Human rights in global supply chains: Do we need to amend the Rome II-Regulation?

Written by Giesela Rühl, Humboldt-University of Berlin

The protection of human rights in global supply chains has been high on the agenda of national legislatures for a number of years. Most recently, also the European Union has joined the bandwagon. After Commissioner for Justice Didier Reynders announced plans to prepare a European human rights to due diligence instrument in April 2020, the JURI Committee of the European Parliament has now published a Draft Report on corporate due diligence and corporate accountability. The Report contains a motion for a European Parliament Resolution and a Proposal for a Directive which will, if adopted, require European companies – and companies operating in Europe – to undertake broad mandatory human rights due diligence along the entire supply chain. Violations will result, among others, in a right of victims to claim damages.

The proposed Directive is remarkable because it amounts to the first attempt of the European legislature to establish cross-sectoral mandatory human rights due diligence obligations coupled with a mandatory civil liability regime. However, from a private international law perspective the Draft Report attracts attention because it also contains proposals to change the Brussels Ia Regulation and the Rome II Regulation. In this post I will briefly discuss – and criticize – the proposed changes to the Rome II Regulation. For a discussion of the changes to the Brussels Ia Regulation I refer to *Geert Van Calster's* thoughts on GAVC.

Victims' unilateral right to choose the applicable law

The proposed change to the Rome II Regulation envisions the introduction of a new Article 6a entitled "Business-related human rights claims". Clearly modelled on Article 7 Rome II Regulation relating to environmental damage the proposal allows victims of human rights violations to choose the applicable law. However, unlike Article 7 Rome II Regulation, which limits the choice to the law of the place

of injury and the law of the place of action, the proposed Article 6a allows victims of human rights violations to choose between potentially four different laws, namely

1) the law of the country in which the damage occurred, i.e. the law of the place of injury,

2) the law of the country in which the event giving rise to damage occurred, i.e. the law of the place of action,

3) the law of the country in which the parent company has its domicile or, where the parent company does not have a domicile in a Member State,

4) the law of the country where the parent company operates.

The rationale behind the proposed Article 6a Rome II Regulation is clear: The JURI Committee tries to make sure that the substantive provisions of the proposed Directive will actually apply – and not fall prey to Article 4(1) Rome II Regulation which, in typical supply chain cases, leads to application of the law of the host state in the Global South and, hence, non-EU law. By allowing victims to choose the applicable law, notably the law of the (European) parent company, the JURI Committee takes up recommendations that have been made in the literature over the past years.

However, a right to choose the applicable law *ex post* – while certainly good for victims – is conceptually ill-conceived because it results in legal uncertainty for all companies that try to find out *ex ante* what their obligations are. Provisions like the proposed Article 6a Rome II Regulation, therefore, fundamentally impair the deterrence function of tort law and increase compliance costs for companies because they have to adjust their behaviour to four – potentially – different laws to avoid liability. It is for this reason that choice of law rules that allow one party to unilaterally choose the applicable law *ex post* have largely (even though not completely) fallen out of favour.

Alternative roads to European law

The proposed Article 6a Rome II Regulation, however, does not only fail to convince conceptually. It also fails to convince as regards to the purpose that it seeks to achieve. In fact, there are much better ways to ensure that European

standards apply in supply chain cases. The most obvious way is to simply adopt the envisioned European instrument in the form of a Regulation. Its provisions would then have to be applied as international uniform law by all Member State courts – irrespective of the provisions of the Rome II Regulation. However, even if the European legislature prefers to adopt a European instrument in the form of a Directive – for political or competence reasons –, no change of the Rome II Regulation is necessary to ensure that it is applied throughout Europe. In fact, its provisions can simply be classified as overriding mandatory provisions in the meaning of Article 16 Rome II Regulation. The national provisions implementing the Directive will then apply irrespective of the otherwise applicable law.

In the light of the above, application of European human rights due diligence standards can be ensured without amending the Rome II Regulation. It is, therefore, recommended that the JURI Committee rethinks – and then abandons – the proposed Article 6a Rome II Regulation.

Note: This post is also available via the blog of the European Association of Private International Law.

CJEU on application of the law of the forum under Article 10 of the Rome III Regulation: Case C-249/19, JE

Back in February we reported on the Opinion presented by Advocate General Tanchev in case C-249/19, JE. Today the Court of Justice rendered its Judgment in which it confirms the interpretation provided in the Opinion.

As a reminder, the question referred to the Court of Justice originated in the

proceedings pending before the Romanian courts dealing with a petition for divorce. The parties to these proceedings are Romanian nationals, habitually resident in Italy.

In these circumstances, under Article 8(a) of the Rome III Regulation, it is a priori Italian law that governs the grounds of divorce. According to Italian law, the dissolution of marriage can be pronounced only where there had been a legal separation of the spouses and at least three years have passed between this separation and the time at which the court have been seized by the applicant.

Seized of a petition for divorce, the first instance court considered that since no provision is made for legal separation proceedings under Romanian law, such proceedings must be conducted before the Italian courts and therefore any application to that effect made before the Romanian courts is inadmissible.

Yet, seized of an appeal lodged by the applicant, the second instance court focused on Article 10 of the Regulation that states, inter alia, '[w]here the law applicable […] makes no provision for divorce […], the law of the forum shall apply'. That court referred a request for a preliminary ruling to the Court asking, in essence, whether Italian law could be disapplied under Article 10.

In his Opinion presented this February, AG Tanchev held that Article 10 of the Rome III Regulation calls for a strict interpretation. The expression 'where the law applicable pursuant to Article 5 or Article 8 makes no provision for divorce' relates only to situations in which the applicable foreign law does not recognize the institution of divorce. Italian law should therefore be applied by the Romanian courts. Despite the lack of procedural rules in relation to legal separation, these courts have to verify whether the requirement relating to separation was met.

The Judgment is in line with the Opinion: it **confirms that a foreign law can be disapplied on the basis of Article 10 only when that law does not provide for any form of divorce.**

As discussed in the initial post, at points 64 to 66, **the Opinion seems to qualify the requirement provided for in the Italian law as a 'procedural condition'. That qualification does not appear explicitly in the Judgment**. At paragraph 43, the Judgment convincingly confines itself to stating that the substantive requirement at issue consists on a three years' separation of the spouses and that the lack of procedural rules in relation to legal separation

cannot prevent the Romanian court from verifying whether that requirement is met.

Against this background, at paragraph 40, the Judgment makes a point in the context of effectiveness of the Rome III Regulation. **If the application of the requirement provided for in Italian law leads to the situation where the petitions for divorce are being rejected without their examination, the practical effectiveness of the uniform conflict of laws rules on divorce is undermined**. I deem the references to the effectiveness/effet utile to be highly interesting. See paragraph 20 of the Judgment in Bier for one of the earliest occurrences of such reference. The Judgment in JE is yet another example: it presents a noteworthy take on the interaction between effet utile and conflict of laws rules. It will be interesting to see whether and how that specific line of argument will be developed in the future.

A Newly Released Commentary on the Rome III Regulation

A comprehensive Commentary, edited by Professor Sabine Corneloup and published by Edward Elgar Publishing, was recently released providing an in-depth analysis of the Rome III Regulation implementing enhanced cooperation in the area of the law governing cross-border divorce and legal separation. The Commentary is a welcome addition to Elgar's already thriving 'Commentaries in Private International Law' series.

Written by a team of internationally renowned experts of private international law in family matters, the Commentary analyses, on an article-by-article basis, and contextualises the provisions of the Rome III Regulation, providing clear insight into the rationale behind the text. Substantive values and political choices underlying the adoption of the Regulation are factored in the analysis, offering the reader a thorough and comprehensive illustration of the objectives pursued with each article and with the Regulation, overall. In this context, each provision

is pondered in connection with, inter alia, the relevant fundamental rights such as non-discrimination between spouses, self-determination of the individual, the protection of the right to marry, and the right to respect for family life.

Overall, the contributors critically engage with each article, shedding the light on the Regulation's effectiveness and offering a balanced critique by approaching the topics from a variety of viewpoints. In this context, they do not shy away from underscoring gaps currently existing in the text of the Regulation (such as, for instance, that arising from the absence of an autonomous definition of 'marriage') and address the open questions that arise therefrom. Furthermore, the Commentary casts the light on the Regulation's interactions and coordination with complementary instruments adopted in the area of EU family law, and in particular (but not only) the Brussels II-bis Regulation, promoting a thorough understanding of the EU private international law system on divorce and legal separation. Finally, the Commentary delves into the interface of the Regulation with national substantive provisions and the differences arising therefrom, hence providing the reader with a clear and valuable understanding of the issues surrounding the practical application of the Regulation at the national level.

The Commentary benefits from the contributions of:

Alexandre Boiché, Attorney in Paris (France)

Laura Carpaneto, Professor at the University of Genova (Italy)

Christelle Chalas, Senior Lecturer at the University of Lille (France)

Sabine Corneloup, Professor at the University of Paris II Panthéon-Assas (France)

Stefano Dominelli, Post-Doc Researcher at the University of Genova (Italy)

Pietro Franzina, Professor at the Catholic University of Milan (Italy)

Cristina González Beilfuss, Professor at the University of Barcelona (Spain)

Susanne L. Gössl, Professor at the University of Kiel (Germany)

Petra Hammje, Professor at the University of Nantes (France)

Bettina Heiderhoff, Professor at the University of Münster (Germany)

Fabienne Jault-Seseke, Professor at the University of Versailles Saint-Quentin – Paris Saclay (France)

Natalie Joubert, Professor at the University of Burgundy (France)

Thalia Kruger, Professor at the University of Antwerp (Belgium) and Honorary Research Associate at the University of Cape Town (South Africa)

Caroline S. Rupp, Junior Professor at the University of Würzburg (Germany)

Jinske Verhellen, Professor at the University of Ghent (Belgium)

The in-depth discussion offered by this Commentary will prove to be an essential guide for private international law scholars and practitioners alike to navigate the complex field of family litigation. It will be of particular interest to those working in family law, including judges, lawyers, public notaries and family mediators, as well as graduate students looking for in-depth knowledge of the subject.

Sabine CORNELOUP (ed), *The Rome III Regulation. A Commentary on the Law Applicable to Divorce and Legal Separation*, pp v-242 (Elgar, 2020). The eBook version of the Commentary is available on Google Play, ebooks.com and other eBook vendors, while in print the book can be ordered from the Edward Elgar Publishing website.

Opinion of Advocate General Tanchev in the case C-249/19, JE: Application of the law of the forum under Article 10 of the Rome III Regulation

In his **Opinion** delivered today, Advocate General Tanchev presents his take on Article 10 of the Regulation No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (commonly referred to as Rome III Regulation), under which '[w]here the law applicable pursuant to Article 5 or Article 8 makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the forum shall apply'.

More specifically, the Opinion deals with the question lodged before the Court of Justice by a Romanian court, concerning the interpretation of the expression 'the law applicable pursuant to Article 5 or Article 8 [the Rome III Regulation] makes no provision for divorce'.

By its question, the referring court is, in essence, asking whether Article 10 of the Rome III Regulation must be interpreted in a strict sense, meaning that the recourse to the law of the forum can be made only where the foreign law designed as applicable does not recognize any form of divorce, or more broadly – the law of the forum should be applied when the foreign law designed as applicable under the Regulation permits a divorce, but does so in 'extremely limited circumstances involving an obligatory legal separation procedure prior to divorce, in respect of which the law of the forum contains no equivalent procedural provision'.

Even though the requests for a preliminary ruling concerning Article 10 of the Regulation were already presented in the cases **C-281/15, Sahyouni** and **C-372/16, Sahyouni II** (yet, in a different context, relating to the second limb of Article 10 – discrimination through lack of equal access to divorce), ultimately this provision has not been yet interpreted by the Court of Justice. Therefore, alongside the Opinion of AG Saugmandsgaard Øe delivered in the case **C-372/16, Sahyouni II**, which also addresses this provision, Opinion of AG Tanchev is certainly worthy of attention. While the very question referred to the Court did not seem to pose a particular difficulty, these are the supplementary considerations on the consequences of the proposed interpretation of Article 10 that certainly make this Opinion an interesting read.

Legal and factual context

Seized of a petition for divorce, the first instance court established the jurisdiction of the Romanian courts under Article 3(1)(b) of the Brussels II Regulation due to the common nationality of both spouses.

Since the parties seemingly had not chosen the law applicable to divorce and had been habitually resident in Italy, the first instance court considered that, pursuant to Article 8(a) of the Rome III Regulation, it is the Italian law that governs the grounds of divorce.

Yet, this court observed that, according to the Italian law, the dissolution of marriage can be pronounced only where there had been a legal separation of the spouses and at least three years have passed between this separation and the time at which the court have been seized by the applicant. It seems that in this regard the first instance court referred itself to Article 3(2)(b)of the Law No 898 of 1 December 1970 (Disciplina dei casi di scioglimento del matrimonio), mentioned in the Opinion presented by AG Bot in case **C-386/17, Liberato** (for multiple linguistic versions of this provision see point 20 of this Opinion).

However, the first instance court considered that since no provision is made for legal separation proceedings under Romanian law, those proceedings must be conducted before the Italian courts and therefore any application to that effect made before the Romanian courts is inadmissible.

The applicant lodged an appeal against the decision of the first instance court. In those circumstances, the second instance court presents its request for a preliminary ruling.

Opinion of Advocate General

According to the Opinion of AG Tanchev, it is manifest that Article 10 of the Rome III Regulation calls for a **strict interpretation in the sense that the expression 'where the law applicable pursuant to Article 5 or Article 8 makes no provision for divorce' relates only to situations in which the applicable foreign law does not recognise the institution of divorce** (see, most notably, point 19 of the Opinion). In order to reach this conclusion, the Opinion delves into literal, systemic, historical and teleological interpretation of the provision in question.

At point 37, the Opinion indicates that '[the] Italian law, as the applicable law, does not prohibit divorce; it merely subjects it to certain requirements, which is within its competence regarding its substantive family law'. Therefore, in the present case, there is no room for Article 10 of the Rome III Regulation to apply.

Yet, as mentioned in the introduction, the analysis does not stop here. At points 59 et seq. **the Opinion addresses the consequences of the advocated interpretation of Article 10.**

At points 62 and 63 the Opinion argues in following terms that the national courts seized of a petition for divorce **could have recourse to 'adaptation'** (see also point 68) :

62. First of all, pursuant to Section 1 of Chapter II of [the Brussels II bis Regulation], where the court of a Member State is seized of an application for divorce, it cannot decline jurisdiction (contrary to a court seized in the area of parental responsibility, which has discretion to address the courts of another Member State, under Article 15 of that regulation) and it is obliged to rule on that application for divorce.

63. I agree with the view of the German Government that the Member States participating in the enhanced cooperation implemented by [the Rome III Regulation] must ensure that both divorce and legal separation may be granted by their courts. Therefore, instead of considering that legal separation must first be established or ordered before the Italian courts, the Romanian courts should, to my mind, allow for such a procedure and apply, by analogy, national procedural rules relating to divorces or even adapt foreign (Italian) procedural rules relating to legal separation (in conjunction with Romanian national rules). Otherwise, the provisions of [the Rome III Regulation] would be partially ineffective.

Against this background, at points 65 and 66 the Opinion refers to the solution proposed by the Commission and favoured also by Advocate General:

65. By way of a concrete solution in the present case, the Commission proposed that the court seized apply the substantive conditions foreseen by the applicable law and forgo the application of any procedural conditions foreseen by that law, in circumstances where the procedural law of the forum does not allow for those procedural conditions to be met. Therefore, if, in a particular case, the substantive conditions for a legal separation order are fulfilled, the forum court may remedy the fact that that court itself cannot grant such an order by waiving that foreign procedural condition.

66. I concur. In my view, such a solution would be balanced and would correspond to the implicit intention of the Union legislature. First, it would not unduly encourage forum shopping, because it would require the substantive conditions of the applicable law to be fulfilled. The applicant would not be able to avoid those conditions by seizing another court under the very generous rules of [the Brussels II Regulation] and by asking for his or her own law to be applied (parties can avoid those conditions quite easily if they agree on the choice of the law of the forum).

On a side note...

It is although distant from the context of the present request for a preliminary ruling but nonetheless interesting to notice some points that may be inspirational in others contexts and in relation to the issues not covered by this request:

*• At point 69, while expressing itself in favour of 'adaptation', the Opinion states 'while [the Rome III Regulation] does not provide specifically for such an adaptation, neither does it expressly prohibit it'. In this regard, the Opinion draws inspiration from the Succession Regulation and from the twin Regulations Nos 2016/1103 and 2016/1104. It is yet to be seen **whether these considerations herald the recognition of adaptation as a general (and non-codified) instrument of EU private international law** and, therefore, such 'adaptation' could occur also in relation to, i.e., the Rome I and II Regulations.*

*• It is worth mentioning that it can be argued that, at points 62 and 63, the Opinion acknowledges the existence of a **link between, on the one hand, the obligation to exercise jurisdiction established under the Brussels II Regulation and, on the other hand, a substantive effect that should be (at least potentially) achievable under the law designed as applicable under Rome III Regulation**. It states 'pursuant to [the Brussels II Regulation], where the court of a Member State is seized of an application for divorce, it cannot decline jurisdiction […] and it is obliged to rule on that application for divorce […]'. Then '[the Member States bound by the Rome III Regulation] must ensure that both divorce and legal separation may be granted by their courts'. If anything, it will be interesting to follow the discussion on the implications of such interpretation of these Regulations.*

• Before delving into the consequences of the proposed interpretation of Article 10 of the Rome III Regulation, at points 59 to 61, the Opinion clarifies that the considerations relating to that issue are necessary 'in order to provide the national court with an appropriate [and useful] answer for the purpose of the application of [EU] law in the dispute before it'.Even though these considerations do not seem vital to answer the preliminary question (what makes them even more worthy of attention – if this is the case, they do not have to be necessarily addressed in the upcoming judgment), they may also be relevant in this as well as in other contexts for a very specific reason.

Before the first instance court, the applicant seeking divorce invoked Article 12 of the Rome III Regulation. The applicant claimed that the application of Italian law is manifestly incompatible with the public policy of the forum, thus making it necessary to exclude the application of the foreign law (point 15 of the Opinion).

If Article 10 of the Rome III Regulation must be considered lex specialis that overrides Article 12, the fact that the former provision is not relevant in the present case could make space for the latter to apply. One could wonder – as the appellant seemingly did – whether a requirement provided for in by a foreign law could be disapplied as contravening the public policy of the forum. The Opinion seems to provide some guidance relating to that issue. In fact, it addresses the public policy exception, yet in a different context.

At point 63, the Opinion provides that 'the Member States participating in the enhanced cooperation implemented by [the Rome III Regulation] must ensure that both divorce and legal separation may be granted by their courts'. At point 64 it argues that 'the referring court cannot refuse to rule on the application in the main proceedings on the basis of Article 12 of the above regulation (which is reserved for exceptional cases) on the ground that its national law does not provide for legal separation or for procedural rules for legal separation'.

Leaving aside the question whether it could be inferred from the lack of procedural scheme to pronounce legal separation that granting a divorce without the separation itself being pronounced is (or could be) contrary to the public policy of the forum (this is, of course, a distinct issue relating to the law of the forum and to the limits of the concept of public policy under the Rome III Regulation), the Opinion seems to recognize the aforementioned lex specialis relation. However, it also seeks to prevent the excessive reliance on the public policy exception with reference to a simple maladjustment of the law of the forum.

*• It seems that the doubts of the referring court result from the fact that the Italian law imposes a requirement that cannot be fulfilled under the Romanian law.Indeed, on the one hand, according to the **information** provided by the database managed by European Judicial Network, '[i]n Romanian law there is no concept of 'legal separation' but only of 'de facto separation' and the judicial division of property. This is a situation that must be proven before the court. In the event of the de facto separation having lasted for at least two years, this is a reason for judicially issuing a divorce.'On the other hand, the Italian law requires a judicial separation to be declared by a judgment that has acquired the force of law or a consensual separation that has been judicially confirmed (Article 3(2)(b)of the Law No 898 of 1 December 1970 read in the light of Article 150 of the Italian Civil Code).*

• At point 64, the Opinion seems to take the view that the requirement provided for in the Italian law according to which a separation has to be declared by a judgment or judicially confirmed is a 'procedural condition'. It will be interesting to see the evolution of case law and literature as to the classification of similar requirements in different contexts than that of Article 3(2)(b)of the Law No 898 of 1 December 1970 read in the light of Article 150 of the Italian Civil Code.The question remains open whether such other requirements are also of procedural nature (or, alternatively, even though it might ultimately boil down to the question of terminology: of formal nature or of substantive nature, yet they can be fulfilled only via the procedural framework of the State that imposes them and of the other States that provide for a judicially-pronounced separation, if one takes into account the recognition of a judgment on separation within the divorce proceedings) and, if they are truly of procedural nature, do they fall within the scope of the law designed as applicable under the Rome III Regulation.

Complaint against France for a violation of several obligations arising from the Rome III and Brussels IIbis Regulations

On 19 April 2017, Professor Cyril Nourissat and the lawyers Alexandre Boiché, Delphine Eskenazi, Alice Meier-Bourdeau and Gregory Thuan filed a complaint with the European Commission against France for a violation of several obligations arising from the European Rome III and Brussels II*bis* Regulations, as a result of the divorce legislation reform entered into force on 1 January this year. The following summary has been kindly provided by Dr. Boiché.

“Indeed, since January the 1st, in the event of a global settlement between the spouses, the divorce agreement is no longer reviewed and approved in Court by a French judge. The agreement is merely recorded in a private contract, signed by the spouses and their respective lawyers. Such agreement is subsequently registered by a French *notaire*, which allows the divorce agreement to be an enforceable document under French law. From a judicial divorce, the French divorce, in the event of an agreement between the spouses, has become a purely administrative divorce. The judge only intervenes if a minor child requests to be heard.

The implications and consequences of this reform in an international environment were deliberately ignored by the French legislator, with a blatant disregard for the high proportion of divorce with an international component in France. The main violations arising from this reform are the following.

First of all, as there will be no control of the jurisdiction, anyone will be able to get a divorce by mutual consent in France, even though they have absolutely no

connection with France whatsoever. For instance, a couple of German spouses living in Spain will now be able to use this new method of divorce, in breach of the provisions of the Brussels II*bis* Regulation. The new divorce legislation is also problematic in so far as it remains silent on the law applicable to the divorce.

Moreover, the Brussels II*bis* Regulation states that the judge, when he grants the divorce (and therefore rules on the visitation rights upon the children, or issues a support order, for instance) provides the spouses with certificates, that grant direct enforceability to his decision in the other member states. Yet, the new divorce legislation only authorizes the notary to deliver the certificate granting enforceability to the dissolution of the marriage itself, but not the certificate related to the visitation rights, nor the support order. This omission is problematic insofar as it will force the spouses who seek to enforce their agreement in another member state to seize the local Courts.

Last but not least, article 24 of the Charter of Fundamental Rights of the European Union makes it imperative for the child's best interests to be taken into consideration above all else, and article 41 of the Brussels II*bis* Regulation provides that the child must be heard every time a decision is taken regarding his residency and/or visitation rights, unless a neutral third party deems it unnecessary. Yet, under the new legislation, it is only the parents of the child who are supposed to inform him that he can be heard, which hardly meets the European requirements. Moreover, article 12 of the Brussels II*bis* Regulation provides that, when a Court is seized whereas it isn't the Court of the child's habitual residence, it can only accept its jurisdiction if it matches the child's best interests. Once again, the absence of any judicial control will allow divorces to be granted in France about children who never lived there, without any consideration for their interests. This might be the main violation of the European legislation issued by this reform.

For all those reasons, the plaintiffs recommend that the Union invites France to undertake the necessary changes, in order for this new legislation to fit harmoniously in the European legal space. In particular, they suggest a mandatory reviewal by the judge in the presence of an international component, such as the foreign citizenship of one of the spouses, or a foreign habitual residence. They would also like this new divorce to be prohibited in the presence of a minor child, an opinion shared by the French 'Défenseur des Droits'"

The full text of the complaint (in French) is available here.

The first request for a preliminary ruling concerning the Rome III Regulation

The *Oberlandesgericht* of Munich has recently lodged a request for a preliminary ruling concerning the interpretation of Regulation No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, *ie* the Rome III Regulation (Case C-281/15, *Soha Sahyouni* v *Raja Mamisch*).

The request provides the ECJ with the opportunity of delivering, in due course, its first judgment relating specifically to the Rome III Regulation.

To begin with, the referring court asks the ECJ to provide a clarification as to the scope of the uniform conflict-of-laws regime set forth by the Regulation. In particular, the German court wonders whether the Regulation also applies to 'private divorces', namely divorces pronounced before a religious court in Syria on the basis of Sharia.

If the answer is in the affirmative, the referring court asks whether, in the case of an examination as to whether such a divorce is eligible for recognition in the forum, Article 10 of the Regulation must also be applied. According to the latter provision, where the law specified by the Regulation to govern the divorce or the legal separation "does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex", the *lex fori* applies instead.

Should the latter question, too, be answered in the affirmative, the referring court wishes to know which of the following interpretive options should be followed in respect of Article 10: (1) is account to be taken in the abstract of a comparison showing that, while the law of the forum grants access to divorce to

the other spouse too, that divorce is, on account of the other spouse's sex, subject to different procedural and substantive conditions than access for the first spouse? (2) or, does the applicability of Article 10 depend on whether the application of the foreign law, which is discriminatory in the abstract, also discriminates in the particular case in question?

Finally, were the ECJ to assert that the second of these options is the correct one, the *Oberlandesgericht* of Munich seeks to know whether the fact that the spouse discriminated against has consented to the divorce — including by duly accepting compensation — constitutes itself a ground for not applying Article 10.

Spanish Articles on Rome III and the Succession Regulation

Two Spanish Articles on Rome III and the Succession Regulation have recently been published in Diario La Ley:

- **La nueva regulación de la ley aplicable a la separación judicial y al divorcio: aplicación del Reglamento Roma III en España,** *Patricia Orejudo Prieto de los Mozos,* Profesora Titular de Derecho internacional privado (Universidad Complutense de Madrid), Diario La Ley, Nº 7913, Sección Tribuna, 31 July 2012
- **El nuevo reglamento europeo sobre sucesiones,** *Iván Heredia Cervantes*, Profesor Titular de Derecho internacional privado (Universidad Autónoma de Madrid), Diario La Ley, Nº 7933, Sección Tribuna, 28 Sepeptember 2012

English-language Commentary on the Rome I and II Regulations

It has not yet been mentioned on this blog that there is a new English-language commentary on the Rome I and II Regulations out there. Edited by *Gralf-Peter Calliess* from the University of Bremen and published by Kluwer Law International, the commentary provides an in-depth analysis of the new European conflict rules on contractual and non-contractual obligations. More information is available on the publisher's website.

The official announcement reads as follows:

> *The year 2009 marks a revolution in European conflict of laws. The so-called Rome I and II Regulations, both entering into force this year, will bind the Member States of the European Union to a common set of rules for the choice of law in international private law disputes. They apply to both contractual and non-contractual disputes, their reach even extends to the application of non-Member State law. This poses great challenges to Courts and practitioners in every EU Member State, as there is only little case-law and doctrinal literature on the new rules, the uniform application of which will be overseen by the European Court of Justice. The Commentary answers to these challenges. It is an indispensable companion for both academics and legal professionals seeking their way through the Regulations. Renowned conflict of laws scholars comment every provision of the Regulations in a systematic, thorough and comprehensive manner, making them accessible to a broad international legal audience.*
>
> *Mirroring the German tradition of scholarly commentaries on Parliamentary Acts, the authors are selected from the distinguished group of relatively young German private international law scholars, whose exceptionally high qualifications are represented by their passing through the German "Habilitation"-system (second book requirement) as well as their proven ability to publish in the English language .*

The list of authors reads as follows:

- Professor Dr. Dietmar Baetge, University of Hamburg
- Assistant Professor Dr. Frank Bauer, University of Munich
- Professor Dr. Benedikt Buchner, LL.M. (UCLA), University of Bremen
- Professor Dr. Martin Franzen, University of Munich
- Professor Dr. Martin Gebauer, University of Heidelberg
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- Professor Dr. Boris Schinkels, LL.M. (Cambridge), University of Greifswald
- Professor Dr. Goetz Schulze, University of Lausanne
- Professor Dr. Matthias Weller, Mag. rer. publ., EBS Law School Wiesbaden

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Franzina (Ed.), Commentary on Rome III Regulation

The Italian journal *Le Nuove Leggi Civili Commentate* has published in its latest issue (no. 6/2011) an **extensive commentary of the Rome III Regulation** (Council Regulation (EU) No 1259/2010, implementing enhanced cooperation in the area of the law applicable to divorce and legal separation). The same journal had published, back in 2009, the first article-by-article comment of the Rome I Reg. (see our previous post here).

The commentary has been written, under the editorship of *Pietro Franzina* (Univ. of Ferrara), by a team of Italian scholars: *Giacomo Biagioni* (Univ. of Cagliari), *Zeno Crespi Reghizzi* (Univ. of Milano), *Antonio Leandro* (Univ. of Bari) and *Giulia Rossolillo* (Univ. of Pavia). Here's the comments' list:

Introductory remarks: P. Franzina, Z. Crespi Reghizzi; Art. 1: G. Rossolillo; Arts. 2-3: P. Franzina; Art. 4: A. Leandro; Arts. 5-7: G. Biagioni; Art. 8: Z. Crespi Reghizzi; Art. 9: G. Rossolillo; Arts. 10-13: A. Leandro; Arts. 14-15: P. Franzina; Art. 16: G. Rossolillo; Art. 17: G. Biagioni; Art. 18: Z. Crespi Reghizzi; Art. 19: G. Biagioni; Art. 20: G. Rossolillo; Art. 21: Z. Crespi Reghizzi.

A detailed table of contents is available here.

Rome III Regulation Published in the Official Journal

The Rome III regulation (see our most recent post here, with links to the previous ones) has been published in the Official Journal of the European Union n. L 343 of 29 December 2010. The official reference is the following: **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** (OJ n. L 343, p. 10 ff.).

Pursuant to its Art. 21(2), **the regulation should apply from 21 June 2012 in the 14 Member States which currently participate in the enhanced cooperation** (Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia).

Art. 18 (*Transitional provisions*) provides that "[the] regulation shall apply only to legal proceedings instituted and to agreements of the kind referred to in Article 5 [choice of the applicable law by the spouses] concluded as from 21 June 2012". The same article stipulates that "effect shall also be given to an agreement on the choice of the applicable law concluded before 21 June 2012, provided that it complies with Articles 6 and 7" (rules governing material and formal validity of the agreement). As regards proceedings commenced in the court of a participating Member State before 21 June 2012, the regulation will be without prejudice to *pacta de lege utenda* concluded in accordance with the law of that

State (Art. 18(2)).

In order to make national rules concerning formal and procedural requirements of an *optio legis* fully accessible, Art. 17 (applicable from 21 June 2011) requires the participating Member States to communicate any relevant information in respect thereof to the Commission, which will make them publicly available, in particular through the website of the European Judicial Network in civil and commercial matters.

(Many thanks to Federico Garau – Conflictus Legum blog – for the tip-off)