TO BE, OR NOT TO BE: ENHANCED COOPERATION IN INTERNATIONAL DIVORCE LAW WITHIN THE EUROPEAN UNION

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Professor Tony Angelo has throughout his career devoted much of his energy to the conflict of laws and in particular to problems created by different substantive rules relating to family law. It is therefore appropriate in this article that Professor Boele-Woelki reviews the recent European attempts to integrate the European Union's approach to international divorce. Professor Boele-Woelki reviews the process that led to the formulation of the proposals known as 'Rome III' and why those proposals ultimately failed. She argues, in part, that the failure of the international divorce process, at least at the moment, reflects significant disagreement amongst members as to the substantive content of their own laws. She expresses some concern that the ultimate solution to that substantive disagreement may be the further employment of the concept "enhanced cooperation" amongst those members who can reach agreement on substantive content of divorce law, but which leaves others behind. The professor's concern is that while that such an enhanced cooperation regime may enable an agreement to be concluded, it has significant impact on the universality that the European Community and the European Union have previously sought to impose upon members, and creates further risk of a "two-speed" European Union.

I THE LACK OF UNANIMITY WITHIN THE EUROPEAN UNION

It even reached the news Down Under. On 24 July 2008 New Zealand's national public television broadcaster reported in its *ONE NEWS*[1] about the totally unexpected move by nine European Union countries to implement a cooperation mechanism in the field of international

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1 "EU Co-operates Over Divorce Law" http://tvnz.co.nz (accessed 1 September 2008).

divorce law. Supposedly in Europe it was "cucumber time" or "silly season"[2] in which light-hearted news stories readily emerge. The news from Brussels, however, was everything except light-hearted because *enhanced cooperation* between a group of countries within the European Union may lead to a divided, two-speed European Union.[3]

At the beginning of the summer of 2008 the European Union received the first blow. The negative outcome of the Irish referendum on the Lisbon Treaty,[4] which was designed to restructure the European Union by amending the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Community (TFEU),[5] was received with great disappointment by many Member States. Before the Treaty could become effective rational ratification procedures by all 27 Member States needed to take place. The refusal of the majority of the Member States to renegotiate the Treaty made it even more difficult. Will there be a second referendum in Ireland?[6] Will all other Member States ratify the Treaty? Legal objections delayed the ratification in the Czech Republic and Poland. In Germany, the ratification has been challenged before the Constitutional Court which in February 2009 has heard the claim that the Treaty violates the German constitution. When the final decision of the *Bundesverfassungsgericht* will be rendered is not yet known. Will the European Union lose one or even more Member States? Or will they obtain a special status? Undeniably, the European Union is facing uncertainty and the crucial question is who is holding the trump card?

In addition to this political deadlock a lack of agreement, or, more specifically, a lack of unanimity among the Member States prevented the adoption of a new regulation in the field of international divorce law. The background, consequences and challenges of this significant modification of circumstances will be addressed in this contribution which is dedicated to Tony Angelo. I admire his wisdom, humour and down-to-earthness.

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2 In New Zealand, the silly season refers to the Christmas/New Year festive period which is in the summer in the Southern Hemisphere.

3 See also "Divorce without Borders" (2 August 2008) *The Economist* 30-31.

4 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, signed at Lisbon, 13 December 2007 (13 December 2007) OJ 2007/C 306/01.

5 See Jaqueline Dutheil de la Rochère "The Lisbon Compromise: A Synthesis between Community Method and Union Acquis" (2008) 31 Fordham Int'l LJ 1143, 1144. "On one side, the Lisbon compromise is different from the Constitutional treaty: it proposes a new balance of powers and interests. On the other side, Lisbon confirms a number of characteristics of the Constitutional treaty: it promotes a stabilization of Union law succeeding to Community law."

6 This would not be the first time. It was only during the second referendum that the Irish people voted in favour of the Nice Treaty in 2001.

II FROM BRUSSELS II TO BRUSSELS II BIS TO ROME III

It has been frequently observed that the substantive law concerning divorce differs substantially between the European Union Member States: from Maltese law where a marriage cannot be dissolved to Swedish law where a divorce may be obtained almost immediately and by unilateral request.[7] In addition, there is a comparable divergence with regard to conflict of laws rules, from the regular application of the *lex fori* to the application of the national law of the spouses, the law of their habitual residence or the law with the "closest connection". These discrepancies may seem to be in dissonance with the fact that within the European Union there has been a free movement of divorce decisions since 2001, which provides that divorces obtained in one Member State are recognized in all other Member States.

In fact, for more than 10 years the European Union Member States have been in the process of unifying their rules on cross-border divorce law[8] and it was expected that new European rules concerning matrimonial matters and parental responsibilities for cross-border relationships would have been adopted during 2008. It all started in May 1998 with the adoption of a convention – the so-called Brussels II Convention – which contained rules on jurisdiction and the enforcement of judgments in matrimonial matters.[9] This Convention never entered into force. Instead – due to the entry into force of the Amsterdam Treaty in May 1999[10] which paved the way for European legislative measures to be taken in cross-border situations – the Convention was transformed into a regulation. On 1 March 2001 the Brussels II Regulation[11] entered into force for the then 15 Member States (except Denmark)[12] and from 1 May 2004 onwards it also became effective – as part of the *acquis communitaire* – in the 10 European countries which acceded to the European Union on that date. Shortly afterwards, on 1 March 2005, Brussels II was replaced by the Brussels II bis

7 See Masha Antokolskaia "Objectives and Values of Substantive Family Law" in Johan Meeusen, Marta Pertegás, Gert Straetmans and Frederik Swennen (eds) *International Family Law for the European Union* (Intersentia, Antwerp 2007) 49-67; Katharina Boele-Woelki "Building on Convergence and Coping with Divergence in the CEFL Principles of European Family Law" in Masha Antokolskaia (ed) *Convergence and Divergence of Family Law in Europe* (Intersentia, Antwerp, 2007) 253-269.

8 See Alegria Borrás "From Brussels II to Brussels II *bis* and Further" in Katharina Boele-Woelki and Cristina González Beilfuss (eds) *Brussels II bis: Its Impact and Application in the Member States* European Family Law Series No 14, (Intersentia, Antwerp, 2007) 3-22.

9 Brussels II Convention (28 May 1998) OJ 1998, C 221/1.

10 Amsterdam Treaty (2 October 1997) OJ 1997, C 340/1.

11 Council Regulation (EC) No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L 160/19.

12 In accordance with Articles 1 and 2 of the Protocol on the Position of Denmark annexed to the TEU Union and the TFEU, Denmark is not participating in the adoption of this regulation and is therefore not bound by it nor subject to its application.

Regulation.[13] The scope of application in respect of issues of parental responsibilities was widened whereas matters regarding divorce essentially remained untouched.[14] In the same year, in 2005, it was announced that the Brussels II bis Regulation would be amended.[15] This proposal, which was presented in 2006,[16] was aimed at complementing the jurisdiction and recognition rules with conflict of laws rules on the law applicable to divorce.[17] The European Commission argued that:[18]

> the fact that courts of the Member States apply the same conflict of laws rules to determine the law applicable to a given situation reinforces the mutual trust in the judicial decisions given in another Member State.

However, little is known about how many couples are really concerned. Further, how often do private international law questions arise, and when they arise, are they solved nowadays with difficulties or with unsatisfactory outcomes? The European Commission has roughly estimated[19] that based on the available data in 2003, there are in the order of 2.2 million marriages in the European Union per year. It is estimated that in the order of 350,000 of these marriages are international and that there are around 875,000 divorces in the European Union per year (excluding Denmark). Approximately around 170,000 or 16% of these divorces are of an international character.[20] As a consequence, according to the European Commission, the objectives of the proposal required action at the Community level in the form of common rules on *both* jurisdiction and applicable law.

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13 Council Regulation (EC) No. 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No. 1347/2000, OJ L 338.

14 No differences as regards their substantive content exist between the *Brussels II* and the *Brussels II bis* versions of the jurisdiction rules concerning divorce, only the numbering of the articles changed. The issues addressed in articles 2 to 8 in *Brussels II* moved to articles 3-7 in *Brussels II bis*.

15 The latest version dates from 28 June 2007, 2006/0135 (CNS) 11295/07.

16 Proposal for a Council Regulation Amending Regulation (EC) No 2201/2003 as Regards Jurisdiction and Introducing Rules Concerning Applicable Law in Matrimonial Matters. Brussels 17 July 2006 COM (2006) 399 final, 2006/0135 (CNS).

17 See Fausto Pocar "Osservazioni a margine della proposta di regolamento sulla giurisdizione e la legge applicabile al divorzio" in Stefania Bariatti (ed) *La Famiglia Nel Diritto Internazionale Privato Comunitario* (Giuffrè, Milan, 2007) 267-278.

18 See above n 15.

19 Commission Staff Working Document, Annex to the Proposal for a Council Regulation Amending Regulation (EC) No 2201/2003 as Regards Jurisdiction and Introducing Rules Concerning Applicable Law in Matrimonial Matters, Impact Assessment, (17 July 2006) SEC(2006) 949, 8-13.

20 See also Eurostat 59/2006 of 12 May 2006 (ec.europa.eu/comm/eurostat.html).

As a corollary, the proposed amendment of the Brussels II bis Regulation was to be named Rome III. This change of the name of the Regulation is striking in two respects: Firstly, the inclusion of conflict of laws rules within the scope of the instrument is seemingly of such great importance and significance as to justify a different name. Secondly, neither Rome III nor Brussels II ter would correctly indicate the Regulation's content. Up until now, the designation "Rome" has been used for instruments which only contained conflict of laws rules[21] whereas "Brussels" indicated that only procedural issues were being addressed, such as jurisdiction, recognition and enforcement.[22] The confusion becomes even greater if we add to these Rome IV regulating matrimonial property issues in cross-border relationships[23] or Rome V for succession and wills.[24] These Regulations, which are currently being prepared, will also contain uniform rules in respect of all private international law issues: jurisdiction, applicable law and recognition and enforcement. In this context it has been rightly observed that given the ties between the different legislative measures they should arguably develop in parallel with one another.[25] Hence it is time to make things simpler and more accessible. All Regulations for cross-border relationships in family matters (divorce, parental responsibilities, matrimonial property, maintenance and succession) and in civil and commercial matters (contracts and torts) should be merged so that at the European level all private international law (PIL) issues are only addressed in two regulations: the PIL Regulation for family matters and the PIL Regulation for civil and commercial matters. Ultimately only one Regulation for all PIL matters might even be an option. It is doubtful whether this will ever become reality, but "you don't succeed if you don't try"!

III WHY ROME III FAILED

The proposed Rome III[26] contained two significant elements: Firstly, spouses would have been permitted to jointly select the competent court and, secondly, conflict of laws rules which determine

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21 OJ L 177/6: Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (*Rome I*) and OJ L 199/40: Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (*Rome II*).

22 OJ L 12/1: Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*Brussels I*) and *Brussels II bis* (see note 13).

23 See Green Paper on Conflicts of Laws in Matters Concerning Matrimonial Property Regimes, Including the Question of Jurisdiction and Mutual recognition of 17 July 2006; COM (2006) 400 final. On 5 February 2008, the European Commission published a summary of the 40 replies which it had received from governments, academia and associations. See http://ec.europa.eu/civiljustice/news/whatsnew_en.htm.

24 See Green Paper on Succession and Wills of 1 March 2005, COM (2005) 65 final. The summary of the replies and all replies are accessible at the website of the European Judicial Network (above n 24).

25 See Aude Fiorini "Rome III – Choice of Law in Divorce: Is the Europeanization of Family Law Going Too Far?" (2000) 22 International Journal of Law, Policy and the Family 178, 195.

26 See above n 15.

the law to be applied in cross-border divorce cases would have become part of communitarian law.[27]

Whereas, generally, the adoption of the choice of forum was genially welcomed, the conflict of laws rules were highly disputed. The discussions were passionate and extensive. Little can be added to this debate.[28] The proposal to allow spouses to agree on the law applicable to divorce,[29] however, was not met with considerable concerns; conversely, the conflict of laws rule in the absence of party choice of law caused the break. It was proposed that, when the spouses have not made a choice of the applicable law, the law of the state (a) where the spouses have their common habitual residence, or failing that (b) where the spouses had their last common habitual residence in so far as one of them still resides there, or failing that (c) of which both spouses are nationals,[30] or failing that (d) where the application is lodged, will be applicable. The intended universality of this multi-stage conflict of laws rule can lead to the application of foreign law, not only of the divorce law of another Member State but also of the law of other jurisdictions. Some of these jurisdictions, where, for instance, religion (such as Islam) plays a central role, might disrespect the principle of the spouses' equality. For this and several other reasons some Member States consider the application of foreign divorce law to be impossible. They favour the application of the *lex fori* as the general rule instead. In this context it has been submitted that if it turns out, in an individual case, that there is a conflict between the applicable foreign law and the forum's fundamental views on marriage and divorce, there is no other remedy but the Rome III public policy provision.[31] This argument should,

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27 See for a comparison between *Rome III* and the American approach: Linda Silberman "Rethinking Rules of Conflict of Laws in Marriage and Divorce in the United States: What Can We Learn from Europe?" (2008) 82 Tul L Rev 1999-2020.

28 See for all the arguments that have emerged: Ted de Boer "The Second Revision of the Brussels II Regulation: Jurisdiction and Applicable Law" in Katharina Boele-Woelki and Tone Sverdrup (eds) *European Challenges in Contemporary Family Law* European Family Law Series No 19 (Intersentia, Antwerp, 2008) 321-341; See further Maarit Jänterä-Jareborg "Jurisdiction and Applicable Law in Cross-Border Divorce Cases in Europe" in Jürgen Basedow, Hans Baum and Yuko Nishitani (eds) *Japanese and European Private International Law in Comparative Perspective* (Mohr Siebeck, Tübingen, 2008) 317-343; and Vesna Lazić "Recent Developments in Harmonizing European Private International Law" in *Family Matters* (2008) 10 European Journal of Law Reform 75-96.

29 Under the proposal the law chosen must be one that is identified as having a connection with the parties, such as habitual residence or nationality, or where the marriage took place. Also the law of the forum may be selected.

30 In the case of the United Kingdom and Ireland: where both spouses have their "domicile".

31 Art 20e of the proposal provides that the application of a provision of the law designated by this Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum. See Ted de Boer "Unwelcome Foreign Law: Public Policy and Other Means to Protect the Fundamental Values and Public Interests of the European Community" in Alberto Malatesta, Stefania Bariatti and Fausto Pocar (eds) *The External Dimension of EC Private International Law in Family and Succession Matters* (Cedam, Milan 2008) 293, 306.

however, be put into perspective. If the public policy exception is the only means to escape the application of unwelcome foreign divorce law there are absolutely no commonly accepted views upon which uniform conflict of laws rules can be built in any Community instrument.

In the Netherlands, for instance, this rule was proposed in the mid-1990s;[32] however, the private international law statute on divorce of 1981 has not yet been changed.[33] Further, it is well known that in the United Kingdom and in Ireland, the competent court always applies its own law. This common law approach, however, does not result in a block when a European Union private international law instrument is to be adopted because the United Kingdom and Ireland retained the right under the Treaty of Amsterdam of 1997 not to opt-in to the adoption of instruments if they are not in compliance with English or Irish law respectively. Last but not least, in Sweden, and also in Finland, the right to divorce is considered to be a fundamental right. As a result "a spouse should be free to end a marriage without risking time-consuming or costly proceedings" and it should be kept in mind that the "basically unlimited right to divorce is also an important issue of equality between men and women".[34] Ultimately, the Netherlands reluctantly accepted the Rome III proposal, although it strongly supported the *lex fori* camp. The United Kingdom and Ireland stood aside – they decided not to avail themselves of the possibility to opt-in[35] – and shrugged their shoulders,[36] whereas for two years Sweden strongly opposed and categorically remained against the proposal.[37] As a result unanimity among the Member States, which is required to adopt any amendment of the Brussels II bis Regulation, could not be reached.[38]

Was the Rome III proposal therefore too ambitious?[39] Undeniably, this depends on the aims and objectives of the legislative measure to be taken. Exactly where the European Union stands

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32 Recommendation of the *Staatscommissie IPR* 1995 no 17; included in the draft Bill for a PIL Statute of 2003 in Article 2.2.4.2.

33 According to Article 1 of the Dutch PIL Act on Divorce the applicable law is – provided that the parties have not chosen the applicable law which can be either the law of their common nationality or Dutch law - (1) the spouses' common national law, in the absence thereof (2) the law of the common habitual residence and in the absence thereof, (3) Dutch law.

34 Jänterä-Jareborg, above n 28, 340.

35 As a consequence they had *no* vote when the proposal came forward for adoption in the Council.

36 According to Fiorini, above n 25, 181, the Europeanization was clearly going too far for the United Kingdom and Ireland.

37 See for Sweden's objections: Jänterä-Jareborg, above n 28, 338 and 340.

38 See Julia Bateman "Law Societies" Joint Brussels Office, Brussels Bulletin: the French EU Presidency 2008, International Family Law 2008, 119, 120. Bateman predicted that "it is hard to obtain unanimous agreement among national governments on such a politically, morally and culturally sensitive issue as matrimonial matters".

39 Fiorini, above n 25.

determines the answer to the question of how the differences between the family law systems of the Member States can be effectively smoothed out or even taken away in order to facilitate the free movement of European Union citizens. In any case those citizens should have access to justice, the applicable law should be predictable and the Member States' decisions should circulate freely. In trying to achieve these aims the unification of private international law rules within the European Union as such and at all costs should never be a goal in itself. The content of the rules is more important. In addition, it should be respected that for some Member States higher values than the uniformity of rules and a coherent approach prevail.

IV ENHANCED COOPERATION: WHAT DOES IT ENTAIL?

For the first time during the EC's legislative activities in cross-border matters unanimity in adopting (an amendment of) a Regulation – which in the case of the Rome III proposal undoubtedly contained a substantive modification – could not be reached. When it has been established within the Council of Ministers that the objectives of an intended cooperation among *all* Member States cannot be attained within a reasonable period, the question then arises how such a quandary can be resolved. The Treaty of Amsterdam of 1997 which was amended by the Treaty of Nice in 2001[40] introduced the so-called *enhanced cooperation* of a certain number of Member States, but that may only be undertaken as a last resort.[41] Astonishingly, the private international law rules for divorce would be the first test-case for this only remaining option. Currently, bits and pieces of the enhanced cooperation procedure are scattered in 14 different provisions.[42] Under the Treaty of Lisbon these provisions will be replaced by Article 10 bringing together the different rules which, at present, are effective.[43]

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40 In view of the enlargement of the European Union to 27 Member States.

41 Art 43a TEU.

42 Art 27a-27e, Art 40-40b and Art 43-45 TEU.

43 This provision determines:

1. Member States which wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties, subject to the limits and in accordance with the procedures laid down in this Article and in Articles 280a to 280i of the Treaty on the Functioning of the European Union.

Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States, in accordance with Article 280c of the Treaty on the Functioning of the European Union.

2. The decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it. The Council shall act in accordance with the procedure laid down in Article 280d of the Treaty on the Functioning of the European Union.

The current procedure is long and complicated.[44] First, a group of at least eight[45] Member States address a request to the Commission to establish enhanced cooperation. Then the Commission drafts and submits a proposal to the Council of Ministers to that effect. Next the Council approves the proposal acting on a qualified majority after having consulted the European Parliament. At this stage, a member of the Council may request that the matter be referred to the European Council of Heads of State and Government. Finally, the matter is referred back to the Council of Ministers, which may act by majority.

At the moment it became clear that the unanimity required for the adoption of the Rome III proposal could not be obtained, eight Member States[46] informally reported to the Council their intention to launch the enhanced cooperation mechanism and to request the Commission to draft a proposal to that end. Further it was announced that others[47] were likely to join in that cooperation; however, some Member States[48] expressed doubts as to whether enhanced cooperation was appropriate in this case, whereas a few Member States stated that they did not intend to participate in the instrument but had no reservations regarding enhanced cooperation. The Commission was ready to consider the formal request for enhanced cooperation – and it was announced that it would take place on 28 July 2008, but it did not wish to indicate beforehand what the content of that proposal might be. However, it stressed that it would consider the request in the light of the political, legal and practical aspects of a proposal of this nature.[49]

At the end of July 2008 the request to start the enhanced cooperation procedure was indeed submitted by nine Member States: Austria, France, Greece, Hungary, Italy, Luxemburg, Romania, Slovenia and Spain. Most likely the Commission will proceed and draft a proposal. However, it is uncertain whether the Council of Ministers – to which the request is to be addressed – really likes the idea that the procedure which has previously never been used will be employed to avoid the

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3. All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote. The voting rules are set out in Article 280e of the Treaty on the Functioning of the European Union.

4. Acts adopted in the framework of enhanced cooperation shall bind only participating Member States. They shall not be regarded as part of the *acquis* which has to be accepted by candidate States for accession to the Union.

44 See for a detailed description of the mechanism http://europa.eu/scadplus/nice_treaty/cooperations_en.htm.

45 When the Treaty of Lisbon becomes effective at least nine Member States must be interested to establish the closer cooperation. See Art 10 para. 2, above n 44.

46 Austria, Greece, Hungary, Italy, Luxembourg, Romania, Slovenia and Spain.

47 Belgium, Germany, Lithuania and Portugal.

48 Malta and Sweden.

49 See Press Release of the 2887th Council meeting, Justice and Home Affairs, Brussels, 24 and 25 July 2008, 11653/08 (Presse 205).

unanimity rules and to create different speeds in the unification of law within Europe. Will the hesitation of some Member States not to embark on the enhanced cooperation procedure not cause some hesitation and reluctance by those who initially ventured to pursue this path? Surely the area of international divorce law is not specific enough and indeed too insignificant[50] to allow Europe to be split up into two or even more parts, or, to put it differently, to give up the unanimity which, to date, has always been achieved in cross-border matters? At any rate, exciting times are awaiting us.

V POSSIBLE SCENARIOS

The question arises as to *how* exactly the Member States will be able to escape the deadlock caused by the lack of unanimity in respect of the Rome III proposal. Undeniably, all depends upon the political will of the Member States to continue cooperation in the field of international divorce law and, if so, to what extent. Hypothetically, the following scenarios are possible:

(1) Brussels II bis will not be amended.

This is the easiest way to proceed. Let us keep everything unchanged. In view of the option under (2) it is however unlikely that all suggestions made in the Rome III proposal will be removed from the table.

(2) Brussels II bis will be revised with additional clauses on choice of court agreements.

Given the fact that this part of the Rome III proposal was predominantly met with approval,[51] it is to be expected that this option will be further pursued. In fact, substantive changes are not necessary. The rules on international procedure (jurisdiction and recognition and enforcement) on the one side remain communitarian rules – the new regulation can be indicated with Brussels II ter – whereas the rules on applicable law (conflict of laws rules), on the other side, remain the national rules of the Member States. The advantage of this option might be that also the United Kingdom and Ireland would come on board. They opted into the Brussels II bis Regulation.

(3) Brussels II bis will only be complemented with rules on party autonomy to select the competent court and the applicable law.

The choice of the applicable law by the parties contained in the Rome III proposal received the support of a large majority of the Member States.[52] Technically, it would be

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50 The idea of making use of *enhanced cooperation* in respect of the PIL aspects of non-marital registered relationships has been proffered by I. Curry-Sumner "All's Well That Ends Registered? The Substantive and Private International Law Aspects of Non-Marital Registered Relationships in Europe" European Family Law Series, No 11, 2005, 531: "With these rules never having been used before, perhaps the time has come for the waters to be tested."

51 This also applies to the United Kingdom. See Fiorini, above n 25, 187.

52 See Fiorini, above n 25, 194.

possible that the European legislature only regulates all aspects of the spouses' choice of the applicable law including the rule that in the absence of a choice the national conflict of laws rules of the Member States will determine which law is to be applied. It is questionable, however, whether this option provides a practical solution. Generally, conflict of laws rules, whether they either use an *optio iuris* by the parties, nationality or habitual residence[53] as connecting factors, should be kept together in one and the same legislative measure, be it a regulation or a national statute. Dividing these rules among two different levels – the communitarian level for the choice of the applicable law by the parties on the one side and the national level for the conflict of laws rules applicable in the absence of a choice of law by the parties, on the other – will cause confusion. As a corollary, the predictability of the divorce law to be applied is in danger.

(4) At least eight Member States proceed with negotiations on an instrument which is to be adopted under the enhanced cooperation procedure.

Several paths may be followed. First, the Rome III proposal in respect of the applicable law upon which no unanimity could be reached might be adopted. As has been mentioned above several Member States have initiated this special mechanism. It is surprising that their declaration has been characterised as an action which allows a group of Member States "to go forward faster than others",[54] which "streamlines EU divorce laws"[55] or which "simplifies divorce law".[56] From these kinds of one-liners one easily gets the impression that the Member States which support the enhanced cooperation procedure belong to the frontrunners in terms of modernity and liberalism in the field of (international) divorce law. However, this is not the case. On the contrary. The unsuccessful Rome III proposal truly follows a traditional approach. Adopting the current proposal would entail a retrograde step since the courts of the enhanced cooperation Member States would have to apply foreign divorce law which in many cases is less liberal than their own laws. In addition it should be emphasised that it is not evident at all whether the rules adopted within the enhanced cooperation procedure will work or not. Figures about couples who apply for a divorce and who have moved between Member States (which?) and when do not exist. Will the enhanced cooperation in the field of international divorce really contribute to further the objectives of the Union, protect its interests and reinforce its integration process?

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53 This functional connecting factor usually remains undefined. Its understanding may vary on the basis of the quality of the person it relates to and the context in which it plays a role. See Fiorini, above n 25, 197.

54 Above n 1.

55 See www.ukom.gov.si/eng/slovenia/publications/slovenia-news (accessed 1 September 2008).

56 See Negen EU-landen willen samen echtscheiding vereenvoudigen www.tijd.be/nieuws/buitenland/ (accessed 1 September 2008).

More importantly, if, finally, a group of Member States decides to test the waters, then another group of Member States might move in a different direction. Those who favour the *lex fori* approach, for instance, might come up with a new Rome III proposal which contains the uncomplicated rule that the competent court applies its own law provided that the parties have not chosen the applicable law which could be the law of their common nationality or their common habitual residence.[57] So far, seven countries would have no difficulties in supporting this option: Cyprus, Finland, Ireland, Latvia, the Netherlands, Sweden and the United Kingdom. Additional Member States might join such a proposal in order to reach the required number of eight. This would then result in two Rome III instruments which contain different rules for the applicable law. Undoubtedly this would create uncontrollable layers of complexity. In addition, another important detail should be kept in mind: the enhanced cooperation cannot become exclusive; any other Member State must be able to join the original group at a later stage and also a switch from one instrument to the other should be possible. In addition, it is unlikely that all Member States will cooperate in one of these two instruments. Malta, for instance, applies a "wait and see" policy.[58] It has not yet been reported that Malta intends to introduce divorce and therefore the Maltese courts need no conflict of laws rules for divorce.

(5) All Member States return to the table to renegotiate a less ambitious Rome III instrument.

A Community approach to the conflict of laws rules in divorce law has turned out to be unfeasible so far. Would it really be possible to reopen the discussions? Presently, the different views seem to be unbridgeable, but enhanced cooperation also entails considerable disadvantages. It might be a tool to frustrate the European Union-wide cooperation not only in respect of divorce law but also in respect of other family law matters, including the law of succession and even beyond these areas of law. Hence, it might set an important precedent the consequences of which Member States ought not overlook at this stage. As time goes by, uneasiness about the ominous divide caused by an enhanced cooperation initiative might increase.

Meanwhile another aspect should be taken into account, namely the interrelationship between the substantive divorce rules, on the one side, and the private international law rules for divorce on the other. It is well known that the current substantive divorce laws of the 27 Member States differ widely. The liberal Scandinavian systems are set against Ireland or Poland where several conditions must be fulfilled before spouses can request

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57 The application of foreign law on the basis of the parties' agreement is considered to be much more acceptable for states opposed to the application of foreign law than when foreign law is to be applied in the absence of any choice. See Jänterä-Jareborg, above n 28, 342 n 78.

58 See Malta Monitoring Cross-Border Divorce Proposal by EU Countries www.timesofmalta.com/articles/ (accessed 1 September 2008).

the dissolution of their marriage, whereas Malta is the tail-ender in this respect. In an overview of the divorce systems within the European Union, emphasis is often only put on these distinct differences. It has been proven, however, that there is a long list of aspects, in respect of which it is possible to detect a common core as well as converging tendencies.[59] When the differences in the substantive divorce laws of the Member States are becoming increasingly less pronounced such a development would also have an influence on the convergence of the national approaches towards cross-border divorces, in particular the question of which law is to be applied. Unquestionably, this process will last a long time but comparative research has been undertaken and European models are available. Member States can take, for instance, the Principles of European Family Law Regarding Divorce[60] as a frame of reference when considering a reform of their divorce laws.[61] In any event renegotiating the applicable law issue in the field of divorce requires a great deal of patience and it is difficult to predict whether it will really occur.

VI PROGRESS OR REGRESSION?

Generally, the term enhanced cooperation has a positive connotation. Within the framework of the European Union Treaty and the legislative measures to be taken by Member States based thereon, however, enhanced cooperation has a different meaning. A two- or even three-speed Europe might emerge concerning a specific area of law such as international divorce. As a result, the cooperation of all Member States ends where the enhanced cooperation of some Member States begins. Is this development to be considered as either progress or a regression? Perceptibly it

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59 For instance: The law permits divorce; the divorce procedure is determined by law; divorce is permitted upon the basis of the spouses' mutual consent; the agreement containing the mutual consent regarding the dissolution of the marriage is expressed either by a joint application of the spouses or by an application by one spouse with the acceptance of the other spouse; the competent authority determines the consequences for the children (parental responsibility, including the residence of, and the contact arrangements for, the children and child maintenance). An agreement between the spouses is taken into account in so far as it is consistent with the best interests of the child; the competent authority scrutinises the validity of the agreement on the division or reallocation of property and spousal maintenance; the divorce is permitted without the consent of one of the spouses if they have been factually separated for a certain period of time; in cases of exceptional hardship to the petitioner, the competent authority grants a divorce where the spouses have not been factually separated for a certain period; in the case of a divorce without the consent of the other spouse, the competent authority determines, where necessary, parental responsibility, including the residence of and contact arrangements for the children and child maintenance. See Katharina Boele-Woelki "Building on Convergence and Coping with Divergence" in Masha Antokolskaia (ed) *Convergence and Divergence of Family Law in Europe* European Family Law Series, No 18 (Intersentia, Antwerp, 2007) 253, 265-267.

60 See Katharina Boele-Woelki, Frédérique Ferrand, Cristina González Beilfuss, Maarit Jänterä-Jareborg, Nigel Lowe, Dieter Martiny and Walter Pintens *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses* European Family Law Series, No 7 (Intersentia, Antwerp, 2004).

61 The new divorce law in Portugal is a good example of this approach. See Lei do Divórcio reapreciada a 17 de Septembro a Estatuto dos Açores a 26 http://ultimahora.publico.clix.pt (accessed 1 September 2008).

depends on one's own perspective. If more weight is given to unanimous decisions within the European Union which create uniform rules to be applied the answer is obvious: the enhanced cooperation is a retrograde step creating differences and complexity. It divides the European Union into different camps with different rules. It should be kept in mind that initially the enhanced cooperation was certainly not instituted with private international law issues in mind. Essentially, it should be used for substantive law in order to further enhance the internal market and serve economic purposes. Moreover, in all other areas of law the enhanced cooperation epitomised in the field of international divorce law might be cited as a precedent. From now on it will be easier in any other field of law where unanimity and agreement are required to argue that if enhanced cooperation has taken place here then it may also be used anywhere else. For some it might be – to put it dramatically – the beginning of the end. If, on the other hand, the content of the rules is considered to be more decisive than centralist lawmaking the failure of the Rome III proposal and the subsequent enhanced cooperation might also have positive effects. At least the traditional approach of the Rome III proposal is removed from the table for all Members States. Unanimity cannot be reached at all costs. The price to be paid was too high for those jurisdictions where divorce is recognised as being a right. They would have been put into a strait-jacket which would have violated their fundamental norms and values. Further, it should be kept in mind that there is not only one single set of rules which at the same time are also the best rules. The failure of the Rome III proposal and the subsequent enhanced cooperation leads – as has been demonstrated – to different approaches within the European Union. As a result, they compete with each other. After a certain period of time has elapsed a comparison and evaluation can take place. By then one of the pertinent questions might, for example, be how often and under which circumstances foreign divorce law has been applied by the Member States' courts which will take over the unsuccessful Rome III proposal. Necessarily, a review procedure, as foreseen in all private international law regulations,[62] should also become part of enhanced cooperation instruments. A comparative report on the application of the rules on the basis of information supplied by the respective Member States might be accompanied by proposals for adaptations. All in all the possibilities provided by the enhanced cooperation procedure are experimental. It might lead to innovation: countries that see how certain legal rules and solutions are successful abroad might be tempted to adopt these for their international family procedures.[63] It remains to be seen whether this will actually happen. In the near future, however, the colourful picture below strikingly illustrates the European Union's approach towards international divorce law.

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62 See for instance *Brussels II bis* Regulation, art 65

63 See in respect of a similar context Jan Smits "Mixed Jurisdictions: Lessons for European Harmonisation?" (2000) 3 Electronic Journal of Comparative Law www.ejcl.org/121/art121-23.pdf.