. Regulation (EU) No 650/2012 of the European Parliament and of the Council in 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, Official Journal of the European Union of 4th July 2012, L 201/107, pp. 107-134.

**Other**

1. Código Civil (Spanish Civil Code), Real Orden de 29 de julio de 1889, Gaceta de Madrid de 30 de julio de 1889;
2. Einführungsgesetz zum Bürgerlichen Gesetzbuch, Introductory Law to the German Civil Code, Bundesgesetzblatt I (German Journal of Laws Part I.) of 1994, p. 2494; cited: EGBGB;
3. Kodeks rodzinny i opiekuńczy (Polish Family and Guardianship Code), Dziennik Ustaw (Journal of Laws) of 1964, No. 9, Position 59; cited: KRiO;

**D. Other Sources**

1. Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, Official Journal of the European Communities of 23rd January 1999, C 19/01, pp. 1 - 16;
2. Annex to the Green Paper on applicable law and jurisdiction in divorce matters COM 2005, SEC (2005) 331; cited: *Annex to the Green Paper on applicable law and jurisdiction in divorce matters*;
3. *Boele-Woelki, Katharina*, Directorate-General for Internal Policy, Policy Department C, Legal Affairs, Note on the Proposal for enhanced cooperation in the area of cross-border divorce (Rome III), October 2010, PE 432.730, http://www.europarl.europa.eu/RegData/etudes/note/join/2010/432730/IPOL-JURI_NT(2010)432730_EN.pdf, accessed: 12th April 2015; cited: Note on the Proposal 2010;
4. Green Paper on applicable law and jurisdiction in divorce matters COM 2005, SEC (2005) 331; cited: *Green Paper on applicable law and jurisdiction in divorce matters;*
5. Presidency Conclusions of the Tampere Summit, http://www.europarl.europa.eu/summits/tam_en.htm, access date: 14th April 2015;
6. The Hague Programme, Communication from the Commission to the Council and the European Parliament: Ten priorities for the next five years The Partnership for European renewal in the field of Freedom, Security and Justice, COM/2005/0184;
7. The Stockholm Programme (European Council) - An open and secure Europe serving and protecting citizens, (2010/115 C/01);
8. *Winkler von Mohrenfels*, Das neue internationale Scheidungsrecht (Rom III-VO), Speech for the German-Mexican Lawyers Association, on 11.10. 2013); http://www.dmjv.de/PDFDoc/Vortrag_von_Mohrenfels.pdf, accessed: 16th April 2015, p. 7; cited: *Winkler von Mohrenfels*, DMJV Speech 2013.