Codification of European Private International Law!

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Abstract

The term "framework of European private international law" covers all EU instruments in force, dealing with the problem of jurisdiction, applicable law, recognition and enforcement of law, foreign judgments and authentic instruments. Private international law has traditionally been, and in part still is, a matter of national law. Each state has its own rules to deal with jurisdiction, applicable law, recognition and enforcement of foreign judgments. Europe has an interest in matters of private international law since the 1957 Treaty on the European Economic Community. The Treaty of Amsterdam 1997 introduced the broader concept of judicial cooperation and brought three core issues of private international law into the field of the European Community. The three core issues are now found in Article 81 (2) (a) and (c), Treaty on the Functioning of the European Union. This paper suggests a road map towards a more comprehensive codification of EU private international law. At the moment, legislative efforts should be directed to the creation of special instruments for well-defined problems in European private international law. The fruits of these efforts can be long-lasting if they are combined into a code of EU private international law. The content of recent national codifications can help identify current gaps within the EU framework. Motives for national legislatures to codify private international law are also relevant for EU legislatures. A brief comparison is made of three recent codifications: Belgium, Holland and Poland. The Belgian codification contains rules on jurisdiction as well as on enforcement and recognition, while the Dutch and Polish laws decided to limit the DNPE legislation on choice of law rules. A typical characteristic of national codifications of private international law is that they may contain rules on the principles of private international law, or general provisions of private international law. Motives for codification vary, from a desire to increase transparency and make the rules adopt an open and international approach, to a desire to make the rules more easily accessible to legal practitioners. Private international law is also influenced by developments within the internal (national) framework. New rules of private international law will be necessary to adapt to the new legal institutions of national systems. Another way in which developments in substantive law can change private international law is that values considered important at the national level find their way into private international law. Private international rules that provide additional protection for employees and consumers serve as an example of this process. The gaps in the current framework can be divided into three main categories. First, loopholes which are the desired result of territorial limitations to the scope of EU legislation. Second, systemic gaps occur when the current framework is compared to those particular problems that, taken together, constitute the traditional problems of private international law. The current framework fixes most of these particular problems, but not all. Thirdly and finally, there are shortcomings when EU legislation provides for those certain questions that are deliberately left out of the scope of an accession instrument, even though from a systematic perspective these questions are part of the matter regulated in the instrument, e.g. . contractual obligations. In addition to these three main categories, it should be noted that as a result of various factors, the community instrument may contain rules that refer to notions which by their nature are open to interpretation. For the time being these open notions are best left to the case law or legal writing to determine their meaning. The truly necessary insertions would address the gaps that have been defined as 'systematic' omissions, as there is no rule that can be applied. The lack of harmonized or unified rules has an immediate effect on citizens and businesses in the EU. In the discussion on the codification of private international law, attention should be paid to the differences between the national concept and the 'codification' of European private international law. In principle, it means a procedure by which the acts to be codified are repealed and replaced by a single act that does not contain substantial changes in those acts (Interinstitutional Agreement of December 20, 1994, point 1). An important aspect of codification at the EU level is the reduction of the volume of legislation. The EU legislature could consider dividing its attention and efforts into three separate areas of private international law that fall within the framework: civil procedure, civil and commercial cases in general (an almost complete area); choice of law (applicable law) in non-family cases (raising issues that have a strong connection with the internal market); private international law for family law cases (which will require unanimity in the Council). Directing its attention to these specific areas can assist the European legislature in progressing the completion of this framework.

Keywords: *Codification, principles, Treaty on the Functioning of the European Union, current framework*

1. Introduction

1.1 Difference between a code and separate legal instruments. What is meant by a 'code'?

The difference between the meaning of codification at the European level and the meaning of codification as understood at the level of European national legal systems has been clearly defined by a group of authors in 2008[1]: "In the context of the EU the concept of codification has a special meaning ." Codification "is, according to point 1 of the Interinstitutional Agreement of December 20, 1994, a procedure by which the acts to be codified are repealed and replaced by a single act that does not contain substantial changes in those acts.[2] This concept of codification differs from codification as commonly understood in continental legal systems. There the first meaning of the concept of codification is: "extended into a Code". Dating back to the Codex Justinianus, the original idea of codification involved overseeing all existing law on a given subject - even if derived from different sources such as common law, jurisprudence and statutes - in a legislative text, a Code.

Codification in this sense goes beyond the technique of simple collection of rules on a given subject, often requiring additional harmonization of these rules, thus creating a body of provisions that is based on common principles and constitutes a common and integrated system . Continental legal systems traditionally tend to place value on the systematization of law in elaborate codes (Civil Code, Criminal Code, etc.)

1.2 Current overlap between existing instruments

It cannot be denied that there is overlap between existing instruments. These overlaps focus on rules of a general nature. To assess overlaps, the nature of the problem of private international law regulated by the instrument is important. There are overlaps between (parts of) different instruments in applicable law and between different instruments on jurisdiction, recognition and enforcement. Overlaps would seem to exist mainly between different instruments in applicable law, as they tend to use references to familiar concepts of private international law, such as public, policy and binding rules.

1.3 Contributions and benefits of a code to stakeholders

Although the current framework now regulates many issues of private international law, there are still significant gaps that need to be addressed. Addressing these gaps should take priority over the question of whether or not a code is necessary. For institutions preparing legislation for the gaps still found in the frameworks there are at least two very different considerations to take into account. The first is the unanimity required in the field of family law. As explained, many significant deficiencies can be found in the field of family law. The second is that work on legislation to fill existing gaps will also need to involve European citizens and businesses, or at least representatives of citizen and business groups. It also requires technical expertise in many different areas of law. In order to facilitate the tasks of the institutions involved in the legislature and in order to prevent a situation where the legislative process is halted as the required unanimity cannot be achieved, it would be preferable to deal with each gap separately rather than combine work in the gaps. Regarding legal practice it should also be noted that legal practitioners tend to specialize in certain aspects of private law. It is safe to assume that a divorce lawyer will take a strong interest in the Brussels II-bis, Rome III, Maintenance Regulation and the upcoming matrimonial property regulation, but that a corporate lawyer will take little or no there is interest in these instruments. Also, some of the existing instruments are applied and practiced by professionals who are not trained as lawyers, but who have to deal with it as it is relevant to their profession. Reference can be made by staff of different central authorities, who will in principle only deal with one of these framework instruments, e.g. Maintenance Regulation[3].

1.4 Approach to a code – gradual harmonization or substantial adoption, experiences from different member states Netherlands (gradual adoption)

The step-by-step method can be understood as a method where the first legislation is designed for different issues, after which separate acts are consolidated into a comprehensive act or code. The rationale for this working method was to

1 Voermans, Moll, Florijn, Van Lochem
2 According to point 1 of the Interinstitutional Agreement dated December 20, 1994
3 Maintenance Regulation

gain experience with legislation in an area that had previously been based mainly on jurisprudence. Opting for a gradual approach was also prompted by the desire to adhere to new treaties that were due for ratification. After 1980, the Netherlands became a party to a number of private international law treaties which are part of the codification and which are addressed in Book 10.

1.5 Belgium

The Belgian Code is the result of scientific research, including comparative analysis and empirical research, in collaboration with specialists in various fields of law. From the beginning the intention was to create a complete Code of Private International Law. Thematic consistency was considered an important goal of codification.[4]

1.6 Poland

The simultaneous Polish codification has a historical justification. The nation was divided between the three countries for more than 100 years before independence was regained in 1918. The Codification Commission on Civil and Criminal Law, intended to provide an original and modern set of rules, rather than adopting a model borrowed from a previous occupying country. This effort resulted in the adoption of the Private International Law Act of 1926[5], then replaced by another codification, approved by the communist regime in 1965[6].

Discussions on the need to amend or improve the PIL 1965 began in the early 90s. In 2002, the Private International Law Division of the Civil Law Codification Commission[7] was tasked with drafting an entirely new PIL. In 2005, the NCRM adopted a draft for further changes which were introduced in 2006-2008. According to the official explanations accompanying the project, its goals were: the harmonization of the Polish PIL with the EU Law, the modernization and filling of the gaps of the codification of the 1965 PIL.

2. Critical Analysis of Gradual Harmonization Compared to Immediate Adoption

It appears that in the three Member States that have been analysed, there was a debate on the choice between gradual harmonization as opposed to simultaneous adoption. In part, the choice seems to have been a consequence of decisions made from the beginning. In Belgium, the desire was to create a comprehensive code of private international law and to do so in accordance with scientific research. In Poland, the pressure of history appears to have prompted the codification of a single instrument for private international law. In the Netherlands, a cautious approach to legislation was followed as it is mainly based on legal issues. The gradual approach in the Netherlands also seems to have been influenced by the fact that the Netherlands is usually quick to adopt the Hague Conventions of Private International Law. The experiences in Poland and Belgium seem to indicate that simultaneous adoption may be the result of an event that 'triggered' the desire to adopt a comprehensive instrument on private international law.

The experience in Hollande must be the result of a desire to keep pace with the gradual development of private international law that was being developed at the international level (the Hague Conference and in the EU) and at the national level through jurisprudence and legal writing. It should be noted that in the Netherlands it has long been discussed whether a codification would effectively contribute to the current development of private international law.

3. The Most Appropriate Solution in View of the EU Perspective

3.1 Retaining the features of the current framework:

It is believed that the core of the existing framework is characterized by solid legislation regarding civil procedure in civil and commercial matters, based on the Brussels I Regulation and its predecessor the Brussels Convention of 1968. The interpretation of these two instruments is well developed in jurisprudence. of the ECHR since the 70s. Another feature of the current framework, although less developed, is the question of applicable law in non-family law matters. The main

[4] Shih: J. Erauw, Het voorstel van Belgique wetboek van internationaal privaatrecht en zijn algemene bepalingen. WPNR 6537 (2003), f.481-490.
[5] The Private International Law Act of 1926
[6] PIL 1965
[7] CLCC

product was the Rome Convention and several directives. The main products now are the Rome I and Rome II Regulations. These instruments are still not very developed in the case of ECJ law. Since there is a lack of legal guidance from the ECtHR, it seems difficult to add to existing legislation, e.g. laying down principles. It may well be that the future jurisprudence of the ECtHR develops new principles, not recognized in the traditional analysis of private international law, but resulting from the application of the principles of general community law.

Decisions on the impact, freedom of establishment for company law or European citizenship for the name of natural persons may be only the beginning of such a development. The last characteristic is that family law has a special place within the community of the legal order. Legislation can only be undertaken if there is unanimity in the council. It may also be at the level of national legal systems that family law is regularly seen as a specialized area of private law, often applied by specialized courts. On the other hand, although the special position of family law must be respected, the general principles of EU law may influence this particular area of private law. It has long been recognized that differences between certain national rules governing jurisdiction and enforcement can impede the freedom of movement of persons and the proper functioning of the internal market. EC Article 18 on the free movement of persons excluded the application of a German conflict of laws provision on the surname in Grunkin Paul (C-353/06).[8]

A practice followed by the Belgian authorities when registering the name of children who have a Belgian parent and a parent from another EU member state recently prompted the European Commission to refer Belgium to the Court of Justice of the European Union to prevent the right of free movement of these children. According to Belgian practice, these children would only be registered under their father's surname[9]. The best choice for the EU is to continue with a program of gradual adoption which should be favoured. To some extent discussions on some instruments should be done in consultation with the Hague Convention in order to modernize certain Hague Conventions, as has been achieved in respect of maintenance. It is recognized that there are fundamental principles of PIL, but it is not thought that these principles currently require codification. It cannot be ruled out that EU law will further develop and develop some principles of EU PIL. The discussion on PIL principles can perhaps be compared to the discussions that take place regarding other principles of private law.

3.2 Has expanded use and collaboration been achieved? A PIL code and the need for supporting national legislation

During the meeting of experts, it was thought that there would be a need for limited supporting legislation. In general, it was explained that regulations on the law in force do not create a need for supporting legislation. This should be done for instruments in procedural law, but this should not present difficulties[10]. However, it appears that when legislation is defined in a regulation, as is the case for the current framework, the role of the national legislature is limited. A Dutch writer who as a government official was closely involved in making the Netherlands private, however, international legislation points out that the treaty has priority over national law which follows directly from the Dutch Constitution, and the priority of European Regulations over Community law. . Instruments for PIL are usually included in Dutch national legislation with a clear reference to the title of the instrument or instruments in question.[11]

3.3 Using improved collaboration

Noting the potential advantages of enhanced cooperation is perhaps a contradiction in terms. The decision based on Article 329 (2) of the TFEU to use enhanced cooperation is seen as a last resort, only to be taken when the objectives must be pursued by cooperation and cannot be met by the EU as a whole within a reasonable time[12]. The Rome III Regulation was the first piece of legislation based on enhanced cooperation and was followed by a proposal for legislation in the field of patent law in 2011[13]. The result of the expanded cooperation will mean that within the union there will be two groups of states, those who participate in the cooperation and those who are excluded. It should be understood that there are signals on the horizon that an approach, in a two-speed Europe, may become necessary in

[8] *Surname in Grunkin Paul (C-353/06).*
[9] *See recital (4) of the Brussels II Regulation (1347/2000), now repealed.*
[10] *On the problem more generally, see Van Iterson, The Response of National Law to International Conventions and Community Instruments - The Dutch Example, European Law Reform Journal 2012 (14). page 3-16.*
11 Van Iterson (2012), p. 9.
[12] *Article 329 (2) of the TFBE*
[13] *See Council Decision 2011/167 / EU*

relation to general political issues in order to deal with the difficult times in which we live.[14]

From the perspective of the Union, the main priority seems to be that through enhanced cooperation and it is still possible to achieve certain political objectives although not to unite as a whole. Even in a very different, non-legal analysis, it is difficult to determine the pros and cons of this situation, and the final decision can only be based on practical experience. Thus, the economists Bordignon and Brusco, among others, have analyzed that the formation of an extended cooperation agreement may be the only way to find out if centralization in a given function is beneficial[15]. Regarding the disadvantages of enhanced cooperation as a basis for EU policy, especially in the field of family law, the main rule of Article 81 (3)[16]. The TFEU must be taken into account, meaning that the Council will act unanimously in matters of cross-border family law.[17]

Limited to the area of private international law, the use of enhanced cooperation for Rome III, an arrangement which may have only served to further accentuate the divide between Member States taking a liberal approach to divorce and those taking a more restrictive view careful. As the economic crisis since 2008 has shown, in some situations it can be accepted more easily, even by non-participating Member States, that there is a necessity to achieve political objectives.[18] However, it is more difficult to accept such a necessity in the field of status issues. Although done in a very different kind of analysis, Bordignoni and Brusko's observations that countries deciding to opt out of sub-union (which is created through increased cooperation) should be included in the sub-union decision-making process.[19]

In relation to matters of private international law, a critical remark on the practical effect of enhanced cooperation would be that the EU has not progressed much compared to periods when Member States could still decide for themselves whether or not to ratify the Convention of the Hague on private international law. Enhanced cooperation also creates an additional complication regarding the geographical scope of EU regulations, in addition to the complications that have been admitted as a result of the choice of mechanism regarding the United Kingdom and Ireland and the exclusion of Denmark. It should also be expected that the differences in the approach taken when the instruments are based on enhanced cooperation will increase the number of attempts by the parties to avoid its application. In this regard, the use of extended cooperation in family law matters is perhaps even more harmful than in ordinary civil and commercial cases. It is widely accepted that commercial subjects may favor a particular court to decide on their international aspects, modern private international disputes and laws allow a court to have jurisdiction. So if a jurisdiction adheres to a policy that is appreciated by the litigants, they will agree, even in the event of a dispute, to take the case to a particular court. An example is the longstanding practice of bringing all types of maritime disputes before the courts in London.

A practice that has been widely accepted by the private international law rules of the 20th century and that is permitted under Brussels I. In areas where forum selection is not possible or less permitted, such as family law and status , litigants may be tempted to be 'creative with the facts', e.g. in relation to their habitual residence, to find more favorable courts. Child abduction can be seen as the ultimate form of such behavior. In respect of divorce, it should also be noted that at least some of the member states that do not participate in Rome III apply choice of law rules that favor the granting of a divorce more easily than the Rome III rules. A situation can be compared to the problems surrounding the differences between national and EU rules on immigration. The consequences of the enhanced cooperation regarding the choice of law rules in Rome III are reduced by the effect of Brussels II-bis. This Regulation, applicable in all Member States except Denmark, guarantees the recognition of the divorce decree, both by States that apply Rome III and those that do not. If divorce was regulated by a single instrument, comparable to the Maintenance Regulation (4/2009) or future regulations on inheritance and matrimonial property, the lack of coordination and harmonization would have been much more evident.[20]

The lack of uniformity within the EU is now limited to the substantive law conditions under which spouses can obtain a divorce. Jurisdiction and recognition of divorce decrees are still a matter of unified law (except Denmark). It

[14] Cf. Piris, The Future of Europe, 2011.
[15] Bordignon / Brusco: Towards Improved Cooperation, Journal of Public Economics 90 (2006) 2085.
[16] Article 81 (3)
[17] See the 2002 Report on the practical problems resulting from the non-harmonization of the choice of law, Rules in cases of divorce (JAI / Aë / 2001/04) which already found that to achieve the harmonization of the choice of law rules on divorce " profound differences in approach
[18] Bordignon/Brusco (2006), p. 2085.
[19] On the problem more generally, see Van Iterson, The Response of National Law to International Conventions and Community Instruments - The Dutch Example, European Law Reform Journal 2012 (14). page ë-16, starting from an approach based in favor of divorce to an approach which claims to be neutral but which in no case will automatically favor a solution which will lead to a rapid dissolution of the marriage, will be a serious obstacle
[20] Maintenance Regulation (4/2009)

should also be noted that when the first proposals to amend Brussels II-bis and include provisions on the law applicable to divorce were proposed, the dispute over the law applicable to divorce was contested. Article 8 of the 1973 Hague Maintenance Convention, applied by most Member States, refers to maintenance rights between ex-spouses for the law that applied to divorce. The 2007 revision of the Hague Protocol, which was adopted by the EU, removed that rule.

Under the current situation, the main issue would be whether the United Kingdom and Ireland will choose to join and how the special situation of Denmark can be handled. If unification cannot be achieved, the question arises as to whether enhanced cooperation is the next best solution. The arguments for pro-unification through the use of enhanced cooperation seem to be that a further action would nevertheless promote uniformity among a group of states. The outcome of the codification effort would also be a clear statement to non-participating Member States. The result will demonstrate the unity that has been achieved among a group of states. Perhaps the common ground which will be accepted through enhanced cooperation will serve as an example to the states that did not participate and will influence the law and practice of their courts. For the citizens, residents and companies of the countries participating in the enhanced cooperation, the legal certainty will increase as it would and several other countries in the EU, will apply exactly the same rules. In the abstract, the arguments in favor of unification in principle will not change much if unification is achieved between all EU member states or only a selection of these states.

Pursuing the unification of law, whether it is private law or private international law, is generally seen as laudable and as a contribution to the greater good. An obvious advantage of using enhanced cooperation is that it allows states to reach consensus very quickly. It can also be the instrument for alternatives to marriage, same-sex marriage or recognition of faiths can be achieved much faster between some Member States. However, this advantage appears to be limited in value. It is unlikely that willingness to cooperate will always exist among the same group of states. The consequence, in the long term, seems to be enhanced cooperation on selected issues that will increase the lack of harmonization and complicate matters for the practitioner and for the subjects of the law.

The example of Rome III also seems to show a number of counterarguments. The EU is currently at a stage where unification has been achieved in a number of areas of Private International Law. If other instruments, which are applicable only in a select group of countries, are added to the current achievements, this will not necessarily destabilize the state of affairs. To some extent, the very fact that the status quo exists allows some states to continue on isolated issues through enhanced cooperation. However, if the speed or scope of enhanced cooperation was escalated, not to solve one problem, but to legislation dealing with all problems of private international law, such action could contain risks to the existing status quo. This risk will become real as soon as it claims that workplaces together with the enhanced cooperation mechanism would accept the rules to change the status quo. One might think that enhanced cooperation will not be detrimental to the status quo if it is fully respected. However, one of the perceived benefits of full codification is that it would increase the systematization of the law. This desire is understandable, at least for lawyers trained under a continental legal system, especially when the subject, private international law, is itself highly systematic. If several states were to agree on an instrument that brought together, for example, all current rules on applicable law, it seems inevitable that systematization would further affect the interpretation of the rule, a way not possible when the rule is part of a specialized and dedicated instrument.[21]

3.4 Suggested code structure, general principles and relevant issues

For the reasons explained above, there may be another way to proceed instead of starting work on a code. This alternative way would be more convenient. If the Member States nevertheless find themselves in a position to agree on a comprehensive code of private international law, such a code should be adopted by a regulation. Assuming that the comprehensive code for private international law would not be a 'Codification' as it is generally understood under EU law, but an attempt to create a codex of private international law, its main purpose would be to was to bring together all the existing instruments of private international law and then introduce additional legislation in order to fill the 'gaps' in the current legal framework. A characteristic of the current rules of private international law is that they are preceded by detailed considerations. Although these are named as a solution to deal with issues on which there can be no formal agreement, it seems necessary to take up the essence of these considerations in the new codifying instrument.

[21] *Rome I, Rome II, Rome III, Hague Protocol 2007*

3.5 Preferred structure for a code

The issue of the codification of the private international law of the EU, understood as a desire for it creating a Code of Private International Law is increasingly gaining attention in an academic debate in Europe. During the conferences in France, the desire to achieve such codification has been at the center of the discussion and the prevailing tendency in these conferences has been in favor of such codification. Codification was discussed again at the end of June 2012 and again the result should be in support of codification.[22] The problems of general principles of private international law and their place in private international codes, classification, preliminary question, closest connection, autonomy, permanent residence, mandatory rules, public policies, application of foreign law and the principle of recognition.

The preferred solution supported in this paper should be understood as a result of the methodology that has been followed. An important element of the methodology was to bring together a group of experts from different EU countries.

3.6 Member States.

The desire for a comprehensive code was not met with universal support. On the other hand, some experts were sympathetic to the idea of codification. The prevailing view was that it was doubtful that such an idea would be quickly accepted by all Member States. Moreover, it seemed possible that it would lead to a faster result than others, without excluding comprehensive codification as a long-term option. It was also felt that the recommendations should be seen as a road map, rather than a detailed guide. Drafting a comprehensive table of contents for a future code was seen as an unrealistic proposition by some experts. In the discussion of gaps, the question of what should be considered a "gap" from the perspective of traditional private international analysis must also be addressed.

3.7 The law.

There is also the question of to what extent the traditional analysis of private international law should prevail over other considerations, mainly the principles of community law. The institution best equipped to deal with this dilemma would be, for the moment at least, the ECJ.

4. Basic Agreement on the Content of EU Legislation on PIL

At the current stage of the development of private international law of the EU, it is considered better to continue by filling the systemic deficiencies that still exist in the laws. Establishing, for example, general principles of private international law is a task best undertaken once these gaps have been filled, and courts have had more experience with the instruments of the current framework. The analysis of the judicial practice of the national courts and the ECJ in the instruments of the current framework would be essential before undertaking the codification steps. Currently, case law regarding many instruments is still underdeveloped, as they have only been in force for a relatively short period. To fill the gaps, it seems advisable to continue the approach that has been followed so far. This implies that new legislation should be developed for different areas of private international law, rather than a single instrument to cover the gaps. Some areas that still need to be addressed have become very specialized and will require the involvement of specialized experts. An example of the level of specialization is the research study recently conducted regarding subrogation[23].

To fill the existing gaps, it is necessary to try and develop rules in cooperation with the Hague Conference. Experience with Maintenance Regulation shows valu of this approach. It has been noted that the 2007 Hague Protocol was a revision of the 1973 Hague Maintenance Convention, and that some gaps in the European framework deal with issues covered by other Hague Conventions of the 1970s: Marriage, Agency. Ratification by the EU of the Hague Trust Convention is seen as a viable option.[24] The consolidation of the codification, that is, the combination of several instruments into one, would be possible only for the regulations of Rome I and II.

It should be possible to distinguish between three separate areas within the framework. To some extent this

[22] The conference "Do we need a Rome Regulation 0? Considerations for a general part of European IPR "(Do we need a Rome Regulation 0? Considerations for a general part of European privacy international law), which was held on June 29 and 30, 2012 and was hosted by Professors Leible and Unberath.

[23] Study on the question of the effectiveness of a duty or subrogation of a claim against third parties and the priority of the claim assigned or subordinated to the right of another person - May 2012.

24 2007 Hague Protocol

distinction is already found in a more traditional analysis of private international law. The division into these three separate areas happens to fit very well with the structure of community law;

4.1 The three areas that can be distinguished are:

1. ***Civil procedure in civil and commercial cases***. Basically this is the area of the Brussels I Regulation, the Small Claims Regulation, the Indisputable Claims Regulation and the Insolvency Regulation. Some rules are found further in the Inheritance Regulation.
2. ***Choice of law (applicable law) in non-family cases***. This is essentially the law now found in Rome I and Rome II, the Implementing Regulation and to some extent in some private law directives. There are still gaps in this field that need to be filled.
3. ***Private international law for family law cases***. Basically this area consists of the Brussels II-bis Regulation, the Rome III Regulation, the Maintenance Regulation and the future regulations regarding matrimonial property and property of unmarried couples.

5. Conclusions

5.1 Existing gaps in the frame

When talking about gaps, it is useful to further distinguish between different types of gaps. The gaps in the current framework can be divided into three main categories. First of all they are loopholes which are the desired result of territorial limitations in the sphere of EU legislation. Second, there are systemic gaps that arise when the current framework is compared to the discrete problems that make up the traditional problems of private international law. The current framework fixes most of these particular problems, but not all. Thirdly and finally, there are shortcomings when EU legislation provides for it to designate questions that are deliberately left out of the scope of an EU instrument, although from a systemic perspective these elements are part of the particular problem that is regulated by instrument, e.g. contractual obligations. Furthermore, there are provisions in the framework which by their nature are open to interpretation. Such provisions should, however, not be considered loopholes.

5.2 Proposed additions to the current framework

The real gaps in the framework are the systemic gaps, the subject as it currently is are not regulated by the framework. In the field of the law of obligations, these gaps are: • Law on Property; • Beliefs; • Agency; • Corporation; • Arbitration

5.3 In the field of family law, these gaps are:

- Marriage
- Registered partnerships and similar institutions
- Name of natural persons
- Parents
- Protection of adults
- The status and capacity of natural persons in general

5.4 A work plan for the EU for gradual or simultaneous adoption.

It has been argued that the path of gradual adoption should be followed. Gaps in it would need to be addressed before further codification could be envisaged. An important argument for the path of gradual adoption is that legislative work on each of these gaps that are still open will be necessary and should lead to the involvement of specialists from different fields of law. It will be difficult to undertake this work immediately. Another argument is that the courts have only recently started to apply and interpret the framework instruments a lot. It seems appropriate to wait and see how the courts of the Member States and the ECtHR apply and interpret these new instruments on the basis of private international law. Lessons learned from jurisprudence can be integrated into a future code if needed in the future. A final argument is that work on legislation for some loopholes, e.g. which can perhaps be addressed through the revision of the Hague

Conventions of the 1970s, should be developed within the framework of the Hague Conference.

Gradual adoption is also seen as the best way forward as a codification of private international law, as achievable, would also mean that gaps in family law are addressed. This would require a special legislative procedure and unanimity in the Council. It is suggested that new legislation be developed for specific areas of private international law, not a single instrument to cover the gaps, ensuring coherence with other instruments. While working on such new legislation, the EU legislator may consider dividing its attention and efforts into three distinct areas of private international law that fall within the framework: civil procedure in civil and commercial cases in general (a field that is almost finished); choice of law (applicable law) in non-family cases (raising issues that have a strong connection with the internal market); private international law for family law cases (which will require unanimity in the Council). Directing its attention to these specific areas can help the EU legislator to make progress in completing the framework.

The realization of an EU code on private international law, the visibility of an EU code on private international law should be assessed once the gaps are filled. It should also be understood that the notion of codification in European law differs from the notion of codification in the law of the Member States. It should also be understood that the legal systems of some Member States do not have a tradition of codification. It is foreseeable that certain instruments, such as Rome I and Rome II, may be subject to further codification within the meaning of European law. It is another matter whether a codification as known in the domestic law of certain Member States is feasible and desirable. A strong argument against is the still undeveloped issue of the impact of EU general law principles on the application of EU private international law instruments. It would be advisable not to undertake a codification - as the concept is understood in some Member States - until this area has been further developed and the gaps in the current framework have been addressed.

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