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Influence of European Private International Law on a National Codification

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Andrea Bonomi

Influence of European Private International Law on a National Codification

Some Thoughts in View of a Reform of the Austrian IPRG

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I. The Growing Importance of European PIL Rules

During the last two decades, in the wake of the Amsterdam Treaty, EU institutions have adopted several regulations, based on the competences

granted by the TFEU. These texts cover an increasingly broad spectrum of subjects, ranging from civil and commercial matters to important areas of family and succession law.

Following the path of the first two seminal texts of European PIL, the Brussels and Rome Conventions, current EU regulations embrace issues of international civil procedure, such as jurisdiction, *lis pendens* and related actions, the recognition and enforcement of decisions, authentic instruments and judicial settlements, as well as more traditional conflict of law questions, in particular rules on the determination of the applicable law. The most recent trend is to regulate all those aspects within a single instrument devoted to a specific field of private law, such as maintenance, succession or the property relations of spouses and partners.

As a result of these developments, national PIL codifications have largely lost their centrality. In many fields of law, their rules are simply no longer applicable, preempted by EU law.

Even in fields not covered by EU regulations, where Member States are still free to maintain and develop their own rules, national lawmakers have sometimes made the choice to simply refer to the existing EU rules, thus extending their application beyond their scope. Already before the rise of EU regulations, the drafters of the 1995 Italian PIL Act[1] not only included, in the Act, some narrative norms referring to the Brussels and Rome Conventions, but also made those instruments, or some of their rules, applicable even in situations outside their material or spatial scope.[2]

The basic principles, on which national PIL rules and codifications are based, are also partly shaken by the coexistence with European regulations, insofar as these are based on different, sometimes opposing doctrines (typically, habitual residence as opposed to nationality).

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1 Legge 31 maggio 1995, GU n. 218, Riforma del sistema italiano di diritto internazionale privato <gazzettaufficiale.it/eli/id/1995/06/03/095G0256/sg>.

2 Art 3 (2) Italian PIL Act, GU 218/1995, for example, refers to the jurisdiction rules of certain sections of the Brussels Convention to define the reach of Italian courts' jurisdiction over claims brought against a defendant domiciled in a non-Member State, a situation in which the Convention (like subsequent regulations) defers to national law. Similarly, Art 57 of the same Act refers to the Rome Convention to determine the law governing all sorts of contractual obligations, even those expressly excluded from the material scope of the Convention. In other national codifications, national lawmakers have also been widely inspired by EU law rules.

With the blossoming EU legislation, the case law of the CJEU has also gained importance in the field of PIL. Besides the impressive and steadily growing set of decisions interpreting EU derivative law, a separate, less voluminous but no less important line of rulings has directly inferred innovative and wide-reaching consequences from primary EU law, in particular from the fundamental freedoms of EU law and from the human rights protected by the EU Charter.[3] In many regards, these decisions echo parallel developments in case law of the ECtHR. The »recognition approach« adopted by this case law also imposes, in certain situations, a radical change of perspective with respect to traditional, well-rooted national conflict of law methodology.

II. The Continuing Relevance of National PIL Rules

In spite of the increasing influence of the European PIL, national PIL rules and codifications are still relevant and will continue to be for a long time to come.

A. International Civil Procedure

This is first obviously the case in significant areas of international civil procedure. National rules on jurisdiction, parallel proceedings, and recognition and enforcement of decisions or other foreign acts (authentic instruments, judicial settlements) continue to be relevant not only in those fields of private international law which are not (yet) covered by EU instruments (e.g., filiation and adoption), but also in the harmonized areas as soon as the situation reveals significant connections with third States.

3 See *infra,* section IV.F.

1. The Different Fields

a. Jurisdiction

With respect to jurisdiction, while national jurisdiction rules still play an important role, their impact is clearly declining.

Indeed, recent regulations in the area of family law and succession law provide for a self-sufficient jurisdictional regime, thus leaving no room for national rules of international jurisdiction. This is the case with the Maintenance Regulation, the Succession Regulation and the Matrimonial Property and Registered Partnerships Regulations: all these instruments contain their own harmonized rules of »subsidiary« jurisdiction, with the consequence that national rules are no longer applicable – subject to the determination of the specific competent court within the relevant EU Member State.

Even in those regulations, which under the persisting influence of the Brussels Convention still refer, at least in some cases, to national jurisdiction rules, the role of these rules is clearly declining. Thus, in civil and commercial matters, while the Brussels I *bis* Regulation still refers to national jurisdiction rules in situations where the defendant is domiciled in a non-Member State (Art 6), this is subject to a growing number of exceptions (protective and exclusive rules, choice of forum agreements). It is well known that the Commission had even envisaged a correction of this »anomaly« by including, in its recast proposal, harmonized rules applicable to defendants domiciled in third States[4]: if the European Parliament preferred to put off this significant amendment, it was only to give the Hague Conference the opportunity to continue to negotiate a treaty solution.[5] The attempt of setting up a global instrument with uniform jurisdictional rules is still underway in The Hague. However, the chances of this project succeeding should not be overestimated, in particular after the adoption of the Hague Judgments Convention in July 2019:[6] indeed, now that a common mechanism for

4 See the Recast Proposal COM(2010) 748/3, notably Artt 4 (2), 25 and 26.

5 See the European Parliament Resolution INI(2009) 2140 of 7.9.2010, paras 15–18, and INI(2010) 2080 of 23.11.2010, para 35.

6 Convention of 2.7.2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, for first comments, see *Bonomi/Mariottini,* A Game Changer in International Litigation? Roadmap to the 2019 Hague Judgments Convention, in Bonomi/Romano (eds), Yearbook of Private International Law Vol. XX 2018/2019 (2019) 537; See also *Bonomi,* Courage or Caution? A Critical Overview of

recognition and enforcement of decisions has been set up, this objective cannot be used anymore, in treaty negotiations, as political leverage for the inclusion of uniform jurisdictional rules. In the absence of a viable treaty solution in the next future, it is likely that the EU institutions will have to envisage a unilateral extension of European jurisdictional rules to third country defendants, a solution which is imposed by fundamental considerations of consistency and fairness.[7] Whether in an international treaty or in a future recast of the Brussels I *bis* Regulations, the fate of national jurisdiction rules in this area is probably sealed.

Although based on a different approach, the Brussels II *bis* Regulation also allows for the residual application of national rules on jurisdiction.[8] While such reference has survived the recent recast,[9] the role of national rules is particularly narrow in this area because they can only come into play when the courts of no EU Member State has jurisdiction under the already wide and generous jurisdictional options offered by the Regulation.[10] The practical importance of such residual rules is now even more limited since – under Art 5 of the Matrimonial Property Regulation – a court seized on the basis of these rules can no longer decide on the property consequences of a divorce (or legal separation or annulment of marriage) unless both spouses agree.

b. Lis pendens *and related actions*

While national jurisdiction rules still play a greater role in civil and commercial matters as opposed to family and succession law disputes, the opposite is true with respect to *lis pendens* and related actions. It is well known that rules of this kind, originally included in the Brussels Convention and in the Brussels I Regulation, have been extended by the Recast Regulation to situations where parallel (identical or related) proceedings are pending in non-Member States (Artt 33 and 34), with the consequence that national rules have now been entirely superseded in this area. By contrast, since the provisions on *lis pendens* and related

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the Hague Preliminary Draft on Judgments, in Bonomi/Romano (eds), Yearbook of Private International Law Vol. XVII 2015/2016 (2016) 1.

7 *Bonomi,* European Private International Law and Third States, IPRax 2017, 184 (185 et seq).

8 Art 7 Brussel II *bis* (after the recast).

9 See Art 6 Brussel II *ter.*

10 CJEU 29.11.2007, C-68/07 (Sundelind Lopez).

actions included in all instruments on family and succession matters are still limited to relationships with other Member States, only national rules can fill the gap, provided that they exist and that they are deemed to be compatible with EU jurisdictional rules – a question, which is still controversial since the *Owusu* decision of the CJEU.[11] On account of the difficulties it creates, it is likely that this gap will be corrected in a future revision of the relevant regulations: until then, national rules are still relevant.

c. Recognition and Enforcement

Last but not least, a very important role is still reserved to national rules as far as the recognition and enforcement of non-Member States' decisions are concerned. This applies to all matters, as no EU regulation covers the recognition and enforcement of such decisions so far. Harmonized European rules on recognition and enforcement of third country decisions have occasionally been discussed in academic circles,[12] but will probably not be addressed by the EU lawmaker in the near future. As far as civil and commercial matters are concerned, the recent adoption of the Hague Judgments Convention makes the unilateral issuing of EU recognition rules even more unlikely.

2. Meaning of »Third States«

Across the whole area of international civil procedure, national rules of international civil procedure are particularly relevant, as mentioned, when »third States« are involved.

In this respect, it is noteworthy that the expression »third States« obviously includes all non-Member States of the EU, with the only rel-

11 CJEU 1.3.2005, C-281/02 (Owusu).

12 The European Group of PIL thoroughly analysed the question of uniform rules for third-country judgments in its Copenhagen and Brussels meetings and came up with a detailed draft proposal, available at <gedip-egpil.eu/documents/gedip-documents-20poe.htm>; See also *Carbone,* What about the Recognition of Third States' Foreign Judgments? in Pocar/Viarengo/Villata (eds), Recasting Brussels I, Milan 2012, 299 (309); *Fallon/Kruger,* The Spatial Scope of the EU's Rules on Jurisdiction and Enforcement of Judgments: From Bilateral Modus to Unilateral Universality? in Bonomi/Romano (eds), Yearbook of Private International Law Vol. XIV 2012/2013 (2013) 1 (22 et seq); *Bonomi* in Bonomi/Romano, YbPIL Vol. XVII, 190 *et seq.*

evant exception – in civil and commercial matters – of the Contracting States of the Lugano Convention (Iceland, Norway and Switzerland). It follows that Brexit may extend, in the next future, the number of cases where national rules are applicable. Unless the United Kingdom joins the Lugano Convention as an independent Contracting State, or other specific agreements are entered into between this country and the European Union to preserve the existing cooperation mechanisms in the area of civil justice, national rules will become applicable – both in the United Kingdom and in the remaining EU Member States – at the end of the provisional period in all situations, in which they are now relevant in the relationship to non-Member States.

However, the meaning of the expression »third States« goes beyond non-Member States and also encompasses those EU Member States, which are not bound by a specific EU regulation. Based on the provision of the TFEU, this is normally the case for Denmark – a country that is not bound by EU measures in the area of judicial cooperation, unless it enters into a specific agreement with the EU.[13] This is also the case for Ireland, unless this Member State makes use of its right to »opt-in« with respect to a specific regulation.[14] Last, but not least, the same is true for all Member States that did not participate in the process of enhanced cooperation leading to the adoption of certain specific regulations, such as the Rome III Regulation and the Matrimonial Property and Registered Partnership Regulations.[15] In all of these cases, non-participating EU Member States are to be regarded – for the purpose of the relevant instrument – as »third States«.[16] The consequence is twofold: not only do *non-participating* EU Member States continue to apply their national rules of international civil procedure instead of the (partially) harmonized rules, but national rules will also be applicable in the *participating* Member States in their relationship with the non-participating Member States, so far as this is allowed or provided for by the relevant regulation.

13 Art 2 Protocol 22 to the TFEU on the position of Denmark, OJ C 2012/326, 1.

14 Art 2 Protocol 21 to the TFEU on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, OJ C 2016/202, 295.

15 See Art 20 (4) TEU.

16 This is expressly spelled out in Art 3 (1) Rome III. This is also widely accepted with respect to the Succession Regulation, the Matrimonial Property Regulation, and the Registered Partnership Regulation, despite these texts being silent on that issue.

All this considered, it is evident that national rules of international civil procedure are still (and will long remain) relevant in a conspicuous number of situations.

B. Conflict of Laws

National PIL systems are also still relevant when it comes to conflict of law rules, i.e., rules on the determination of the applicable law, although their continuing importance is reduced.

Indeed, all conflict of law rules included in EU regulations are »universally applicable«, i.e., they apply even if they designate the law of a »third State« (which includes, as mentioned, both non-Member States of the EU and non-participating EU Member States). This is true in civil and commercial matters[17], as well as in family and succession law.[18] Because of their *erga omnes* nature, harmonized conflict of law rules leave very limited room for the application of national rules.

Besides EU Member States that – for whatever reason – are not bound by the relevant EU regulation, national conflict of law rules are only relevant for those matters that are (still) not covered by EU harmonized conflict of law rules.

However, this area is broader than the non-harmonized area in the field of civil procedure. Indeed, for several matters covered by the Brussels I *bis* and Brussels II *bis* (in the future, Brussels II *ter)* Regulations, no EU conflict of law rules exist. Although, some of these matters fall within the scope of international conventions ratified by all or most Member States – such as the 1996 Hague Convention on the Protection of Children or the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations – several others are still a matter for the national PIL systems. This is the case, *inter alia,* of company law and the law of other legal persons (such as associations or foundations), property rights, trusts, intellectual property (with the partial exception of »supranational« IP rights such as the EU trademark or the EU unitary patent), the violation of privacy and personality rights, and the annulment of marriage.

17 Art 2 Rome I; Art 3 Rome II.

18 Art 4 Rome III; Art 20 Succession Regulation; Art 20 Matrimonial Property Regulation and Registered Partnership Regulation.

Beyond these areas where uniform procedural rules are not accompanied by uniform conflict of law rules, there are of course several matters, which are not addressed in *any* EU instrument, whether in terms of procedural law or conflict of laws, such as legal capacity, the name of individuals and other personality rights, the celebration and recognition of marriages, the creation and dissolution of registered partnerships, the personal effects of marriages and registered partnerships, the existence, recognition and effects of *de facto* unions, the transfer or compensation of pension rights at divorce, the establishment of parentage, and adoption.

In all these fields, national PIL rules are still applicable, subject to a number of international conventions. However, they must comply with fundamental rights, as enshrined in the ECHR and in the EU Charter (such as the right to personal and family life), as well as with EU fundamental freedoms and principles (such as the free movement, the freedom of establishment, and the principle of free competition).

It is possible that the EU lawmaker will take steps to harmonize the conflict of law rules (or even the substantive law rules) in some of these areas. This might happen, for instance, in the field of company law,[19] or in the field of property rights, in particular security rights on movable property, where a need certainly exists because of the relevant disparities under substantive national law and the resulting impact on the functioning of the internal market.[20] In the area of personality rights, uniform choice of law rules might be developed with respect to names, an area already paved by the case law of the CJEU.[21]

The development of EU legislation seems much less likely in other, more politically sensitive areas: diverging conceptions with regard to same-sex unions as well as to new assisted reproductive technologies (e.g., surrogacy) make harmonized legislation in these areas extremely

19 See *Gerner-Beuerle/Mucciarelli/Schuster/Siems,* Study on the Law Applicable to Companies, finalized on behalf of the EU Commission in June 2016; the Final Report is accessible at the address <op.europa.eu/s/n7HB> accessed 2.6.2020.

20 See the recent ruling of the Austrian OGH 23.1.2019, 3 Ob 249/18s concerning the effects in Austria of proprietary security rights created in Germany. While the Court analyzed the implication of the case on EU fundamental freedoms, it did not found its decision on this ground: see *Faber,* Foreign Proprietary Security Rights Failing to Comply with National Publicity Standards to Be Accepted? in Bonomi/Romano (eds), Yearbook of Private International Law Vol. XXI 2019/2020 (forthcoming).

21 See *infra,* Fn. 57.

unlikely, at least in the predictable future. National conflict of law rules will continue to play a crucial role here.

III. Considering EU Law when Reforming National PIL Codifications

The coexistence of European and national conflict of law rules cannot be ignored by national lawmakers when envisaging a reform of their PIL systems. Indeed, there are several reasons to take the applicable EU sources into account.

A. European PIL as a Source of Inspiration

EU law can be a precious source of inspiration. In an increasingly globalized and intertwined world, comparative law has become an indispensable ingredient of sound legislation. For obvious reasons, this is particularly true in a naturally transnational field such as private international law. National codifications in this area have always heavily relied on comparative law analysis: certain legislations have exerted an extensive influence well beyond their national boundaries. The same can be said of international conventions, in particular the multilateral and potentially global texts elaborated under the auspices of the Hague Conference.

What applies to national laws and international conventions is *a fortiori* true for wide-ranging and comprehensive legislation such as the European legislation. Indeed, the influence of EU PIL instruments on national PIL systems has been clearly visible for many decades.

Thus, in the area of international civil procedure, the face of national law has been profoundly changed due to the European influence. Besides the pure and simple reference to EU texts included in some national rules,[22] several EU Member States have »imported« in their legislation or case law typical features of the European system, such as the jurisdictional criteria of the place of performance of a contract and of the place of a wrongful event, the protective rules for weak parties,

22 See *supra,* Fn. 2.

the broad recognition of choice-of-forum agreements, international *lis pendens* rules, the automatic recognition of foreign decisions, and the admission of only limited grounds for refusal.

A similar influence can also be traced with respect to traditional conflict of laws. Besides the protection of weak parties (which is also important in this area), other features of EU PIL regulations have found their way into recent national PIL codifications, such as the wide recognition of party autonomy, the preference for the connecting factor of the habitual residence, the use of escape clauses, and the definition of overriding mandatory provisions.

While European precedents have sometimes directly influenced national legislation, they have also sometimes exerted influence on the decisions of EU Member States' courts: this is the case for the broad notion of identical claims for *lis pendens* purposes, the »functional« interpretation of service of process as grounds for refusal, or the restrictive application of public policy.

Of course, many of these trends were already well-established in some national codifications or in international conventions before the rise of EU PIL: the latter has however clearly contributed to their wider diffusion.

This influence of EU PIL on the national systems is far from surprising. Indeed, both EU regulations and the case law of the CJEU are deeply pervaded by the idea of coordination among national laws, which is (or should be) one of the most important objectives of PIL systems. Also, it largely builds upon a comparative approach, and it reflects convictions widely shared among the Member States. Moreover, it sometimes implements new techniques which may further the evolution of national systems. Lastly, EU PIL rules cannot (or should not) be perceived as foreign bodies, since do not come »from the outside«, but are applicable by EU Member States' courts as part of their own law, which undoubtedly favours their penetration and absorption in the internal legal system.

B. The Need for Consistency between EU and National PIL Rules

A second very important reason for including EU PIL among the elements to be considered when recasting national PIL codifications is the need for some consistency between EU and national sources.

In this respect, it is fair to recognize from the outset that no serious issues of incoherence exist between these two bodies of PIL rules. Indeed, since EU law preempts domestic rules – in this area as in all others – incoherencies in a proper sense cannot arise. EU Member State courts must simply disregard national PIL rules that contradict EU regulations or the case law of the CJEU.

When referring to »consistency«, we actually have in mind a sort of »coordination«, or »harmonious coexistence« between European and national sources. In particular, it is submitted that national lawmakers should avoid taking completely different approaches to address similar or related questions.

Granted, such coordination is not an absolute necessity. It has often been observed that – because of the sectorial approach of EU law, different solutions coexist even among regulations governing distinct areas:[23] indeed, it is well known that PIL regulations take diverging approaches on very important issues, such as the treatment of third-country defendants, the relevance of international *lis pendens,* the admission of *renvoi,* or the effects of overriding mandatory provisions. While these differences may sometimes be motivated by the specificity of each regulated sector, they seem sometimes less justified and may therefore give an impression of »inconsistency«. In any event, since such discrepancies are tolerated within one single legal system (EU law), they should *a fortiori* be acceptable when they appear between European law, on one hand, and the national law of a Member State, on the other.

Nevertheless, if not strictly needed, a certain degree of consistency is certainly important in order to increase both the legitimacy and the effectiveness of the PIL system as a whole.

Private international law is a difficult and sensitive area of law, which is not always easily understood and sometimes regarded with some suspicion by domestic lawyers. The quest for coordination with foreign systems, which is at the heart of our discipline, forces the acceptance of results that might sometimes be at odds with the precepts governing purely internal situations. The legitimacy of the rules in this area should, therefore, be a matter of serious concern for the drafter of PIL rules.

23 See various contributions in von Hein/Rühl (eds), Kohärenz im Internationalen Privat- und Verfahrensrecht der Europäischen Union (2016); see also *Sanchez Lorenzo,* El principio de coherencia en el derecho internacional privado europeo, Rev Der Int 2018, 17 (47).

It goes without saying that the legitimacy of the system is enhanced if the EU and national rules reflect the same philosophy and are based on similar approaches to key issues. For example: it is certainly difficult to convince national courts and domestic lawyers of the legitimacy of a national conflict of law rule calling for the application of the national law of the person concerned, while EU conflict of law rules governing distinct, but related areas make use of the connecting factor of that person's habitual residence.

The efficacy of the PIL system is also enhanced by consistent rules. The interpretation and application of PIL rules is a difficult task for national courts, attorneys, notaries and other legal professionals. Such a task is made even more demanding by the coexistence of different kinds of sources: in a single divorce case, for instance, a court might have to apply – simultaneously – four EU regulations (Brussels II *bis,* Rome III, Maintenance Regulation, Matrimonial Property Regulation), two international conventions (1996 Hague Child Convention, 2007 Hague Maintenance Protocol), and some national conflict of law rules of the forum (e.g., those on the validity or recognition of the marriage, if this question is raised incidentally, or those on the transfer or compensation of pension rights between the spouses). There is certainly a risk that this complexity becomes Kafkaesque if different philosophies and connecting factors govern each of these issues.

If consistent rules are easier to understand and to explain, then they are also easier to apply in practice. When determining the habitual residence of a person for the purpose of a conflict of law rule included in an EU regulation, a court would certainly prefer to avoid the task of also determining the person's nationality for the purpose of the national conflict of law rule, in particular if this task creates additional complexity (e.g., in the difficult case of a person with more than one nationality).

Finally, if EU and national rules are based on similar connecting factors, the case law of the CJEU can also be of assistance in applying national PIL rules. Thus, the habitual residence determined for the purpose of an EU regulation will often also be decisive for the application of national PIL rules, if these make use of the same notion.

IV. The Possible Influence of EU PIL on a Reform of the Austrian PIL Codification

A. Need for Reform of the Austrian IPRG

The Austrian IPRG is one of the best known and most widely reputed PIL codifications of the second half of the 20th century. While the Austrian lawmaker remained true to some traditional features of the Austrian system of PIL, other solutions it implemented were regarded, at the time of adoption, as very innovative and had impact on other national PIL codifications in the following decades. However, forty years have passed since the IPRG was enacted, and during this long time span, significant changes occurred.

The economic and sociological realities have very much changed: technological progress, globalization, and the appearance of new forms of family relations are just some examples.

The overall legal context has also much evolved, with comprehensive legal reforms in the domestic legal system and the accession of Austria to the EU. More specifically, the context of PIL has also radically changed, with the entry into force, in Austria, of a number of important international conventions, the adoption of new PIL codifications (or comprehensive reforms of existing legislation) in several European States, some of which are neighboring countries or countries traditionally linked to Austria, and, of course, the spectacular rise of EU PIL.

For all these reasons, the time has certainly come to engage in a process of revision of the IPRG, to adapt it to the new factual and legal realities. Based on our previous considerations, we will now try to determine in which areas EU PIL could or should be considered when implementing this task. In doing so, we will not only focus on EU regulations, but also on the case law of the CJEU.

It is a delicate and somewhat embarrassing task, for a foreign lawyer, to suggest changes to a country's legislation. The following ideas are only very modest and general suggestions, intended to incite discussion, without any claim to provide magic formulas or ready-made solutions. The revision of the IPRG should obviously be a matter for Austrian authorities to consider under the guidance of Austrian PIL experts.

▷

B. A Joint Regulation of International Civil Procedure and Conflict of Laws?

To begin with, we would like to tackle a structural aspect of the IPRG. Following a long-standing Austrian tradition, which has illustrious precedents and is still followed in a significant number of legal systems, the IPRG is only devoted to conflict of laws in a narrow sense, i.e., the determination of the applicable law. International procedural law issues (»Internationales Zivilverfahrensrecht«), such as jurisdiction, *lis pendens* and related actions, recognition and enforcement of foreign judgments, authentic instruments and judicial settlements are governed by separate texts, in particular (but not only) the »Jurisdiktionsnorm« (JN).[24]

We are not sufficiently acquainted with the Austrian legal system to assess whether these texts complete each other well. While assuming that this is the case, it is clear that this traditional technique has been replaced in several recent PIL codifications, by a comprehensive approach pursuant to which conflict of laws and procedural aspects (»conflit de lois« and »conflits de jurisdiction« to use the well-known French dichotomy) are jointly regulated within the same act or piece of legislation. The Swiss PIL Act of 1987[25] is often mentioned as the forerunner of this new legislative technique, although other national codifications had already adopted it previously.[26] In any case, many others have followed suit.

This trend has recently been taken over in EU law. While a first generation of instruments (the Brussels and Rome Conventions, the Brussels I and II Regulations, the Rome I, II and III Regulations) were still built on the distinction between procedural and conflict of law aspects, the most recent regulations adopted in the last ten years to cover new areas of PIL (the Maintenance Regulation, the Succession Regulation, the Matrimonial Property and the Registered Partnership Regulations) have all opted for a comprehensive approach. This is widely approved

24 Rules on the recognition of foreign decisions in family matters are also included in the Außerstreitgesetz – AußStrG. Noteworthy, in an earlier draft of the IPRG – dated 1971 – Prof. Fritz Schwind had suggested to include International Procedure in the act. The draft is published and commented in *Schwind,* Entwurf eines Bundesgesetzes über das internationale Privat- und Prozeßrecht, ZfRV 1971, 161.

25 Bundesgesetz über das Internationale Privatrecht, of 18.12.1987, SR 291/1987.

26 Such as the Yugoslavian PIL Act of 1982.

by commentators and scientific circles. It is interesting to note, in this regard, that the European Group of Private International Law has recently adopted a resolution proposing to devote a specific and comprehensive text to all PIL aspects of divorce and legal separation, thus replacing (and at the same time reforming) the rules that are presently scattered between the Brussels II *bis* and the Rome III Regulations.

This clear trend towards a joint regulation of procedural and substantive law aspects of PIL is not surprising, and is supported by strong arguments.

From a theoretical perspective, the existing links and interactions between all PIL issues are widely known, and this is certainly not the place to describe them. A joint regulation emphasizes them and allows for a better understanding of PIL issues as a whole. It also promotes consistency among the single components and facilitates their joint revision in case of law reform.

Pedagogical and practical arguments also support this solution: PIL professors and experts are well aware of how difficult it may be to explain the somewhat arcane reasoning of our subject to students, clients, domestic lawyers, and sometimes even judges. Such difficulties are obviously multiplied by the coexistence of national, international, and EU legal sources, and are compounded if the single components are scattered among separate national texts. The joint regulation of all aspects of PIL within a single act makes their understanding much easier.

For all these reasons, we strongly suggest that – notwithstanding the charms of tradition and the complexity of elaborating a comprehensive text – the Austrian approach be reconsidered.

C. Maintaining and Clarifying the Principle of the Closest Connection

A reform of the IPRG should also tackle a certain number of general issues of PIL (»Allgemeine Lehren« as they are called in the German-speaking world). Among them, we will first evoke the principle of the closest connection: as enshrined in § 1 IPRG[27], this is one of the distinctive

27 § 1 IPRG:
»(1)Sachverhalte mit Auslandsberührung sind in privatrechtlicher Hinsicht nach der Rechtsordnung zu beurteilen, zu der die stärkste Beziehung besteht.

features of the Austrian PIL Act,[28] and probably one of the best known from a comparative perspective.

The central role of the principle of closest connection (also called »principle of proximity«) in modern PIL can hardly be contested[29]; however, its meaning and functions can seriously vary depending on the context.

The principle is referred to widely – albeit sometimes under different names, such as »the most significant relationship«[30] or the principle of the »proper law« – in several Common Law jurisdictions as an operative rule for the determination of the applicable law, and for the same purpose it is also sometimes referred to in some arbitration laws and arbitration rules.[31]

More generally, it is an important source of inspiration (or a »choice-influencing consideration«, to use an American expression) for the conflict of law rules included in the PIL systems of many countries, including several Member States of the EU. However, it is rarely spelled out in national PIL codifications: its most common legislative expressions are so-called »escape clauses« included in some legislations – like the well-known Art 15 of the Swiss PIL Act.

European PIL is also pervaded by the idea of proximity. Its most significant expressions are to be found in the case law of the CJEU, notably in the fields of jurisdiction and applicable law. As is widely known, a large number of decisions interpreting various sorts of jurisdictional rules, both in civil and commercial matters and in areas of family and succession law, refer to proximity as one of their paramount objectives and criteria of interpretation. This is typically the case for the special, protective and exclusive jurisdiction grounds under the Brussels I *bis* Regulation. Proximity is also one of the main criteria used for the interpretation of the European conflict of law rules: the CJEU has also used proximity to interpret Art 4 of the 2007 Hague Protocol on the law appli-

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(2) Die in diesem Bundesgesetz enthaltenen besonderen Regelungen über die anzuwendende Rechtsordnung (Verweisungsnormen) sind als Ausdruck dieses Grundsatzes anzusehen«; see *Schwimann,* Internationales Privatrecht[3] (2001) 28 *et seq.*

28 *Verschraegen,* Internationales Privatrecht (2012) para 1390.

29 *Lagarde,* Le principe de proximité dans le droit international privé contemporain, 196 Collected Courses of the Hague Academy 1986, 25.

30 See American Law Institute, § 188 (1) of the Restatement Second on Conflict of Laws (1969).

31 See for instance Art 187 (1) Swiss PIL Act, and Art 33 of the Swiss Rules of International Arbitration.

cable to maintenance obligations, although this international convention does not openly refer to it.[32]

The notion of closest connection is also expressly reflected in several conflict of law rules included in European PIL regulations. Some (few) provisions make direct use of this criteria as a connecting factor: while the closest connection was the main connecting factor under Art 4 of the Rome Convention (now completely restructured in Art 4 of the Rome I Regulation), it is only referred to now as a subsidiary connecting factor – i.e., failing other preferred connecting options – in few regulations.[33] More frequently, the search for the closest connection is employed as an escape clause, allowing the court to derogate from the normal connecting factors in exceptional circumstances: such clauses are found in several provisions[34], and can be regarded as a distinctive feature of European PIL law.

In all the examples cited, the principle of the closest connection has a specific normative function: it is used either as an interpretive criterion, a connecting factor or an escape clause. By contrast, the function of § 1 IPRG is still controversial.

According to § 1 (2) IPRG, all conflict of law rules of the IPRG are a normative expression of this principle. It seems therefore that this provision can, at the very least, be used as a criterion for the interpretation of other conflict of law rules included in the Act. The principle of closest connection can probably also be referred to directly as a connecting factor, which could be useful to fill a gap in areas where the IPRG does not contain specific conflict of law rules.[35]

In some cases, courts have apparently used § 1 IPRG as an escape clause, i.e., to derogate from codified conflict of law provisions, but this has only happened in very few cases and practically only to determine the law applicable to the formal validity of certain acts,[36] as well as to *res in transitu.*[37]

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32 CJEU 7.6.2018, C-83/17 (KP) paras 41 *et seq.*

33 Art 4 (4) Rome I and, more recently, in Art 26 (1) (c) Matrimonial Property Regulation.

34 Arts 4 (3), 5 (3) and 8 (4) Rome I, Arts 4 (3), 5 (2), 10 (4), 11 (4), and 12 (2) (c) Rome II, Art 21 (2) Succession Regulation.

35 ErlRV 784 BlgNR XIV. GP, 10; OGH 3 Ob 549/94 ZfRV 1995, 36. See also *Heindler,* Dingliche Wirkungen der Zession im IPR, ZFR 2020, 288 (with respect to proprietary effects of assignment).

36 This is the majority view: with further references *Schwimann,* IPR[3], 29; *Verschraegen,* IPR, para 1391; *Reichelt,* Das Europäische Kollisionsrecht der vertraglichen Schuld-

Because of the crucial role of proximity in modern PIL and the exemplary value of § 1 IPRG, we strongly believe that this provision should be maintained in a revised IPRG. However, it would certainly be appreciated if the Austrian lawmaker could provide for some additional indications about the practical implications of this principle. Forty years after the adoption of the IPRG, domestic case law, European models and comparative law should offer sufficient background to bestow that highly symbolic provision with more detailed practical content.

D. Defining the Residual Role of Renvoi

Renvoi is one of those general issues, which is always hotly debated when it comes to PIL codifications. Inspired by Art 4 of the EGBGB, § 5 IPRG takes a very generous approach to *renvoi:* all reference to foreign law is intended as »IPR-Verweisung«, i.e., as including the conflict of laws rules of the *lex causae,*[38] subject to only some limited exceptions.[39] Both »Rück-« and »Weiterverweisung« are relevant under the Act.

As is well known, national PIL systems are divided on this issue. Between *»renvoi*-friendly« and *»renvoi*-hostile« legislation, we also find »mixed« systems, in which *renvoi* is only relevant for certain matters or under specific conditions. These differences are perpetuated in recent codifications, so that no uniform trend is clearly discernable.

EU law is also not entirely consistent on this point. Admittedly, *renvoi* is rejected in the large majority of EU regulations;[40] however, a conspicuous exception is provided by Art 34 of the Succession Regulation. A

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verhältnisse: Rom I-VO, in Reichelt (Hrsg), 30 Jahre österreichisches IPR-Gesetz – Europäische Perspektiven (2009) 49 (55).

37 The application of the law at the place of delivery – in derogation of the law designated by § 31 IPRG – is based on § 1 IPRG: *Duchek/Schwind,* Internationales Privatrecht (1979) 5; *Heindler,* Continuation of security rights in movable assets in conflict of laws – Austrian approach reconsidered, EPLJ 2019, 301 (321).

38 § 5 (1) IPRG: »Die Verweisung auf eine fremde Rechtsordnung umfaßt auch deren Verweisungsnormen«. See *Schwimann,* IPR[3], 39 *et seq.*

39 Exceptions are provided *inter alia* for provision concerning the formal validity of certain acts (see §§ 8 and 16 (2) IPRG).

40 This the case in the Rome I (Art 20), Rome II (Art 24) and Rome III Regulations (Art 11), as well as in the Matrimonial Property and Registered Partnerships Regulations (Art 32).

more general discussion on the merits and downsides of *renvoi* should therefore also take place at the European level.

In this divided context, the task of the Austrian lawmaker will not be an easy one. While we sympathize with the main functions of *renvoi* (i.e., quest for uniformity, application of domestic substantive law), we tend to consider that a provision for a general admission of *renvoi,* such as the current § 5 IPRG, can hardly be maintained. Indeed, when a European regulation rules out *renvoi,* it would not be very consistent to maintain it in closely related areas. Why should *renvoi* be allowed for personal relationships between spouses while it is excluded by the Matrimonial Property Regulation for their financial relationships? Why should it be allowed for tort liability arising out of violations of privacy or personality rights while the Rome II Regulation bans it for all other non-contractual obligations?

Based on such considerations, if *renvoi* is still to have a future in Austrian PIL, it could only be on the basis of a selective approach, i.e., only in those areas that are less directly related to EU regulations and where the main advantages of *renvoi* (notably uniformity) may be regarded as of particular value: this might be the case for marriage, filiation, or family name.

If *renvoi* is still permitted by a revised IPRG (or in those areas in which it will be permitted), some reflection will also be needed regarding its modalities. Thus, in the case of »Rückverweisung« by the foreign law to Austrian law, § 5 (2) presently provides for a so-called »interruption« of the chain of referrals (»Unterbrechung«),[41] following a model that is traditionally also adopted under German law:[42] in other words, Austrian substantive law will be applied, without considering what solution would prevail under the foreign *lex causae.*[43] While this approach undeniably has some practical advantages, it is hardly consistent with the primary function of *renvoi,* i.e., the quest for uniformity. If *renvoi* is only and specifically admitted in those areas of law where uniformity is perceived as particularly important, the adoption of a different approach

41 § 5 (2) IPRG: »Verweist die fremde Rechtsordnung zurück, so sind die österreichischen Sachnormen (Rechtsnormen mit Ausnahme der Verweisungsnormen) anzuwenden«.

42 See Art 4 (1), second sentence EGBGB.

43 *Schwimann,* IPR[3], 40; *Verschraegen,* IPR, para 1273 and 1275; *Siehr,* Österreichisches IPR-Gesetz und europäische Ideengeschichte, in Reichelt, 30 Jahre IPRG, 9 (18).

(such as the so-called »foreign court theory«)[44], might be more appropriate, because it is intended to achieve identical solutions in both legal systems involved. In the context of the reform of international succession law, the Swiss lawmaker has recently proposed to expressly codify this solution in the Swiss PIL Act.[45] A similar approach could also be considered in the case of »Weiterverweisung« in order to achieve uniformity with the law of the (two or more) relevant foreign countries.

E. A Specific Reference to Overriding Mandatory Provisions

While it enshrines, in its § 6, a classical public policy exception, the IPRG does not contain any express reference to overriding mandatory provisions (»Eingriffsnormen«, »lois de police«). This silence is not surprising, because – although already well developed in legal writing – the doctrine of »Eingriffsnormen« was not as largely accepted in 1978 as it is now. Besides some few (and not particularly clear) exceptions, such as the seminal Art 3 of the French Civil Code, the notion was still absent from most national PIL codifications and international conventions.

The situation has very much changed since. Just two years after the adoption of the IPRG, the doctrine of overriding mandatory provisions has received an official blessing at Art 7 of the Rome Convention. Since then, several national PIL codifications include specific language, stating the priority of overriding mandatory provisions of the *lex fori*[46], and sometimes even allowing courts to give effect to foreign overriding

44 On the »foreign court theory« see *Clarkson/Hill,* The Conflict of Laws (2011) 507. For a broad analysis, see *Davì,* Le renvoi en droit international privé contemporain, 352 Collected Courses of the Hague Academy, 170 *et seq.*

45 See the text of proposed revision of chapter 6 Swiss PIL Act on the website of the Federal Office of Justice, at the address <ejpd.admin.ch/dam/data/bj/aktuell/news/2018/2018-02-14/vorentw-d.pdf> accessed 2.6.2020; according to the draft, following language should be added to Art 91 (1) Swiss PIL Act: »Verweist dieses [i.e. *das letzte Wohnsitzrecht des Erblassers]* auf das schweizerische Kollisionsrecht zurück, ist das Sachrecht des betreffenden Staates anzuwenden«. See *Bonomi,* Die geplante Revision des schweizerischen Internationalen Erbrechts: Erweiterte Gestaltungsmöglichkeiten und Koordination mit der Europäischen Erbrechtsverordnung, SZIER 2018, 159 (174 *et seq).*

46 See *inter alia* Art 18 Swiss PIL Act, Art 17 of the Italian PIL Act and Art 20 (1) Belgian PIL Code.

mandatory provisions.[47] In the wake of the *Arblade* decision by the CJEU[48] (which involved national »lois de police«), an EU law definition of such provisions was included at Art 9 (1) of the Rome I Regulation. Other EU PIL instruments – although admittedly not all of them – also include a specific provision. The CJEU had several other opportunities to better define their application requirements, including most recently, in the controversial *Nikiforidis* case.[49]

In such a context, the Austrian lawmaker would also be well advised to clearly differentiate between public policy and overriding mandatory provisions. Although these two mechanisms are obviously closely related, it is a widely-held opinion – also shared by Austrian scholars[50] – that they operate differently: public policy being used as a defensive tool – a shield – to reject the effects of a foreign law designated by the conflict of laws rules, whereas overriding mandatory provisions being »immediately« applicable – as a sword – prior to the selection of the applicable law and irrespective of the *lex causae.* A difference also exists with regard to their content: while the public policy exception only covers the violation of fundamental principles of law, and is therefore the object of an increasingly restrictive interpretation, overriding mandatory provisions reflect crucial public interests of the issuing State, including »its political, social or economic organization«. Therefore, while it is certainly possible to continue to give effect to overriding mandatory provisions through § 1 IPRG[51] or by way of the public policy clause, the adding of a specific provision would make the law more readable and transparent.

The new specific provision to be included in a revised IPRG – although obviously only applicable in areas not covered by EU regulations – should be largely modelled on Art 9 (1) and (2) of the Rome I Regulation. Indeed, the definition of Art 9 (1) is very clear and pedagogical, much

47 This is the case of Art 19 of the Swiss PIL Act and Art 20 (2) of the Belgian PIL Code.

48 CJEU 23.11.1999, C-369/96, C-376/96 (Arblade and Leloup) para 30.

49 CJEU 18.10.2016, C-135/15 (Nikiforidis).

50 *Verschraegen,* IPR, para 1319 *et seq; Egglmeier-Schmolke,* Einführung in das Internationale Privatrecht[2] (2016) 35. On the possible characterization as overriding mandatory provisions of Artt 451–452 of the Austrian Civil Code see recently *Bachner,* Publizität und stärkste Beziehung bei Mobiliarsicherheiten im deutsch-österreichischen Rechtsverkehr, ÖJZ 2020, 53 *et seq; Faber* in Bonomi/Romano, YbPIL Vol. XXI (forthcoming).

51 See *Duchek/Schwind,* IPR, 10; *Heindler,* Die Faustpfandpublizität im IPR, ÖBA 2020 395 (397 Fn. 54).

easier to explain and to understand than those included in certain national PIL codifications.[52] The reference to overriding mandatory provisions of the *lex fori* in Art 9 (2) is also very straightforward and can easily be transposed into a national codification.

There are, however, some issues that the Austrian lawmaker might wish to clarify. The first one involves the regime of overriding provisions belonging to the applicable foreign law. While, according to the preferred opinion, such rules should be applied as a part of the *lex causae* referred to by the ordinary conflict of law rules, a different view, going back to the German doctrine of *»Sonderanknüpfung«,*[53] holds that the reference to a foreign law does not include the overriding mandatory provisions of that legal system, the latter being subject to their own applicability criteria.[54]

Another, much debated question relates to the treatment of foreign overriding mandatory provisions when they are not part of the *lex causae* (also called »third States' mandatory provisions«). It is well known that in contractual matters, the generous, »open-ended« provision of Art 7 (1) of the Rome Convention was replaced by the much narrower Art 9 (3) of the Rome I Regulation, a literal reading of which was endorsed by the CJEU in the *Nikiforidis* case.[55] It is also remarkable that no other EU regulation expressly allows for applying or giving effect to foreign overriding mandatory provisions.[56] In this respect, however, the European approach is not only overly restrictive, but also strangely at

52 See for instance Art 18 of the Swiss PIL Act, which refers to »mandatory provisions of Swiss law which, by reason of their special aim, are applicable regardless of the law referred to by this Act«.

53 At the origin of this doctrine, see: *Wengler,* Die Anküpfung des zwingenden Schuldrechts im internationalen Privatrecht. Eine rechtsvergleichende Studie, 40 ZVglRWiss 1941, 168 *et seq; Wengler,* Sonderanküpfung, positiver und negativer ordre public, JZ 1979, 175 *et seq; Zweigert,* Nichterfüllung auf Grund ausländischer Leistungsverbote, 14 RabelsZ 1942, 283 *et seq.*

54 *Martiny* in *Säcker* (ed), Münchener Kommentar zum Bürgerlichen Gesetzbuch[5] Art 9 Rom I-VO para 43 (2010); *Thorn* in Rauscher (ed), Europäisches Zivilprozess- und Kollisionsrecht Band III[4] Art 9 Rom I-VO para 78 (2011).

55 CJEU, C-135/15 (Nikiforidis) paras 41–50.

56 With the only very limited exception of Art 30 of the Succession Regulation, which provides for the mandatory application of a particular category of provisions, i.e. special rules imposing restrictions concerning or affecting the succession in respect of certain immovable property, certain enterprises or other special categories of assets located in the issuing State for economic, family or social considerations, without distinguishing as to whether they belong to the *lex fori* or a foreign law.

odds with the possibility – widely recognized by the CJEU in the very same *Nikiforidis* case[57] – to give effect to foreign mandatory provisions as simple »facts«, based on the application of the substantive law rules of the *lex causae* (»Datumtheorie«). As mentioned, some »modern« national codifications (such as the Swiss and the Belgian ones) are also open to giving effects to foreign mandatory provisions.[58]

In this respect, the Austrian legislator would be well advised to take some distance from the EU law models and give some leeway to the courts.[59]

F. Specific Provisions based on the »Recognition Approach«

As most national PIL codifications and EU law regulations, the IPRG is largely based on a traditional »choice-of-law« methodology, consisting of conflict of law rules that designate, through a connecting factor, the law governing the relevant issue. Based on the classical theory of *Savigny,* these rules are quite different from rules on recognition of foreign decisions and, unsurprisingly, do not reflect a »vested rights« approach.

As is well known, however, a number of important decisions by the CJEU in the last two decades have clearly shown that the outcome of the classical PIL approach is not always compatible with human rights principles and EU law fundamental freedoms, and therefore, needs to be complemented by what is now widely called a »recognition principle«, based on the acceptance of personal and family status validly constituted abroad, though under conditions other than those provided by the law designated by the conflict of law rules of the forum.[60] Some decisions of the ECtHR also point in a similar direction (although for different reasons and with partly different effects).[61]

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57 CJEU, C-135/15 (Nikiforidis) paras 51–53. In Austria, see *Verschraegen,* IPR, para 1332.

58 See *supra,* Fn. 47.

59 See also *Egglmeier-Schmolke,* IPR², 35.

60 We refer to the well-known decisions of the CJEU concerning the recognition of companies (CJEU 9.3.1999, C-212/97 [Centros] and its progeny), the family names (CJEU 2.10.2003, C-148/02 [Garcia Avello]; CJEU 14.10.2008, C-353/06 [Grunkin and Paul]; CJEU 8.6.2017, C-541/15 [Freitag]) and, lastly, of same-sex marriages (CJEU 5.6.2018, C-673/16 [Coman]).

61 ECtHR 20.6.2007, 76240/01 (Wagner v Luxembourg) and ECtHR 3.5.2011, 56759/08 (Negrepontis-Giannisis v Greece) concerning the recognition of foreign adoptions.

The scope of application of the recognition principle, as well as its conditions and effects, are still hotly debated across Europe. In the field of family law, for instance, the CJEU and the ECtHR have rendered seminal decisions concerning the recognition of family names, adoptions, and same-sex marriages: we still do not know whether the principles enshrined in those rulings will also extend to other areas, such as filiation, registered partnerships, or perhaps even *de facto* unions – although it seems quite obvious that they should. The conditions for recognition are also open to discussion: in the cases decided by the CJEU, the family status at stake had been created in another EU Member State, to which the persons concerned had some significant links, while the ECtHR also imposes recognition of situations created in »third« States (i.e., not bound by the ECHR), and sometimes even in the absence of significant links with the country of origin.[62] As for the effects, while the CJEU imposed the recognition of a »foreign« family name as such, it took great pains, in the *Coman* case, to specify that recognition of a foreign same-sex marriage was imposed by free movement »only for the purpose of a residence permit«: however, such limitation was probably dictated by the specific circumstances of the case, so that it will be difficult in future circumstances to rule out the recognition of the other »social« effects of the foreign relationship.[63]

Notwithstanding all such uncertainties, obviously related to the judge-made nature of the principle, several PIL scholars seem to favour a sort of »wait and see« attitude; in other words, they suggest that – while waiting for future cases – the content and philosophy of current national PIL codifications remain unchanged. However, under a misleading appearance of coherence, this approach undermines predictability and creates confusion among the final addressees of PIL rules.

See also ECtHR 14.3.2018, 26431/12, 26742/12, 44057/12 and 60088/12 (Orlandi et al v Italy) where the Court does not impose an obligation to recognize foreign same-sex marriages as such, but only to provide them with some form of recognition. See also ECtHR 26.6.2014, 65192/11 (Mennesson v France) and numerous other decisions concerning the recognition of parent-child relationship of children born through surrogacy.

62 In some of the cases decided by the ECtHR in the *Orlandi* judgment, Italian citizens had entered into same-sex marriages in Canada and in The Netherlands without having any qualified connection with the country of celebration.

63 See *Kinsch,* European Courts and the Obligation Partially to Recognise Foreign Same-Sex Marriages – On Orlandi and Coman, in Bonomi/Romano, YbPIL Vol. XX 2018/2019, 47 (56 *et seq).*

We submit that national lawmakers should take a proactive attitude and replace some of the traditional choice of law rules with recognition rules.[64]

Models already exist in some national PIL codifications and international conventions.[65] With respect to foreign marriages, Art 9 of the 1978 Hague Marriage Convention is a good example, since it provides for recognition of »[a] marriage validly entered into under the law of the State of celebration or which subsequently becomes valid under that law […]«, subject only to public policy exceptions. This approach is applied not only in the (few) Contracting States of the Convention, but also in other European countries.[66] A similar approach is largely followed for registered partnerships, an area where § 27a IPRG as well as most national PIL systems[67] and the 2007 Munich Convention, which never entered into force, refer to the law of the country of registration. A general rule based on the recognition approach has been more recently included in the Dutch Civil Code.[68] All these rules impose the recognition of a foreign created status, whatever law was applicable under the conflict of law rules of the country of origin.

A similar approach could also be extended, in a revised Austrian PIL Act, to name, establishment of parentage and adoption, when validly constituted abroad, subject to the usual public policy limitations. Recognition could be made subject to the existence of a significant link with the country of origin, but – in order to respect the fundamental

64 See also, recently, *Davì,* Il riconoscimento delle situazioni giuridiche costituite all'estero nella prospettiva di una riforma del systema italiano di diritto internazionale private, Riv dir int 2019, 319 (in particular at 389 *et seq).*

65 See also *Davì,* Riv dir int 2019, 319 (330 *et seq).*

66 This approach is followed by several provisions of the Swiss PIL Act concerning the recognition of foreign acts, notably Artt 39 (change of name), 45 (marriage), 65a (registered partnership), 73 (acknowledge of a child), 74 (legitimation of a child), and 78 (adoption).

67 Besides Art 65a Swiss PIL Act, see *inter alia* Art 17b EGBGB, Art 60 of the Belgian PIL Code, Art 515-7-1 of the French Civil Code, and Art 32 *ter* of the Italian PIL Act.

68 See Art 10.9 Dutch Civil Code: »Where a fact has certain legal effects under the law that is applicable according to the private international law of a foreign State involved, a Dutch court may, even when the law of that foreign State is not applicable according to Dutch private international law, attach the same legal effects to that fact, as far as the non-attachment of these legal effects would be an unacceptable violation of the parties' justified confidence or legal certainty«. See also the more specific provisions of Arts 10.24 (recognition of foreign names) and 10.101 (descendancy) of the Dutch Civil Code.

principles on which recognition rules are based (respect of personal and family life, free movement) – such link should be conceived in broad and alternative terms, including (at least) both the nationality and the habitual residence of one of the persons concerned.

By anticipating the likely impact of future decisions, the Austrian lawmaker will not only reduce the risk of Austria being reproved by the CJEU or by the ECtHR, but will also be able to play a forerunner role in and outside of Europe.

G. Habitual Residence and Nationality

The IPRG is still largely based on the nationality principle, as several other national PIL systems in Europe and in a number of non-European countries. Indeed, a great number of provisions of the IPRG refer to the »personal law« of an individual (»Personalstatut«), which is defined in § 9 (1) IPRG as the law of the country »to which that person belongs«, i.e., the law of her or his nationality.[69]

By contrast, all EU PIL regulations give priority to the habitual residence of the party or parties concerned.[70] Nationality is clearly in retreat. While it still often is one of the criteria framing the parties' right to select the applicable law,[71] it is only used as a subsidiary connecting factor in some of those instruments.[72] The trend in favour of habitual residence is also present in some recent national PIL codifications.

Both those connecting factors have their advantages and downsides. Subject to the increasingly frequent cases of plurality of citizenships, nationality is normally easier to determine than habitual residence, which requires, from a court, a difficult exercise of weighing the contacts that a person may have to different countries. It also ensures a greater stability of the applicable law, since it is not so easily changed as residence. However, habitual residence generally better reflects the

69 § 9 (1) IPRG: »Das Personalstatut einer natürlichen Person ist das Recht des Staates, dem die Person angehört«.

70 This is true in civil and commercial matters (Rome I and Rome II Regulations) as well as in most fields of family and succession law (see Art 8 (a) and (b) Rome III, Art 21 (1) Succession Regulation, Art 26 (1) (a) Matrimonial Property Regulation).

71 Art 5 (c) Rome III, Art 22 (1) Succession Regulation, Art 22 (1) Matrimonial Property Regulation and Registered Partnership Regulation.

72 Art 8 (c) Rome III Regulation, Art 26 (1) (b) Matrimonial Property Regulation.

»proximity principle« and thus ensures more predictability as to the applicable law. It also promotes a more uniform treatment of all individuals living in the same country, preventing disparities between its citizens and migrants. Last but least, it more often leads to the application of the law of the authority seized, reducing the cases in which it has to apply a foreign law.

Whatever the preferences of a national lawmaker, coordination with the EU PIL regulations clearly calls, at least in some areas of PIL, for adopting habitual residence as the main connecting factor. This is clearly so when the subject-matter is closely related to one of those covered by an EU regulation. For example, it is difficult to justify from a policy point-of-view and it is a source of unnecessary complexity that the personal effects of a marriage are governed by the common national law of the spouses (§ 18 (1) IPRG), when its property effects, the maintenance claims among the spouses, as well as divorce and legal separation are governed by the law of their common habitual residence. This is even more true since § 27b IPRG refers, for the personal effects of a registered partnership, to the law of the habitual residence of the partners as the main connecting factor.

In other areas of law, such as the legal capacity of individuals, their name, the celebration of a marriage, and the establishment of parentage, where the link with the EU legislation is not so close, nationality could theoretically be maintained as the main connecting factor. However, strong reasons call for a re-thinking of the present approach.

On one hand, coordination with EU law and simplicity call for a uniform approach throughout the revised codification.

On the other hand, the impact of the »recognition method«, as enshrined in the above-mentioned case-law of the CJEU and the ECtHR, should not be underestimated in many of those areas where the nationality principle currently still plays a paramount role in the IPRG.

Indeed, if specific »recognition rules« are included in the revised codification, to cover personal and family status created abroad – as previously suggested – this may also have an impact on the conflict of law rules applicable to personal and family status created in the forum. As mentioned, foreign status should be recognized when validly created in the country of the nationality or in the country of the habitual residence of one of the relevant parties. In order to avoid adverse discrimination, such an alternative reference to both nationality and habitual residence should also be followed when the relevant right or status is

created in the forum, regardless of whether this is by decision of the local authorities or by simple operation of the law.

To a certain extent, this parallel approach is already implicit in some decisions of the CJEU, in particular those on family names.[73] Based on such precedents, a national lawmaker should accept that – subject to public policy grounds – the family name of a person could be based, alternatively and probably at her or his choice, both on the law of the country of her or his nationality or on that of her or his habitual residence. This should not only apply to status created abroad, but also to that created in the forum.

A similar conclusion could be extended to the capacity of a person, the validity of a marriage or of a partnership, the establishment of parentage, and adoption.

It follows that the sole reference to a person's national law presently included in most provisions of the IPRG should be replaced by an alternative reference to the national law or the law of the habitual residence, subject to public policy.

V. Conclusion

Despite the growing importance of EU PIL sources, national systems will continue to be relevant in several important areas for many years still.

When revising national codifications, EU PIL regulations should be looked at as a possible source of inspiration in order to improve coordination and to simplify the application of national PIL rules. The case law of the CJEU, based on primary EU law and that of the ECtHR, play an even more important role, because they transcend the harmonized matters.

National lawmakers should take the opportunity of a national PIL reform to be proactive and anticipate (and thus influence) future European developments.

73 The decisions *Garcia Avello, Grunkin and Paul* and *Freitag* (see *supra,* Fn. 57) have established an obligation to recognize family names as provided by both the national law or the law of the habitual residence of the party concerned.