Issue 2012.4 Netherlands Private International Law on Family Law

The fourth issue of 2012 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht,* includes seven articles dedicated to the topic 'Party autonomy in international family law.'

Maarja Torga, Party autonomy of the spouses under the Rome III Regulation in Estonia – can private international law change substantive law?, p. 547-554. The abstract reads:

At the moment Estonia is preparing to join Council Regulation (EU)No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (hereafter: Rome III Regulation). Article 5 of the Rome III Regulation gives limited party autonomy to the spouses in divorce matters. However, regardless of the applicable law chosen by the parties, under Article 13 of the Rome III Regulation the Estonian courts would not have to grant a divorce if Estonian substantive law does not deem the marriage in question to be valid for the purpose of divorce proceedings. The present article evaluates the discretion of the Estonian judges to rely on Article 13 of the Rome III Regulation and the alternative courses of action for the spouses in order to avoid the application of the said provision. By using the Rome III Regulation as an example, the author takes the position that the extension of party autonomy in one field of Estonian private international law should lead to a gradual expansion of party autonomy in other fields of Estonian law, which at the moment is rather conservative in its treatment of non-traditional forms of marriage.

Ilaria Viarengo, The role of party autonomy in cross-border divorces, p. 555-561. The abstract reads:

The Rome III Regulation allows spouses to choose the law applicable to their divorce. This choice represents a relevant change for a field which is traditionally regulated by provisions from which the parties cannot derogate. First of all, the article analyses the reasons that justify optio juris *in the case of international divorce. The article furthermore examines the* optio juris *functioning and, in particular, it focuses on ways of assuring the full awareness of the parties and*

limitations to the choice. Although the Netherlands does not take part in the adoption of the Rome III Regulation, there are scenarios in which Dutch citizens might be affected by it, given that the Regulation has a 'universal' character. Finally, the article examines the role of the parties' will in determining the law which is applicable to the financial consequences of the divorce and in particular in the conclusion of prenuptial agreements.

Janeen M. Carruthers, Party autonomy and children: a view from the UK, p. 562-568. The abstract reads:

This article examines the extent to which children, in proceedings affecting their transnational legal affairs, are entitled to express their views, and in what manner, at what time, and to what effect. Attention is paid to international standards set out in the United Nations Convention on the Rights of the Child, and to particular rules contained in international instruments such as Brussels II bis and the 1980 Hague Abduction Convention, and in unharmonised areas such as international family relocation. The influence which children increasingly may exert through the expression of their will is distinguished from the device of party autonomy as that concept generally is understood in private international law. The article shows that implementation of the policy of respecting children's views varies among legal systems, rendering important the matter of forum.

Anna Wysocka, How can a valid *profession iuris* be made under the EU succession Regulation? p. 569-575. The abstract reads:

In the near future, the Succession Regulation will unify international succession law in the EU. Containing rules which have a universal nature, starting from August 17, 2015 it will almost entirely replace international succession rules which are currently in force in the Member States. The Succession Regulation allows for a professio iuris*, which may be made even now as long as it complies with certain requirements. Which laws may be designated as applicable? In what form should a* professio iuris *be made? Which law applies to the material validity of the* professio iuris*? Must the choice of law be clearly expressed or may it be tacit? May it be modified or revoked? What if the* professio iuris *turns out to be invalid? The above questions are answered by comparing the provisions of the Succession Regulation with the Hague Convention, as well as domestic laws of countries currently allowing for* professio iuris*.*

Csongor István Nagy, What functions may party autonomy have in international family and succession law? An EU perspective, p. 576-586. The abstract reads:

The article examines, from an EU perspective, what functions and considerations may justify party autonomy in the fields of international family and succession law. The article argues that in family and succession law the main function of party autonomy should be to tackle the uncertainties related to the applicable law (predictability), to protect vested rights and to ensure the operation of the country-of-origin principle. It is also submitted that this function is less relevant regarding matters connected to legal systems that contain uniform choice-of-law rules, like the Member States of the EU. Furthermore, the article also argues that in the EU the mutual recognition of the choice-of-law rules of the Member States may also justify party autonomy, especially in family and succession law.

Maria Hook, Party autonomy – yes or no? The 'commodification' of the law applicable to matrimonial property relations, p. 587-596. The abstract reads:

The party autonomy principle has met with some success in matrimonial property law, having been embraced, albeit with restrictions, by most civil law countries, but eschewed by the relevant statutory regimes of common law countries such as England and Australia. This article argues that the rationale for extending party choice to matrimonial property disputes is in need of re-examination. In particular, it submits that insufficient attention has been paid to the mechanism behind the party autonomy rule – the choice of law contract – and proposes a contractual framework of evaluation, founded on the choice of law agreement as a self-sufficient contract. This framework is used to determine whether, in the area of matrimonial property law, objective choice of law rules are mandatory in nature – that is, whether they seek to give effect to public policies that ought not be the subject of party choice. By importing contractual theory into the choice of law process, this article hopes to offer a principled alternative to the traditional, often narrowly-focused approach that has been taken to party autonomy in this area.

Sagi Peari, Choice-of-law in family law: Kant, Savigny and the parties' autonomy principle, p. 597-604. The abstract reads:

This article offers an explanation for the emerging popularity of the parties' autonomy principle in the area of family law. It will be argued that Friedrich Carl

von Savigny's divergence from Kant in the area of family law is what underlies the reluctance of different jurisdictions to implement the parties' autonomy principle in this area. Accordingly, the adoption of this principle in the area of family law reflects a complete reversion of Savigny's choice-of-law theory to its Kantian roots.