Party Autonomy in European Family and Succession Law

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Abstract In this contribution, party autonomy is discussed in relation to European family and succession law. The topic is briefly introduced, followed by a survey covering the main EU-instruments with particular emphasis on the parties' possibility to influence choice of court and law by agreements. Thus, autonomy as described in this contribution embraces both prorogation

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and choice of law. The contribution also includes a brief comparison with the development of party autonomy in Sweden and some general conclusions are presented. It is observed that party autonomy in European family and succession law can be described as an area characterized by a number of dividing interests and that we can see a trend towards increased party autonomy balanced by a similarly increased possibility for court discretion to take into account the interest of weaker parties. This fosters a development towards incomprehensible rules and legal instruments that leads to the conclusion that complexity is the new black.

Keywords party autonomy, European family and succession law, Swedish international family law, Nordic international family law.

I. Introduction

Over the last decades, European family and succession law has seen a gradual implementation of party autonomy. Irrespective of potential skepticism, party autonomy plays an important role in the current European instruments and it seems likely that this is an on-going development, and that the importance of party autonomy will increase rather than decrease. However, the fact that party autonomy exists and is generally acclaimed, does not mean that the recent development is impervious to criticism. There might well be reasons to examine ways to improve and enhance the current system. This contribution aims at creating grounds for such discussions.

Before party autonomy can actually be analyzed and discussed, it is necessary to agree on a definition. In this contribution, I have chosen a rather broad definition and will use the concept of party autonomy in relation to parties' mutual choice of both law as well as court.[1] Unilateral dispositions will thus not be directly covered, but the inclusion of unilateral options will be touched upon when necessary in order to convey the bigger and more complete picture.

This study will focus primarily on the developments within the EU and use European instruments as examples and objects. In addition, the national developments of party autonomy in family and succession law in Sweden

1 For a discussion about different definitions of party autonomy, see *Mills,* Party Autonomy in Private International Law, p. 14–24.

(and to some extent the Nordic countries) will be provided as a comparative example.

II. The development of party autonomy in family and succession law – history and justification

Traditionally, party autonomy has not played a significant role in family law, most likely due to the public interests involved.[2] From the outset, party autonomy in general has been regarded as somewhat controversial and surrounded by opposing interests. Party autonomy may be regarded as part of personal freedom – a vested right conferred directly on individuals and as such closely related to human rights and individual freedom and fairness. However, party autonomy can also be described as a privilege granted by the State regarding interests (jurisdiction, application of law, and recognition and enforcement) which are indispensably connected to the State.[3]

Much could be said regarding different justifications for party autonomy and I will not develop these discussions thoroughly. Obvious opposing interests are the ones described above – individual freedom versus State sovereignty – and the inclusion of party autonomy in this regard is usually justified with utilitarian and/or liberal arguments.[4]

Another way to view party autonomy would be to discuss this version of individual freedom as part of the realm of contractual freedom in general, but due to its special nature, party autonomy can be described as a separate entity – an agreement of its own kind (*sui generis*) – and thus an agreement that must be treated according to its own conditions.[5]

The early examples of party autonomy are to be found in the area of commercial law.[6] In family and succession law, the resistance to party autonomy was more persistent. Both family and succession law are more sensitive areas, fenced by protectable interests of the weaker parties, and it is logical that the State should be more involved (i.e. wielding more influence and greater control) in these areas than in relation to commercial transactions.

2 *Mills*, Party Autonomy in Private International Law, p. 444.
3 *Mills*, Party Autonomy in Private International Law, p. 6, 8.
4 *Mills*, Party Autonomy in Private International Law, p. 29–90; *Basedow*, The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws, p. 149–152; *Nygh*, Autonomy in International Contracts, p. 258.
5 *Mills*, Party Autonomy in Private International Law, p. 21.
6 E.g. the Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods.

But the need for foreseeability and individual freedom also exists in relation to family and succession law, and it may actually be stated that party autonomy as a form of exercising human rights is a claim that can be said to be strongest in relation to family law.[7] Hence, it is logical that that there has been a trend towards party autonomy in family and succession law, but it is also natural that the freedom that this creates is connected to special protection mechanisms. In contrast to the principal rule in commercial law, where party autonomy usually is provided in an open-ended fashion (i.e. with more or less complete freedom to choose), the principal rule in family law is rather limited (occasionally described as indirect) autonomy.[8]

Limited party autonomy is usually designed in relation to different objective connecting-factors and autonomy in this context means that the parties are allowed to choose between a number of given options, usually selected in view of their strong connection to the dispute at hand. Hereinafter, I will use the term limited autonomy to denote this situation and I will use the term indirect autonomy for situations where parties can influence choice of court and law by means other than an agreement. One such example is when jurisdiction is conferred to a court by the appearance of the defendant. Another example is when a number of different options focusing on objective connecting-factors are expressed directly in law, providing the plaintiff with an individual possibility to choose (among the different alternatives). This kind of freedom is indeed individual, but it does not really encompass party autonomy, as these choices are unilateral acts and not agreements between the parties.

As regards the recent developments in family law, it can first of all be concluded that modern families do not fit the traditional and conservative framework, which indicates that family law (including its international dimension) needs to adapt. This adaption is, as will be further developed below, on-going. As indicated above, the usual way to address party autonomy in this area of law is to provide the parties with means to choose between different forms of objective criteria. There may also be additional choices, e.g. due to multicultural identity providing room for a choice between different forms of personal identities that can be transferred into different objective criteria, but such elaborate choices will not be included in the presentation that follows.[9]

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7 *Mills*, Party Autonomy in Private International Law, p. 72.

8 *Mills*, Party Autonomy in Private International Law, p. 14.

9 Multicultural identity and its effects on autonomy are discussed by *Mills*, Party Auton-

III. Party autonomy in European family and succession law

1. Introductory remarks

Although this contribution deals with family and succession law, it may be relevant to remember that party autonomy was an integral part of the original Brussels Convention of 1968. It may thus be stated that party autonomy has been a living concept since the beginning of the development of European private international law.[10]

It will therefore be no surprise that party autonomy was also considered in relation to the first instrument in family law – the Brussels II regulation – that was negotiated during the 1990s and adopted in 2000. From the outset, it can be concluded that the EU version of party autonomy in family and succession law is primarily designed as limited.

In this section, the different European instruments will be covered in chronological order and a specific focus will be put on different provisions that provide for (limited) party autonomy. Indirect autonomy is treated in a more synoptical manner. A comparison with the development of party autonomy in Sweden will follow in section IV, and further analysis in section V and VI.

2. The Brussels II Regulations

a. Past

The Brussels II Regulation was inspired by the 1996 Hague Child Protection Convention and thus the first version of the Regulation is – in important aspects – similar to the Convention. There are no express provisions regarding party autonomy in the Brussels II Regulation, but the Regulation allows for different types of choices. As regards divorce proceedings, the choice is comprised of the possibility for the parties to choose among the jurisdictional rules that are present in the Regulation (Art. 3–6). All choices are based on a strong connection to the forum and in principle (not least due to the express wording of Art. 7), imply that there are no additional possibilities

omy in Private International Law, p. 445. Related problems are discussed in CJEU, 02. 10. 2003, C-148/02 (*Garcia Avello/Belgium*), where the CJEU is providing guidelines for handling dual nationality issues which opens the way for indirect choices.

10 See further *Jenard* Report, p. 36–38.

to prorogate jurisdiction, and that there is no possibility to derogate jurisdiction in the sense that it is not possible to enter into an agreement in order to prevent a court that bases its jurisdiction on the rules in Art. 2–6 from hearing a case.[11] As regards divorce jurisdiction, the only provision that provides for party autonomy would be Art. 2 (a) indent 4, where the parties have a possibility to actively promote the competence of a specific court by a joint application.

As regards parental responsibilities, the Brussels II Regulation is (almost) silent when it comes to party autonomy. However, a sign of potential party autonomy is visible in Art. 3 (2), which provides that courts of a Member State exercising divorce jurisdiction shall have jurisdiction in a matter relating to parental responsibility over a child of both spouses also in some situations where the child is not habitually resident in that Member State. A precondition is that at least one of the spouses has parental responsibility in relation to the child and that the jurisdiction of the court has been accepted by the spouses and is in the best interests of the child.

The provision speaks of acceptance in relation to jurisdiction and it is, if anything, similar to the tacit choice of jurisdiction that may be found in Art. 26 Brussels I bis Regulation. This is not an express choice of court provision, but it is an indirect possibility for parties to actively give competence to a court (in addition to the divorce competence that is provided for by the Regulation).

b. Present

When the Brussels II Regulation was amended and transformed into the present Brussels II bis Regulation, the rules on party autonomy were further developed, particularly in relation to parental responsibility.

The Brussels II bis Regulation still provides limited options for autonomy in relation to divorce proceedings. The old Art. 2 (a) indent 4 is now to be found in Art. 3 (a) indent 4, and there is no change of wording. As regards parental responsibility, the old Art. 3 (2) has been extensively developed and amended and there is now an expressed, open-ended (albeit limited) provision regarding "real" party autonomy that is to be found in Art. 12 (3). The old provision in Art. 3 (2) has been transferred into a slightly amended version in the new Art. 12 (1). This provision still deals with the possible

11 *Magnus/Mankowski,* in: Magnus/Mankowski, Brussels II bis Regulation, Introduction note 129 et seq.

extension of jurisdiction for divorce courts to also handle questions regarding parental responsibility. The difference is that the old "acceptance" requirement has been enhanced insofar as the jurisdiction is to be accepted, expressly or otherwise, in an unequivocal manner by the spouses and by the holders of parental responsibility. The provision still provides room for the court's discretion in the sense that it is mandatory that the jurisdiction is in the best interest of the child.[12] In this regard, it is relevant to note that the possibility to prorogate jurisdiction is mentioned as an exception to the principle rule that competence should reside with the court where the child has its habitual residence and that the Regulation is shaped in order to secure the best interest of the child.[13]

The real novelty (as regards party autonomy) in the Brussels II bis Regulation is Art. 12 (3), which provides for a choice of court possibility for cases regarding parental responsibility irrespective of the divorce jurisdiction of the court. Art. 12 (3) states that courts of a Member State shall also have jurisdiction (in addition to the possibilities mentioned in Art. 12 (1) about extension of the competence for divorce courts) in relation to parental responsibility if the child has a substantial connection with that Member State and the jurisdiction of the courts has been accepted, expressly or otherwise, in an unequivocal manner by all the parties to the proceedings. Also, in relation to this provision, there exists room for discretion built on the fact that the seized court shall take into account the best interest of the child.

As regards the close connection criteria, it is mentioned that such a connection can be created by the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State (Art. 12 (3) (a) Brussels II bis Regulation).

When it comes to the application of the Brussels II bis Regulation, there are some CJEU cases. In case C-436/13 (*E/B*), some issues regarding Art. 12 (3) were discussed, namely temporal aspects with regard to the competence that may be established through this provision.[14] It was argued that a court, once competent under Art. 12 (3), should remain competent in "similar issues" even after the case was finally decided. The CJEU however, firmly declined

12 It may be noted that the English version of Art. 12 uses different expressions in Art. 12 (3) – best interest of the child – and Art. 12 (1) (b) – superior interest of the child. It seems, however, that this difference it not supposed to impose a different meaning. See *Pataut,* in: Magnus/Mankowski, Art. 12 Brussels II bis Regulation note 51 et seq. and 55. The conclusion is further confirmed by other language versions (e.g. the Swedish version) where the same wording applies in both provisions.

13 Recital 12 Brussels II bis Regulation.

14 CJEU, 01. 10. 2014, C-436/13 (*E/B*).

this proposition and clarified that the jurisdiction of a court in matters of parental responsibility must be verified and established in each specific case where a court is seized, which implies that it does not continue after pending proceedings have been brought to a close.[15]

In case C-656/13 (*L/M*), there were two questions regarding Art. 12 (3).[16] The first question dealt with the scope of application, with the CJEU confirming that this provision must be interpreted as allowing, for the purposes of proceedings in matters of parental responsibility, the jurisdiction of a court of a Member State which is not that of the child's habitual residence, to be established even where no other proceedings are pending before the court chosen.[17] The second question regarded the expression "accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings". The CJEU concluded that it cannot be considered that the jurisdiction of the court seized by one party has been "accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings" within the meaning of that provision where the defendant in those first proceedings subsequently brings a second set of proceedings before the same court and, on taking the first step required in the first proceedings, pleads the lack of jurisdiction of that court.[18]

In case C-215/15 (*Gogova/Iliev*), it was clarified that an absent defendant on whom the document instituting proceedings had not been served and who was unaware that proceedings had commenced, cannot in any event be regarded as accepting that jurisdiction.[19] Thus, the requirements in Art. 12 (3) that prorogation shall be "accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings" is not fulfilled solely because the legal representative of the defendant, appointed in view of the impossibility of serving the document instituting proceedings on the defendant, has not pleaded the lack of jurisdiction before the court that is to take a decision on its competence.[20]

Finally, in case C-565/16 (*Saponaro/Xylina*), it is clarified that the joint lodging of proceedings by the parents of the child before the court of their choice is an unequivocal acceptance by them of the competence of that court.[21] It is further established that a prosecutor who, according to the law of

15 CJEU, 01. 10. 2014, C-436/13 (*E/B*), note 45–50.
16 CJEU, 12. 11. 2014, C-656/13 (*L/M*).
17 CJEU, 12. 11. 2014, C-656/13 (*L/M*), note 52.
18 CJEU, 12. 11. 2014, C-656/13 (*L/M*), note 59.
19 CJEU, 21. 10. 2015, C-215/15 (*Gogova/Ilev*).
20 CJEU, 21. 10. 2015, C-215/15 (*Gogova/Ilev*), note 47.
21 CJEU, 19. 04. 2018, C-565/16 (*Saponaro and Xylina*).

the forum State, has the capacity of a party to the proceedings commenced by the parents, is a party to the proceedings within the meaning of Art. 12 (3) (b). In the capacity of party to the proceedings, it is possible to preclude jurisdiction by opposition, but the lack of such opposition may be regarded as an implicit agreement, meaning that the condition of the unequivocal acceptance of prorogation of jurisdiction by all the parties to the proceedings may be held to be satisfied.[22]

In summary, it can be concluded that the Brussels II bis Regulation provides a limited version of party autonomy with choices that are based on existing strong objective connections to the forum. It can also be noted that the Regulation provides for plenty of room for court discretion (usually based of the best interest of the child) and for a specific provision on *forum non conveniens* (Art. 15).

In this regard, it can be stated that the Regulation does not really contain an expression of party autonomy, but is rather an expression of efficiency in relation to proceedings, with some options.[23]

c. Future

The Brussels II ter Regulation does not entail any substantive amendments as regards party autonomy. The question of party autonomy is furthermore not directly commented on in the discussions that preceded the new Regulation.[24] One observation is that the title of Art. 12 Brussels II bis Regulation (which will be Art. 10 in the Recast) is amended from prorogation of jurisdiction to choice of court. In an earlier version of the now adopted Regulation, it was suggested that this title should be "Choice of court for ancillary and autonomous proceedings" which, in a sense, would be a better description inasmuch as it indicates that this provision does not really entail any freedom of choice for the parties, but rather some limited options for specific situations.[25] Nevertheless, it can be concluded that party autonomy exists (albeit in in a limited fashion) in relation to jurisdiction regarding divorce and parental responsibility proceedings, but the principal rule is still that jurisdiction should be based on the express rules in the Regulation and all posibilities to find a competent court are based on a true and strong connection to the forum. Hence, the novelty in the Brussels II ter Regulation is not the

22 CJEU, 19. 04. 2018, C-565/16 (*Saponaro and Xylina*), note 40.
23 *Pataut,* in: Magnus/Mankowski, Art. 12 Brussels II bis Regulation note 1–9.
24 COM (2016) 411 final.
25 COM (2016) 411 final, p. 37.

introduction of party autonomy, but rather the introduction of a far reaching discretion for courts to take into account the best interest of the child and an express *forum non conveniens* provision that allows a court to deny its competence in favor of a more suitable court.

In light of the fact that the Brussels II ter Regulation was adopted in 2019, it is not likely that there will be a development towards enhanced party autonomy in the fields covered by the Regulation in the near future.[26]

A potential development of a new form of party autonomy would be the strengthened position for children affected by disputes, by the fact that they are to be heard to a greater extent than before. Such hearings have a potential influence on jurisdiction and may thus be developed as an expression of indirect party autonomy, with the twist that children in these circumstances are to be regarded as third parties. Irrespective of this, it is not unlikely that there will be a development where spouses with parental responsibility will try to affect the issue of competence by influencing their children. Such a development is likely inevitable when the child's voice becomes more influential, but it is a development that needs to be closely monitored in order to make sure that it is the interest of the child that is in focus and not the indirect interest of parents – trying to influence the court's decision regarding its own competence by exercising influence over their children.

3. Maintenance

a. Introductory remarks

As regards maintenance, the EU has chosen a two-pronged solution. Questions regarding jurisdiction and recognition and enforcement are covered by the Maintenance Regulation and questions regarding choice of law are answered by the 2007 Hague Maintenance Protocol. This latter instrument was adopted by the EU as a member of the HCCH and thereby became applicable in the EU Member States. Instead of turning the Protocol into a regulation (e.g. by including rules on choice of law directly into the Maintenance Regulation), it was decided that the Protocol should be directly applicable in the Member States. In this section, aspects regarding party autonomy will be discussed first in relation to the Regulation and thereafter to the Protocol.

26 The Brussels II ter Regulation was adopted on 25.06.2019, but it will not be applied until 01.06.2022 (cf. Art. 100 (1) Brussels II ter Regulation).

b. The Maintenance Regulation

The Maintenance Regulation contains a specific provision in Art. 4 regarding choice of court. This is a concrete expression of party autonomy, but it is still an autonomy with limitations. The recitals clarify that party autonomy in this regard exists in order to increase legal certainty, but it is also emphasized that such autonomy should not be allowed in the case of maintenance obligations towards a child under the age of 18.[27]

The options that are available for choice of court agreements are all forums with an established strong connection to the dispute, making it possible for the parties to agree on a court of a Member State in which one of the parties is habitually resident or of which one of the parties has the nationality. In addition, spouses or former spouses may also choose the court which has jurisdiction to settle their dispute in matrimonial matters or the court of the Member State of the spouses' last common habitual residence for a period of at least one year (Art. 4 (1)).

The jurisdiction conferred by an agreement shall be exclusive unless the parties have agreed otherwise; additionally, the agreement shall be in writing (Art. 4 (1) and (2) Maintenance Regulation). It is also to be observed that the choice of court agreements discussed in Art. 4 are not applicable in relation to a child under the age of 18 (Art. 4 (3)). The Regulation also provides an indirect autonomy inasmuch as it allows "tacit" agreements (Art. 5).

As regards the application of the Regulation, there is no case law that specifically deals with the rules on party autonomy in Art. 4. In order to find a case that actually addresses aspects of autonomy in relation to maintenance, we need to look at Art. 5 and its rule regarding jurisdiction based on the appearance of the defendant. In this regard one case that may be of interest is C-468/18 (*R/P*).[28]

The case regards a complicated, but not unusual, situation with three heads of claims: divorce, parental responsibility, and maintenance. The Romanian court seized was competent regarding the application for divorce, but not for the parental responsibility claim. The question regarding the competence to hear the maintenance claim was addressed to the CJEU, among other things, regarding the fact that the defendant had appeared without contesting the court's competence. Thus, the application of Art. 5 was discussed and the CJEU concluded that the Romanian court was to be regarded

27 Recital 19 Maintenance Regulation.
28 CJEU, 05. 09. 2019, C-468/18 (*R/P*).

as competent if the defendant, in accordance with Art. 5, had appeared before that court.

c. The 2007 Hague Maintenance Protocol

As regards choice of law, the 2007 Hague Maintenance Protocol is the central instrument. The Protocol entails a rather strict regulation in favor of the law of the State of the habitual residence of the creditor (Art. 3).

Regarding autonomy, there are several relevant provisions. To begin with, the Protocol leaves some room for indirect autonomy. One such example is that the creditor will, by seizing a competent court or other authority, influence the choice by making the law of the forum applicable. This is not real party autonomy though, and the influence is limited by safeguards in the situation where the creditor is unable, by virtue of the law of the forum, to obtain maintenance from the debtor, allowing a court to apply e.g. the law of the State of the habitual residence of the creditor (Art. 4 of the 2007 Hague Maintenance Protocol).

In addition, there is a specific rule regarding spouses that allows the parties to object against the application of Art. 3 and 4 of the Protocol, and thereby compel the court to apply a law to which the marriage has a closer connection. This would typically be the State of the spouses' last common habitual residence (Art. 5).

In addition, there are express rules in favor of party autonomy. In Art. 7, it is provided that the maintenance creditor and the debtor, for the purpose only of a particular proceeding (e.g. an on-going divorce proceeding or a proceeding regarding parental responsibility), in a given State may expressly designate the law of that State as applicable to a maintenance obligation.

Furthermore, Art. 8 provides that the maintenance creditor and the debtor may at any time designate one of the following laws as applicable to a maintenance obligation: a) the law of any State of which either party is a national at the time of the designation; b) the law of the State of the habitual residence of either party at the time of designation; c) the law designated by the parties as applicable or the law in fact applied to their property regime; d) the law designated by the parties as applicable, or the law in fact applied to their divorce or legal separation.

But there are still certain safeguards. To begin with, choice of law agreements under Art. 8 are not applicable in respect of a person under the age of 18 or of an adult who, by reason of an impairment or insufficiency of his or her personal faculties, is not in a position to protect his or her interest

(Art. 8 (3)). Another safeguard deals specifically with questions of renouncement in relation to which the law of the State of the habitual residence of the creditor at the time of the renouncement shall be applied, irrespective of potential choice of law agreements.

Finally, Art. 8 (5) provides room for court discretion inasmuch as it allows the court to refuse to apply the law designated by the parties where the application of that law would lead to manifestly unfair or unreasonable consequences for any of the parties.

Thus, it can be concluded that the Protocol provides an open-ended party autonomy rule, but it is still a rule that is embedded in a safe environment and there is still plenty of room for discretion. As regards the application of the Protocol, there are no decisions from the CJEU dealing with party autonomy.

4. The Rome III Regulation

In order to complement the Brussel II bis Regulation it was discussed to establish another regulation on conflict of laws in relation to divorce proceedings. This, however, appeared to be a mission impossible if all Member States were to agree on a joint wording. Thus, some Member States decided to pursue the project in line with the existing possibilities of enhanced cooperation and this made the Rome III Regulation possible. The Regulation, however, is not applicable in Sweden which had strong dissenting opinions in the negotiations.

In relation to this Regulation, it is emphasized that the increased mobility among EU citizens calls for flexibility and legal certainty and, in order to pursue these objectives, party autonomy should be enhanced.[29] Autonomy, however, should be limited to the laws of the countries with which the spouses have a special connection. Moreover, their choice should be informed in order to ensure that the two spouses are aware of the legal implications of the choice of law agreement that they have concluded.[30]

The provision on party autonomy in Art. 5 Rome III Regulation provides the spouses with a possibility to choose among four explicit options: the law of the State where the spouses are habitually resident, the law of the State where the spouses were last habitually resident, insofar as one of them still

29 Recital 15 Rome III Regulation.

30 Recital 16 and 18 Rome III Regulation.

resides there at the time the agreement is concluded, the law of the State of nationality of either spouse or the law of the forum (Art. 5 (1)).

The choice of law provision in Art. 5 is prompted by a specific rule regarding consent, providing that a spouse that wants to establish that he or she did not consent to the agreement, may rely upon the law of the country in which he or she is habitually resident at the time the court is seized. Provided that it appears from the circumstances that it would not be reasonable to determine the effect of the consent in accordance with the law otherwise applicable according to the Regulation (Art. 6).

As regards the Rome III Regulation, it can be observed that discussions about party autonomy are more elaborate in the recitals compared to prior instruments. This might be an indication that party autonomy is also increasingly accepted in relation to "sensitive issues". Another observation is that the Regulation introduces a concept of consent (i.e. informed agreements). It may be argued that such prerequisites are implied in relation to all agreements, but the fact that this is made explicit in the Rome III Regulation underlines that the freedom to choose in this area of the law is to be handled with caution. It further underlines that courts in this field retain control over the adjudication of justice by a wide-reaching discretion.

As regards the application of the Regulation, there are no decisions from the CJEU that deal with the different provisions regarding party autonomy.

5. The Succession Regulation

Rules regarding succession are to be found in the Succession Regulation. One of the objectives of this Regulation is to enable citizens to know in advance which law will apply to their succession. Such legal certainty should be achieved with harmonized conflict of law rules and the applicable law should – as a principal rule – govern the succession as a whole.[31] Furthermore, it is stated that citizens should have the possibility to organize their succession in advance by choosing the law applicable to their succession. That choice, however, is not open-ended but limited to the law of a State of their nationality in order to ensure a connection between the deceased and the law chosen.[32]

This indicates that there is party autonomy as regards choice of law, but the recitals are quiet as regards prorogation. Still, there are some possibilities

31 Recital 37 Succession Regulation.

32 Recital 38 Succession Regulation.

to choose a court in addition to the limited options to choose the applicable law.

The Regulation actually introduces a dual system which enables a choice of court in the Member State whose law has been chosen by the deceased to govern the succession (Art. 5). Irrespective of an explicit choice of court agreement, a court of the Member State whose law has been chosen may have jurisdiction if the parties to the proceedings have expressly accepted the jurisdiction of the court seized (Art. 7 (c)).

In addition to the limited versions of party autonomy that are provided, there is also a possibility to base jurisdiction on appearance, under specific circumstances (Art. 9 Succession Regulation).

The overall impression is that the rules governing jurisdiction are rather technical and that it is difficult to foresee to what extent party autonomy will actually thrive in this environment. Either way, it is clear that the central provision regarding party autonomy in the Regulation is the rule in Art. 22 regarding choice of law.

The choice of law provision in the Regulation is, in contrast to the intertwined rule about jurisdiction, rather straightforward.[33] According to Art. 22, a person may, as the law to govern his or her succession as a whole, opt for the law of the State whose nationality he or she possesses at the time of making the choice or at the time of death (Art. 22 (1)). The choice shall be made expressly and the substantive validity of the act whereby the choice of law was made shall be governed by the chosen law (Art. 22 (2) and (3)). A specific possibility is provided for persons with multiple nationalities, as they may choose the law of any of the States whose nationality they possess (Art. 22 (1)).

As regards the application of the Regulation, there are so far no decisions from the CJEU that deal with the different provisions regarding party autonomy.

6. The Property Regimes Regulations

There are two mirroring EU-instruments dealing with property regimes. The first concerns matrimonial property regimes (Matrimonial Property Regulation) and the second matters of property consequences of registered

33 It may be relevant to note that similar provisions are included in Art. 5 of the Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons.

partnerships (Partnership Property Regulation). The two instruments are in important aspects identical and will be covered together in the following section, based on the provisions that are to be found in the Matrimonial Property Regulation.

The two Regulations that form part of the enhanced cooperation within the EU leave room for party autonomy in relation to both jurisdiction as well as choice of law.[34] In the recitals, it is emphasized that party autonomy is important in order to make sure that the spouses are able to manage their property, but it is also highlighted that it is important that such agreements should be properly notified and that a choice should be informed and that the parties actually have expressed their clear consent to the agreement.[35]

The provisions in the Property Regimes Regulations are well-aligned with rules on party autonomy in other European instruments. The Regulations establish party autonomy within limits, allowing for choices between forums and laws of Member States with an established connection to the dispute at hand.

As regards jurisdiction, the Regulation makes two distinctions. The first situation relates to situations where a court of a Member State is seized to rule on an application for divorce, legal separation or marriage annulment pursuant to the Brussels II bis Regulation. Such a court shall also have jurisdiction to rule on matters of matrimonial property arising in connection with that application (Art. 5 (1) Matrimonial Property Regulation). In relation to these kinds of situations, there is room for party autonomy for the spouses to agree on jurisdiction and this autonomy comprises a possibility to choose from the courts that are potentially competent according to the Brussels II bis Regulation (Art. 5 (2) Matrimonial Property Regulation).

The second situation relates to other disputes (e.g. disputes not covered by the Brussels II bis Regulation). In these other cases, jurisdiction for matters of matrimonial property shall lie with the courts of a specific Member State according to a hierarchy of exclusive options starting with a court in the Member State in which the spouses are habitually resident, or failing that, where the spouses where last habitually resident or, failing that, where the respondent is habitually resident or, failing that, the court of the Member State of the spouses' common nationality (Art. 6 Matrimonial Property Regulation).

34 The fact that there is room for party autonomy in this area of the law was already established in 1978 when the Hague Convention on Matrimonial Property Regimes was enacted, but the Convention only covers choice of law aspects.

35 Recital 45, 46, and 47 Matrimonial Property Regimes Regulation.

According to Art. 7, there exists party autonomy inasmuch as it is possible for the parties to choose the forum in connection with their choice of law, i.e. if a valid choice of law exists, the parties may also agree that the courts in the country of the chosen law should be competent.

Hence, the choice of law agreement may have an influence on jurisdiction. Choice of law is covered by Art. 22, and it is stated that spouses or future spouses may choose between the law of the State where the spouses or future spouses, or one of them, is habitually resident or the law of a State of nationality of either spouse or future spouse.

The agreement shall be expressed in writing and a certain safeguard exists to make sure that a spouse is able to object that she or he did not consent to the choice of law agreement (Art. 23 and 24 Matrimonial Property Regulation).

As regards the application of the Regulation, there are so far no decisions from the CJEU that deal with the different provisions regarding party autonomy.

IV. Party autonomy in Sweden (and the Nordic countries)

1. Introductory remarks

As regards the development of party autonomy in Sweden, it should be stated, from the outset, that there are only a few examples of party autonomy in family and succession law. In older Swedish legal history, the elements of private international law are sparse. It was not until around 1900 that private international law was actually regulated in Sweden.[36] Nevertheless, there have been discussions about private international law, e.g. in relation to the status of the principle of nationality and the principle of residence, and the dilemma of different countries applying the different principles. Primarily, the discussions have focused on which principle should

36 The sources referred to in this section are commissions of inquiry (SOU), a statement of opinion from a parliamentary committee (LOU, indicating that this statement is from the Law Committee) and Government bills (Prop.), e.g. the Government's proposals for new legislation. The documents are available in Swedish only. Most of the documents can be found on the homepage of the Swedish Parliament (Riksdagen): https://riksdagen.se/en/. Further information on preparatory acts in Sweden can also be found in English. For a more comprehensive discussions regarding the development of party autonomy in Sweden, see *Jänterä-Jareborg*, Partsautonomi och efterlevande makes rättsställning, p. 272–352.

prevail, rather than how the principles should be applied or how to bridge conflicts between countries that apply the different principles.[37]

The first major legal codification in the area of private international law is a general regulation regarding international marriages, but this rather comprehensive regulation does not contain any specific provisions regarding party autonomy.[38]

In contemporary Swedish private international law, there are only three examples of express rules that provide room for party autonomy within the field of family and succession law. The first to mention is the Ordinance (1931:429) on Certain International Legal Relations Concerning Marriage, Adoption and Guardianship, and the second is Act (1990:272) on Certain International Legal Relationships Concerning the Property Effects of Marriage and Co-habitation. A third (and final) example is a recently adopted Act complementing the Property Regimes Regulations.[39] It is a third example, but a more appropriate description would probably be that it is an example derived from the second, as the 1990 Act was revoked by the new 2019 Act. However, considering the fact that the Regulations only apply in relation to marriages and partnerships entered into on or after 29 January 2019, the old revoked Act will be relevant for a long time to come. Hence, both the old and new Act will be discussed below.

2. Ordinance (1931:429) on Certain International Legal Relations Concerning Marriage, Adoption and Guardianship

During the Nordic legislative co-operation in the field of substantive family law during the 1910s and 1920s, requests were made for a treaty regulating certain international family law issues in the relationship between the Nordic countries. This was, however, complicated by the fact that Sweden and Finland applied the principle of nationality, while Denmark, Iceland and Norway applied the principle of residence.

After some initial hesitation, it was considered possible to accept an arrangement which meant that a citizen of one of the Nordic countries, who

37 SOU 1969:60, p. 33.

38 Act (1904:26) on Certain International Aspects Regarding Marriage and Custodianship (Lag (1904:26) om vissa internationella rättsförhållanden rörande äktenskap och förmynderskap).

39 Act (2019:234) on Certain International Aspects Regarding Spouses' and Co-Habitants' Property Regimes (Lag (2019:234) om makars och sambors förmögenhetsförhållanden i internationella situationer).

was domiciled in one of the others, would in the areas unified by the joint legislative work be considered to fall under the authority of that country. On the few points where important differences remained between the substantive rules of the different countries, it was instead considered appropriate to apply the principle of nationality. After agreeing on these main issues, a convention was concluded on 6 February 1931 between Sweden, Denmark, Finland, Iceland, and Norway containing private international law provisions on marriage, adoption and guardianship, which resulted in the 1931 Ordinance (1931:429).[40] In the original text from 1931, there was no mention of party autonomy. Instead, party autonomy in this context became an issue almost 80 years after the entry into force of the original text.

In March 2007, the Swedish government proposed an amendment to the 1931 Ordinance stating that Sweden should approve and accede to the agreement of 26 January 2006 between the Nordic countries amending the Convention of 1931.[41] The provisions of the Nordic Marriage Convention on the law applicable to spouses' property relations had not been amended since the Convention entered into force in 1931. The substantive rules on the spouses' property relations were well coordinated at that time, but in all the years that had passed, the rules became increasingly different between the countries, mainly due to new legislation, but also through a somewhat separated development in case law. After 75 years without a single change, it was considered necessary to update and modernize the legal text.

The purpose of the submitted amendment was thus to adapt the Nordic legislation to other regulations in the field, especially the Law (1990:272) on Certain International Legal Relations Concerning the Legal Effects of Marriage (hereinafter: 1990 Act). Unlike the Nordic Convention, the conflict of law rules in the 1990 Act allowed spouses or prospective spouses to agree on applicable law.

When the Swedish parliament decided to adopt the amendments on 7 June 2007, party autonomy was (finally) introduced into the ordinance through a new wording in Section 3.[42] This provision is, as indicated above, modelled on the similar provision in the 1990 Act and it is a clear example of limited party autonomy, as it provides options that have a close relation to the spouses. It addresses the possibility to agree on the law of a

40 SOU 1969:60, p. 33.

41 Prop. 2006/07:60, p. 1.

42 Act (2007:522) Amending the Ordinance (1931:429) on Certain International Legal Relations Concerning Marriage, Adoption and Guardianship (Lag (2007:522) om ändring i förordningen (1931:429) om vissa internationella rättsförhållanden rörande).

specific country to govern the spouses' property regimes. Such an agreement is, under certain preconditions, valid if it relates to either the law of the country of which either spouse is a national or the country in which either spouse has his/her habitual residence. A third option, available when one or both spouses establish a new habitual residence after marriage, is to designate the law in the contracting State where both spouses had their last habitual residence.

The new provision entered into force on 1 December 2008 and it has not given rise to any particular problems. It is a rather straightforward rule that closely follows established principles regarding party autonomy in relation to property regimes and it thus – at least according to the drafters of the provision – provides for a more appropriate regulation with enhanced predictability for spouses in inter-Nordic relationships regarding applicable law.[43]

3. Act (1990:272) on Certain International Legal Relationships Concerning the Property Effects of Marriage and Co-Habitation

As already indicated, one of the main inspirations for the introduction of party autonomy in the Nordic ordinance was the already existing Swedish regulation regarding property regimes in international marriages. In this area – property regimes between spouses – party autonomy has played a more influential role.

The first time party autonomy was mentioned was in Justice *Wallin's* comment on the Parental Code in 1952, in which he spoke in favor of a mixed system. He also emphasized that a principle, that seemed well justified, was that different issues in a family law relationship did not all need to be assessed according to the law of one and the same country. There should be freedom to make a decision according to what was natural for each particular group of issues. In some cases, it could possibly be thought of as a solution of necessity that a party was given the right to choose between different personal statutes.[44] This reasoning is not developed further, and it does not lead to any specific provisions. The discussion, however, suggests that a seed has been planted, from which future provisions regarding party autonomy may grow.

It took some time for that seed to develop, but eventually in SOU 1987:18 on international family law issues and in the Law Committee's report

43 Prop. 2006/07:60, p. 10.

44 SOU 1969:60, p. 41 et seq.

1989/90:LOU32 to the Government Bill 1989/90:87 on certain international issues concerning spouses' property relations, the discussions about the introduction of party autonomy gained momentum. Reference was made to the work on the 1978 Hague Matrimonial Property Convention, in which the importance of party autonomy was emphasized as a solution to bridge the differences between countries that apply the principle of nationality and those applying the principle of habitual residence. The Convention provided the opportunity for spouses to enter into agreements both before and during a marriage. By reaching an agreement on which law is to be applied to their property relationship, spouses could remove any ambiguities and submit to an arrangement that they found objectively appropriate.[45]

Although the arguments for introducing party autonomy into Swedish law were taken from the work on the 1978 Hague Matrimonial Property Convention, it was never intended to ratify it. While discussing this in the governmental report that preceded the final Swedish legislation, the family law experts recommended not acceding to the Convention. The assessment was based, among other things, on the fact that it was unlikely that a large number of States would do so (at the time of submission of the final report, only five States had signed and not a single State had ratified the Convention).[46]

On 1 July 1990, party autonomy was introduced for the first time into Swedish international family law, when the Act (1990:272) replaced the Act (1912:69).

The provision regarding party autonomy is included in Section 3. This provision entails a clear example of limited party autonomy as it provides options that have a close relation to the spouses. It allows them to agree, in writing, that the law of a specific country should be applicable as regards the spouses' property regimes. Such an agreement is, under certain preconditions, valid if it designates either the law of the country of which either spouse is a national or the country in which either spouse has his habitual residence. The provision also provides a similar possibility for a surviving spouse to enter into agreements with the heirs of the deceased.

Compared with the text of the 1978 Hague Convention, that in a way may be regarded as a model for the Swedish Act, it may be noted that the Swedish version is somewhat different. The Convention is generally much more elaborate in its regulations and it establishes a third alternative (besides nationality and domicile) in Art. 3 (3), i.e. the law of the first State where one

45 SOU 1987:18, p. 95.

46 SOU 1987:18, p. 189 et seq.

of the spouses establishes a new habitual residence after marriage. The Convention also expressly deals with immovables and states that it is possible to designate, with respect to all or some of the immovables, the law of the place where these immovables are situated (Art. 3 (3)). In contrast, the Convention has no provision that allows for a surviving spouse to enter into agreements with the heirs of the deceased.

This difference in wording between the Swedish Act and the 1978 Hague Convention is not specifically discussed in the Swedish preparatory acts.

4. Act (2019:234) on Certain International Aspects Regarding Spouses' and Co-Habitants' Property Regimes

In relation to the enactment of the Property Regimes Regulations, Sweden adopted a new legislative act, with the ambition to complement the Regulations and to simplify and update other related Swedish Acts in the field of property regimes in international family law. As described above, the new Act revokes the 1990 Act and relevant provisions regarding property regimes in the 1931 Ordinance are transferred into the new Act (among other things sections 3, that was presented and described above). It is thus relevant to discuss the rules regarding party autonomy in the 2019 Act.

The 2019 Act is divided into different chapters. In addition to the rules that complement the Property Regimes Regulations (chapter 2), there are special rules regarding Nordic relations (chapter 3), other international relations (chapter 4), and co-habitants (chapter 5). This is not the place to present the new Act in detail, but in the following section, I will provide a brief overview.

From the outset, it is interesting to note that party autonomy is an integral part of the 2019 Act and that party autonomy exists as a possibility in all the abovementioned situations. Party autonomy is not specifically discussed in the preparatory works, but treated as a natural and integral part in the legislative process.[47] The 2019 Act only refers to existing rules on party autonomy in the Regulations. But, as regards both Nordic as well as other international regulations, there are specific rules in the 2019 Act. To a large extent, the rules in question are derived from and similar to the rules presented above (IV.2. and IV.3.) but they are generally more elaborate.

As regards Nordic relations, rules on party autonomy are to be found in Chapter 3 Section 8 to 11. The principal rule (section 8) is still that the

47 Prop. 2018/19:50.

spouses may choose either the law of the Nordic country of which either spouse is a national or the Nordic country in which either spouse has his/her habitual residence. A third option, available when one or both spouses establish a new habitual residence after marriage, is to designate the law in the contracting State where both spouses had their last habitual residence. A novelty in the 2019 Act is a specific rule (section 11) regarding immovable property, stating that the law of the Nordic country in which the property is situated shall be applied.

As regards other international relations, there are no specific rules regarding party autonomy, whereas the rules in the Property Regimes Regulations regarding choice of law are of a universal nature. Hence, we have a situation similar to the one described above, where the European regulations are to be applied in relation to marriages and partnerships entered into on or after 29 January 2019, and the old revoked 1990 Act will be applied in relation to older relations, also "other international" relations (e.g. such relations that are not EU or Nordic relations).

Finally, it may be of interest to note that the 2019 Act contains specific rules regarding co-habitants, also allowing for party autonomy. For co-habitants, the 2019 Act provides a possibility to choose the applicable law and it is the "traditional" choice that is available, e.g. a possibility to choose either the law of the country of which either party is a national or the country in which either party has his/her habitual residence. Such an agreement is valid if it is in compliance with other provisions (e.g. some specific rules regarding the distribution of estate) in Chapter 5 of the 2019 Act.

A brief concluding comment regarding the development in Sweden would be that party autonomy in Swedish international family law is a rather novel activity which, up-until recently, was disregarded, but now, it seems, is included as a natural and integral part of new legislation in the field. It seems likely that this rather dramatic – in terms of the limited timeframe – shift in perception is an obvious example of parallel development within the EU having a manifest influence on the mind-set of the national legislator.

V. Assessment of the benefits and risks of party autonomy

As has been discussed in the introductory section, party autonomy is a rather controversial issue that has, throughout history, been placed in the midst of the struggle between State sovereignty and individual (contractual) freedom. After having consulted present EU instruments, it may be concluded

that it seems to be individual freedom that has the upper hand and that it is the libertarian arguments that prevail, indicating a trend towards acceptance of contractual freedom. In parallel, however, it may also be concluded that more space is created for court discretion and that disputes are more frequently allowed to be assessed on a case-by-case basis. The increased possibility for parties to choose, which would usually indicate a development towards enhanced foreseeability, is effectively opposed by the increase in discretion. In the following section, I will identify some areas which illustrate the development as regards party autonomy and I will focus on four different divides, and finally address potential risks that this development may imply.

A first divide regards the realm of contract as opposed to other areas of the law and the fact that party autonomy for obvious reasons is closely related to contractual situations. One initial observation is that the ability to choose means that you, in a sense, take on the role of the legislator. This, however, is a statement that depends on the clarifications of the clauses. These can be regarded as part of the contract (e.g. included in the realm of contractual freedom) or as *sui generis* clauses that should be treated according to a different standard. Either way, it may be concluded that party autonomy thrives more in a contractual environment. Disputes relating to contracts are more accustomed to the idea of party autonomy, whereas in non-contractual obligations a different kind of justification is required. This divide originally established in relation to "obligations" is equally relevant in family and succession law. Hence, disputes in family and succession law may be divided according to this standard, meaning that issues that include contracts (wills, prenuptial agreements, and maintenance agreements) are more likely to be relevant in relation to party autonomy than issues of a non-contractual nature.

Another (second) divide would be the apprehension that some disputes should be regarded as mandatory, whereas others are to be regarded as non-mandatory, e.g. disputes that allow for out of court settlements. A typical example of a mandatory dispute are disputes regarding parental responsibility, disputes regarding parenthood, and disputes regarding divorce, while a typical example of non-mandatory disputes would be disputes regarding maintenance. According to this divide, party autonomy – regarded as a derivate of the party's freedom of choice – is only possible in relation to the latter group but not in relation to the former group.

A third divide is the one between man and money, between soft and hard cases. Family and succession law, on a general note, may be characterized as an area of law that deals with people – real people and people's lives and

families. Such issues and disputes are of a quite sensitive character. In contrast, issues that deal with money and/or property – hard cases – are less sensitive and thus more appropriate to contract on.

A fourth divide is that between private international law and the procedural law of the forum State. Party autonomy in private international law has a number of connotations that directly or indirectly relate to the procedural law that applies in the country of the court in which the dispute at hand is adjudicated. This has major implications regarding the possible strands of development for party autonomy. Private international law may be regarded as one of the areas in substantive EU law that is most manifestly harmonized, whereas procedural law has still to be regarded as a highly national area of law. It can be regarded as self-evident that this may pose problems, and that classification becomes crucial. When it comes to private international law, party autonomy will be an issue that is directly under the auspices of the CJEU. However, when the issue is classified as procedural it will be governed by national law and as such, an issue tackled by national courts applying the *lex fori* with no obligations to find solutions that would be workable outside of the national jurisdiction.

All the divides influence the development of party autonomy. To begin with, it is of crucial importance whether or not one takes as a starting point a libertarian approach – promoting freedom of choice – or if one takes a state sovereignty approach, upholding the idea that freedom to choose law and jurisdiction means that the parties assume the role of the legislator. In addition, it is important to note that there are national cultural differences. Some issues may be regarded as mandatory in some countries, whereas they are regarded as non-mandatory in others. There may also be differences in relation to how mixed conflicts are to be divided, e.g. a conflict dealing with both mandatory and non-mandatory issues or disputes regarding both man and money – hard and soft.

In this regard it needs to be observed that some issues are "vested" into State law and should never be open for the parties' freedom. One obvious example would be issues that involve children (not the least in their capacity as third parties in parental responsibility cases), that need the protection of the State in order to prevent potential abuse of freedom by the parents. Other issues are less sensitive and hence more readily available for a development of increased autonomy.

From a Swedish perspective – being representative of a liberal approach to divorce – it seems likely that we could foresee a cultural development that opens up to the possibility that the EU could agree on harmonized rules that allow spouses to divorce by private contract. This however, it not likely

in the near future and it is highly dependent on the cultural environment in which the mentioned development takes place.

In relation to the above, there are risks. An overly liberal approach may lead to a situation where the interests of the weaker party are being threatened, and a restrictive approach – purporting to follow strict State interests – may lead to inefficiency.

In this context, it needs to be acknowledged that legislators have a surmountable problem in order to find solutions that are able to balance all different interests involved. When trying to find legislative solutions that manage to balance a variety of interests there are obvious risks. One identifiable risk is that the development continues to be fragmented in contrast to an improved foreseeability. Another risk relates to regulatory design, i.e. the way in which new legislation is structured and constructed. It can be concluded that the development in private international law in this regard has not really enhanced foreseeability. With today's instruments, it is difficult to gain an overview over all options and much is provided in a hidden, indirect way, driving the development towards rules that are incomprehensible and almost impossible to understand and apply. The increased discretion (with the possibility to take into account "the best interest of the child", overriding mandatory rules, etc.) adds additional fuel for the conclusion that complexity is the new black.

Related to the risk of complexity, it may be noted that the acceptance of enhanced cooperation, where some but not all Member States advance with new legislation, entails the risk that harmonization within the EU will develop at different paces.

VI. Party autonomy and potential future developments

As regards the future of party autonomy, a first observation is that we are in the middle of an ongoing cultural shift, where the concept of family is under great pressure. This needs to be acknowledged and monitored. It is a matter of cultural awareness to observe as to the contemporary ways of living: people are more mobile; are less inclined to marry; live in co-habitant relations; are more willing to live in different forms of mixed relations. The law needs to relate to this development. And this development is – from a historical perspective – increasingly rapid. My impression is that this development is continuing, and that we can foresee a development whereby mandatory issues are transformed into non-mandatory issues, expanding the realm of potential issues that may be contracted on. Divorce could be one such example.

Another trend that may enhance party autonomy is the development of harmonized rules regarding recognition and enforcement. If free movement of court decisions is a principal rule, we indirectly give effect to foreign rules. If that is the case, why not apply foreign law directly in the first place? This indicates a form of hidden liberalization through the strict mechanism of recognition (among other things in the Brussel II bis Regulation), and it is likely that this development may be framed as a strong argument for further party autonomy in the future.[48]

The development of alternative forums for dispute resolution, also in the field of family law, adds to the "trend" that the State has a diminished influence over family law matters, indicating that parties might as well choose from the beginning.

Another observation that may indicate a future trend is the development within the EU towards including informed consent as a prerequisite for different types of choices (e.g. Art. 5 Rome III Regulation), establishing further options to complicate the adjudication of disputes and creating more elaborate possibilities for discretion. In addition, we can identify an enhanced focus on the best interest of the child. I am not criticizing this development, but I acknowledge that it may pose problems as it is a dual development that strengthens the position of weaker parties whilst simultaneously diminishing foreseeability. It is likely that this development will continue. Whether or not it guarantees justice will be seen in the future, but the development needs to be monitored. The complexity risk is a real threat and a precondition for efficient party autonomy is that it is possible to comprehend and assess available options.

At the end of the day, party autonomy is about society and it needs to be assessed in a contemporary context. The introduction of party autonomy into private international law is a relatively new phenomenon, so we have most likely only seen the (early) beginning of the development. For lawyers interested in party autonomy, it will be an exciting time to come.

48 The idea that mutual recognition, especially within the frame of instruments like the Brussels II bis regulation that lack common choice of law rules, fosters a form of hidden liberalization is further developed by *Meeusen,* Eur. J. Migr. L. 9 (2007), 287 (304).

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