On the Lack of a General Part for EU Private International Law

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Abstract

The question of a general part for EU Private International Law has attracted research and debate among PIL scholars long before the EU started to codify this legal field after the Amsterdam Treaty. However, the EU has made no attempt to make use of the existing research to adopt a comprehensive regulation of the general part of EU PIL and has adopted sector-specific regulation with inconsistent regulation of several general institutes. For the occasion of the anniversary of the *Zeitschrift für Europarechtliche Studien* this paper revisits the topic to answer the question which institutes of PIL should be codified in a general part of EU PIL. The conclusions are made based on four criteria: which general institutes of PIL are already regulated in the EU; are they generally applicable to all special parts of EU PIL; what is their practical relevance; and is there a need for their uniform regulation. The paper analyzes the discrepancies between existing general institutes of EU PIL and offers brief discussions on the possible formulation of some of the institutes for the general part.

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A. Is there a Need for A General Part?

For national legislators the question of the need for a general part is rarely asked. It is a part of the usual legislative technique. The EU directives and regulations also regularly contain definitions of certain terms and general principles usually in the introductory articles which apply to the whole legal act. The questions on the need of a general part are asked in areas in which the EU legislator has been very active with sector specific legal acts. Once the EU adopts numerous separate acts in one legal field, there is a problem with contradictions, legal gaps and lack of general principles. The best example is EU consumer law where there have been several attempts to come up with a comprehensive solution, but so far with very limited success.[1]

This is not the first paper written on the need or possible content of a general part of the EU PIL as one of the possible solutions to contradictory definitions and notions that affect legal security and require a systematic review. On the contrary. This topic was discussed long before the EU started to adopt numerous acts on PIL. Admittedly, the topic is dominated by German scholars, with some representatives of the French legal thought.[2] Obviously, the approach towards a general part of the PIL also depends on the legal culture. But as a Bosnian I need to emphasize that also Yugoslavian PIL scholars grew up with a very respectable general part of PIL,[3] that is still applicable in in Bosnia and Herzegovina and Serbia. The former Yugoslav republics Croatia[4] and Slovenia[5] even after joining the EU felt the need to keep a general part of PIL in their national legislations. Further the PIL of Austria,[6] the state where I pursued my legal education, also has a general part. In fact, my very first paper published in a legal journal was on the topic of the future EU PIL codification and its general principles.[7] It was heavily influenced by the extensive

1 The most ambitious attempt to harmonize EU consumer law was done with the EU Consumer Rights Directive, which turned out to be purely amending four Directives on certain matters with little harmonization effects; Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ L 304 of 22/11/2011, pp. 64–88; To compare it with the initial ambition see *Meškić* (2008), p. 1.

2 *Kramer*, p. 16.

3 Act Concerning the Resolution of Conflicts of Laws with Provisions of Other States in Certain Matters, Official Journal of the Socialist Federal Republic of Yugoslavia, Nos 43/82 and 72/82; see *Meškić/Đorđevic*, Private international law, p. 1.

4 Private International Law Act of Croatia, Official Journal no. 101/17, entered into force on 29.1.2019.

5 Private International Law and Procedural Act of Slovenia no. 56/99 of 13/7/1999.

6 Federal Private International Law Act of Austria of 15/6/1978, Official Journal no. 304/1978, last changed with no. 72/2019.

7 *Meškić* (2009), pp. 5–31.

work of my academic mentor, prof. Reichelt[8] with her fellow members of the Groupe européen de droit international privé (GEDIP),[9] including the foundational work of Jayme/Kohler in the IPRax with their regular column on EU PIL.[10] In the meantime, *Lagarde* on behalf of GEDIP even published a concrete proposal for provisions of the general part of the EU PIL.[11] The EU legislator could have drawn some conclusions from such and similar discussions before entering into a comprehensive legislation on PIL. But there was no attempt to regulate the general part of EU PIL in a uniform and comprehensive way.

For this great anniversary of ZeuS, this paper will revisit the topic but from a very different perspective. The starting point will no longer be some future ambition of PIL codification in the EU, but the EU PIL regulations that have been adopted in the meantime. At least after the Amsterdam Treaty, the EU legislator did know it will adopt many sector-specific regulations, so it could have planned for a uniform approach to the general questions of PIL.[12] A need for a general part of EU PIL was there, as the general questions had to be addressed. However, they are formulated differently for different sectors without a sector specific justification. It is even more striking that most of the regulations are adopted within a decade, so there was no meaningful socio-political development that would justify such discrepancies.

General part of EU PIL would not be able to fulfil its function until all areas of PIL are regulated at the EU level. The argument that a general part would overcome the current inconsistencies in the regulation of the general part in national laws is true only to the extent that the EU PIL is applicable. The EU did not yet comprehensively regulate the PIL, so to all unregulated areas the general part provisions of the national laws would continue to apply. The general parts of PIL do exist in many national PIL acts of the EU Member States. The EU regulations also contain some provisions on the general part, which within the scope of application on these particular regulations supersede some of the national provisions on the general part. But the debate on the need for a general part of EU PIL does not predetermine the legislative technique of the EU. There does not have to be a separate EU regulation on the general part. Simply by having the same chapter on the general part of PIL in all EU PIL regulations, a general part would be adopted. Legislators in EU Member States could use such chapter as a role model for the reform of the general part in

8 *Reichelt*, Die Konventionen von Brüssel, Lugano und Rome; *Reichelt/Rechberger*, Europäisches Kollisionsrecht; *Reichelt*, Europäisches Gemeinschaftsrecht und IPR.

9 See https://gedip-egpil.eu/en/ (19/10/2022).

10 The column changed its name as the EU PIL evolved from PIL of the EC (*Jayme/Kohler*, IPRax 1985, p. 65), to EU Law on Conflicts of Laws (Europäisches Kollisionsrecht) in 1994 (*Jayme/Kohler*, IPRax 1994, p. 405).

11 *Lagarde*, Embryon de règlement portant code européen de droit international privé, 16–18 September 2011, available at: https://gedip-egpil.eu/wp-content/uploads/2011/10/Embryon-de-r%C3%A8glement.pdf (19/10/2022).

12 *European Parliament*, A European Code of Private International Law, CONE 3/2013, p. 5.

their national PIL in order to avoid two separate sets of general parts, one for the national law and one for EU law.

In the following, the paper will quickly answer the question of the EU competence for a general part of PIL. Then it will show the existing level of codification of EU PIL and build on the overview of the general institutes contained therein to answer the most important question of the paper: which institutes of PIL should be codified in a general part of EU PIL. While answering this question, there will be brief discussions of the possible formulation of some of the general institutes.

B. The EU does have the competence for a general part of EU PIL

Prior to the Treaty of Amsterdam, the EU PIL was developed by conventions as there was no legal basis of a EU legislative action.[13] It was the Treaty of Amsterdam that enabled the EU to adopt private international law measures "insofar as necessary for the proper functioning of the internal market".[14] The EU legislator no longer had to encourage signing of multilateral conventions and several EU PIL regulations have been adopted on this legal basis. With the Lisbon Treaty the competence for EU PIL was no longer dependent on its necessity for the internal market.[15] The general legal basis for judicial cooperation in civil matters with cross-border implications is given in Art 81 (1) and (2) TFEU, which enables adoption of PIL acts "particularly when necessary for the proper functioning of the internal market". The only real restriction is set for family law with cross-border implications in Art 81 (3) TFEU, requiring an unanimous decision by the Council to adopt the measure. Considering that the general part would apply to all EU PIL regulations, including the ones regarding family law, a separate regulation issued only for the general part would probably require the unanimous vote. However, an argument could be made that the general part would not regulate family law per se, it would not mention it in any word. It would regulate general institutes of EU PIL which of course have family law implications, but so do the regulations on succession matters, maintenance and contractual obligations, which did not require a unanimous vote. The currently valid EU Regulations on family law matters are adopted within the enhanced cooperation mechanism, because an unanimous decision within art 81 (3) TFEU could not be reached. Any changes related to the already enacted family law regulation with regards to the general part provisions can be easily agreed upon by the Member States participating in the enhanced cooperation. There is a strong possibility that a regulation solely focused on the general part of PIL would be considered rather "technical" and would not raise much interest or cause political concerns.[16] Another legislative possibility would be to enact amendments on the general part provisions in the existing EU PIL Regulations and simply transfer the same

13 See *Reichelt*, Die Konventionen von Brüssel, Lugano und Rome.

14 Art. 61 and Art. 65 of the Amsterdam Treaty establishing the European Community; OJ C 340, of 10/11/1997, pp. 173–306.

15 *Jayme/Kohler*, IPRax 2003, pp. 485 ff.

16 *Wilke*, pp. 334, 340.

provisions into future PIL Regulations. Rather than having a separate regulation on the general part of PIL, there would be a uniform chapter on the general part included in all EU PIL Regulations. This approach would have the advantage of having the general part and the special part in the same regulation and would be more convenient for the application in practice. But such approach leaves the unwelcome possibility that in some future regulations the EU legislator adopts a conflicting provision on the general part and endangers the goal of uniformity.

C. The Codification of EU Private International law thus far

It is significant to remind of the existing regulations of EU PIL, because the general part would obviously be applicable within the scope of application of the already existing and future special parts of EU PIL. Further, the current EU PIL does contain certain provisions on the general part and shall be used a source for determining which provisions would belong to an EU PIL general part and how they would look like.

Before the establishment of a clear competence for private international law with the Amsterdam Treaty, the only significant instruments in the area of PIL were conventions. With a clear legislative competence for PIL, the EU has adopted regulations on the law applicable to contractual (Rome I Regulation)[17] and non-contractual (Rome II Regulation)[18] obligations, to succession[19] and to maintenance obligations.[20] Within the enhanced cooperation mechanism, the EU legislator adopted provisions on the law applicable to divorce and legal separation (Rome III Regulation)[21] with 16 Member States participating, and later to the law applicable to matrimonial property[22] and property consequences of registered partnerships[23] with 18 Member States participating.

17 Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I), OJ L 177 of 4/7/2008, pp. 6–16.
18 Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199 of 31/7/2007, pp. 40–49.
19 Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201 of 27/7/2012, pp. 107–134.
20 Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7 of 10/1/2009, pp. 1–79.
21 Council Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343 of 29/12/2010, pp. 10–16.
22 Council Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183 of 8/7/2016, pp. 1–29.
23 Council Regulation (EU) 2016/1104 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183 of 8/7/2016, pp. 30–56.

In addition to all EU Member States already being members of the Hague conference on PIL, the EU has become a member itself in 2007. The purpose of the membership is to enable the EU to directly become a party to Hague conventions which fall within its competence, without the need for each of its Member States to individually ratify the convention.[24] Since then, in the area of applicable law which is in the focus of this paper, in 2010 the EU has become a party to the Protocol on the Law Applicable to Maintenance Obligations of 2007.[25] In fact, the EU Maintenance Regulation states in its title that it includes questions of the applicable law, but in its Art 15 it refers to the Hague Protocol for all questions of the applicable law. For the purpose of this paper the Hague Protocol will be included in the analysis of the future content of the general part of EU PIL, while having in mind that the legislative technique and formulations therein were influenced by the Hague Conference and not just the EU.

D. What belongs to a general part of EU PIL?

This is the main question that authors have been concerned with even before the EU PIL Regulations were adopted as we have them today. The most significant contribution of a paper dealing with the general part of PIL is not only to point to the needs of its adoption, but also to provide suggestions on which provisions should find their way into the general part and possibly even, how they should be formulated. The latter requires a more detailed analysis that cannot be comprehensively done in this paper, but an attempt will be made to contribute to the discussion on selected issues. The conclusion on what belongs to a general part of EU PIL will be based on several criteria which are not cumulative, but rather strong indicators for the overall result: which general institutes of PIL are already regulated in the EU; are they generally applicable to all special parts of EU PIL; what is their practical relevance; and is there a need for their uniform regulation.

I. Overview of the regulation of general institutes in EU PIL

For a starting point it is important to have an overview of the institutes of the general part that the EU legislator has already regulated in at least one of the EU Regulations and the Hague Protocol. A table will be used for this purpose:

24 *Kuipers*, pp. 159–186.
25 Concluded on 23 November 2007.

	Renvoi	Public Policy	Multi-unit-states territorial conflicts	Multi-unit-states personal conflicts	Adjustment/ Adaptation (Anpassung)	Overriding mandatory rules
Rome I Regulation	√	√	√	-	-	√
Rome II Regulation	√	√	√	-	-	√
Succession Regulation	√	√	√	√	√	√[26]
Rome III Regulation	√	√	√	√	-	-
Maintenance Protocol	√	√	√	√	-	-
Matrimonial Property	√	√	√	√	√	√
Registered Partnership	√	√	√	√	√	√

At least two further questions of the general part are implicitly regulated. The EU Regulations apply directly and must be applied, insofar the conflict rules contained therein apply *ex officio*. In national laws of several member states this is not the case in all areas of PIL,[27] but this question is clarified with the mere fact the EU PIL is regulated by EU regulations with direct effect and supremacy.[28] Another question is the problem of characterization, which is impliedly regulated by the provisions on the scope of the applicable law in each regulation, the introductory recitals and additionally with the monopoly of the CJEU to interpret the EU regulations.[29] Insofar it is clear that the characterization shall be conducted *lex europaea*, with an autonomous, EU understanding of the terms.[30]

26 Art. 30 of the Succession Regulation contains an "unfinished" regulation of overriding mandatory provisions; *Köhler*, p. 170.

27 For an overview of the application of the ex officio principle in the national PIL of EU Member States, available at: https://e-justice.europa.eu/340/EN/which_country_s_law_applies (19/10/2022).

28 The French Cour de Cassation on 26 May 2021 confirmed that differently than under national law, due to the supremacy and direct effect the conflict rules of EU PIL have to be applied *ex officio*, unless they allow party autonomy; *Jault-Seseke*, French Supreme Court Rules on Ex Officio Application of EU Choice of Law Rules, available at: https://eapil.org/2021/06/02/french-supreme-court-rules-on-ex-officio-application-of-eu-choice-of-law-rules/ (19/10/2022).

29 *Wilke*, pp. 334, 338.

30 *Köhler,* pp. 170–171.

II. General applicability

The first criterion for selection of institutes that belong to a general part is their general applicability, they need to potentially apply to all special areas of PIL.[31] From a perspective of my legal education this criterion is the most important, as only institutes that could be used in a general scheme for solving cases (Ger. "*Fallprüfungsschema*") regardless of the subject matter of the case, would belong to a general part. The analysis shows that the EU PIL legal sources including the Hague Protocol consider that renvoi, public policy and regulation of territorial conflicts within multi-unit-states are generally applicable to all special parts, as they are part of all EU PIL regulations and the Hague Protocol. Obviously, the codification of PIL at the EU level is not complete, but it already includes important instruments in the three most important and very different special areas of PIL: obligation relations, family law and succession. This is sufficient to decide on the general applicability of a PIL institute.

But also overriding mandatory rules and regulation of inter-personal conflicts in multi-unit states are part of five out of seven EU PIL Regulations and the Hague Protocol. The question arises if an institute of PIL should be regulated in the general part only if it is generally applicable in the sense that it truly applies to all special areas of PIL.[32] But just because an institute is not regulated in all regulations of the EU PIL, it does not mean that it cannot be relevant to all special parts of PIL. One example is adaptation (Ger. *Anpassung*) which is part of three regulations, but which especially in combination with the preliminary question may be applicable in any area of PIL.[33] And preliminary questions are not regulated in any of the EU PIL legal sources in a general manner. Also there is no general escape clause in the EU PIL, which differently than adjustment and preliminary question, is often incorporated in the national legislation. The minimum requirement could be that the institute must be relevant to more than just one special field of PIL,[34] meaning that something which is purely relevant for the Rom I and Rome II Regulations that both regulate the obligation relations would not make it to the general part. Following this criterion all institutes of the general part that are analyzed in the table should form part of the general part of EU PIL. But we cannot make any conclusion *a contrario*. Simply some institutes are left unregulated although they should be considered for the general part.

31 *Kreuzer*, p. 3; *Wilke*, in: Leible/Unberath (eds.), p. 27.
32 *Kreuzer*, p. 3.
33 *Meškić/Đorđevic*, 2016, p. 160.
34 This was the position taken by the symposium with prominent participation in Bayreuth of 29/30 June 2012 when dividing the topics on the possible candidates for the general part of EU PIL; *Wilke*, in: Leible/Unberath (eds.), p. 27.

III. Practical relevance

The will of the EU legislator to regulate certain general institutes of PIL and the general applicability are not the only criteria. The institute of *fraus legis*, the prohibition of the evasion of rules, is a generally applicable institute which used to be important in the past century to prevent avoiding mandatory provisions of *lex fori*. On the contrary, the EU PIL does not prohibit *fraus legis* and follows the principle of (limited) party autonomy even in family law. As such it lacks practical relevance for EU PIL and should not be included in the general part.[35]

IV. The need for uniformity

Finally, the need for uniformity is one of the main reasons why a general part of EU PIL is needed in the first place. Lack of uniformity is of European origin, as it was created by different answers to the same questions by EU Regulations.[36] The lack of uniformity may be analyzed from two different perspectives. Firstly, the institutes of the general part that are already contained in EU PIL as shown in the table above show many discrepancies. The incoherencies may be a proof of the need for the general part.[37] Secondly, the discrepancies invite the discussion on how the final rule in the general part should be formulated. Some of the differences may be justified by the necessary distinction in application to the special parts of PIL.

1. *Renvoi*

If we look at the regulation of *renvoi*, it is justifiable that *renvoi* is excluded for contractual and non-contractual obligations, whereas it is applicable, at least in a limited form, to succession. But if the EU legislator correctly did not intend to make the exclusion of *renvoi* a uniform rule for the whole EU PIL, it is not appropriate that *renvoi* is excluded for maintenance obligations in the Hague Protocol,[38] for divorce in the Rome III Regulation[39] and for matrimonial property[40] and property consequences of registered partnerships.[41] The formulation of *renvoi* in a separate regulation for the general part of EU PIL would certainly need to make some amendments to the existing solutions. Considering that party autonomy is one of the leading principles in the EU PIL the exclusion of *renvoi* as a general principle is justified, but the exception applicable to succession matters should in the appropriate form be widened to cover also family law relations. Despite some criticism in the

35 *Kreuzer*, p. 4.
36 *Wilke*, in: Leible/Unberath (eds.), p. 24.
37 *Rühl/Von Hein*, p. 718.
38 Art. 12 of the Hague Protocol.
39 Art. 11 of the Rome III Regulation.
40 Art. 32 of the Regulation (EU) 2016/1103.
41 Art. 32 of the Regulation (EU) 2016/1104.

literature,[42] it is the position of this paper that Art 34 (1) and (2) of the Succession Regulation may serve well as a starting point of discussion for a future regulation of *renvoi* in family law for cases absent a choice of law.

2. Territorial conflicts within multi-unit-states

A great example of the discrepancies in solutions may be found in the regulation of territorial conflicts within multi-unit-states. Here this paper will exceptionally make a deeper analysis, as it offers the opportunity to truly showcase the level of unjustified discrepancies between EU Regulations. Further, Bosnia and Herzegovina is one of only three multi-unit-states in Europe and as such this topic is of particular personal interest.[43] The EU PIL seemed in the earlier EU Regulations to favor the principle of direct referral to the territorial unit within the complex state, where Art 22 (1) of the Rome I Regulation and Art 25 (1) of the Rome II Regulation solely contain the principle of direct referral.[44] The provision is practical and clear, considering that both Regulations also exclude *renvoi*, meaning that a referral to a complex country excludes the obligation to consider its "international" conflict rules as well as their "interstate" conflict rules.[45] However, an exclusion of *renvoi* should not be interpreted as an exclusion of the obligation to consider the "interstate" conflict rules.[46] The Rome III Regulation on the law applicable to divorce and legal separation uses nationality as a subsidiary connecting factor[47] and nationality is the main example of a connecting factor that does not refer to a territorial unit within the state, and thus makes the direct referral principle useless. Nevertheless, Art 14 of the Rome III Regulation follows the principle of direct referral as the primary solution. It was again Art 36 of the Succession Regulation that brought a real shift in the legislative policy, as it sets the principle of indirect referral as the primary solution of the problem..[48] The EU Succession Regulation is the first PIL EU Regulation to give the international harmony of decisions priority over the harmony of decisions within Member States, as both instruments, *renvoi* and the principle of indirect re-

42 See *Van Hein*, in Leible (eds.), Chapter 12; *Köhler,* p. 177.
43 *Meškić/Duraković/Alihodžić*, pp. 633–642.
44 The formulation is almost identical in both regulations, providing that "Where a State comprises several territorial units, (in respect of contractual obligations/each of which has its own rules of law in respect of non-contractual obligations), each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation".
45 *Altenkirch*, in: Huber (ed.), Art. 25 Rome II, p. 421.
46 *Schröder*, p. 148; *Eichel*, in: Leible/Unberath (eds.), p. 403.
47 Eg in Art. 5 (1) c and Art. 8 (c) of the Rome III Regulation.
48 Under Article 36 (1) of the Succession Regulation: "the internal conflict-of-laws rules of that State (which comprises several territorial units) shall determine the relevant territorial unit whose rules of law are to apply"; This decision was strongly influenced by Spain, who requested respect for their own legislation on internal conflict of laws; *Christandl*, J. Priv. Int'l L. 2013/2, p. 231.

ferral to the law of the complex state, aim at the international harmony of decisions.[49]

Even before the adoption of the Succession Regulation, there has been one exception to the domination of the principle of direct reference. Namely, the EU Maintenance Regulation[50] in its Art 15 refers on the applicable law to the Hague Protocol 2007 on Maintenance Obligations. In Art 16 (2) of the Hague Protocol 2007, the principle of indirect referral is provided as the primary rule.[51] Consequently, the Rome I – Rome III are following the method of direct referral, whereas the Succession Regulation and the Maintenance Regulation provide for the method of indirect-referral. Finally, the change introduced by the Succession Regulation already made its influence on the newly adopted Regulation on matrimonial property[52] and the Regulation on property consequences of registered partnerships[53] that both provide for the indirect-reference model as the primary rule. The provisions of both regulations on "states with more than one legal system" are almost identical to the one in the Succession Regulation. This example clearly shows the advantages of having a general part of the EU PIL, that in case of such change in legislative solutions would provide for uniformity.

A direct reference to the law of a particular unit does not mean that we apply the substantive law of that unit excluding its rules on internal conflict of laws.[54] The question of further consideration of rules for solving internal conflicts of laws, even after the applicable law of the territorial unit has been determined by the direct referral of the conflict rule *lex fori*, the so called "internal *renvoi*", is another important and open question for the Rome-O Regulation. In Germany the prevailing opinion is that in such case the interstate rules for internal conflicts do need to be considered.[55] But following the principle of international harmony of decisions, there are stronger arguments in favor of consideration of the rules for internal conflicts of the complex state referred to, regardless of the method of reference to the law of that multi-unit state.

Further, the EU PIL provides no uniformity when it comes to subsidiary references to multi-unit-states, in case the primary method of reference is not successful in determining the applicable law of the unit within the complex state. Rome I and

49 *Dutta*, in: MüKo BGB, Art. 34 EuErbVO, para. 1.
50 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7 of 10/1/2009, p. 1–79.
51 *Christandl*, J. Priv. Int'l L. 2013/2, p. 229.
52 Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183 of 8/7/2016, p. 1–29.
53 Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183 of 8/7/2016, p. 30–56.
54 *Von Hein,* in: MüKo BGB, Art. 4 EGBGB, para. 195.
55 *Schröder*, p. 136, with further references; Also *Von Hein*, in: MüKo BGB, Art. 4 EGBGB, para. 195.

Rome II Regulation do not provide for any subsidiary method..[56] On the other hand, the subsidiary methods in the Succession Regulation, the Hague Protocol, the Regulation on matrimonial property and the Regulation on the property consequences of registered partnerships are very similar as they provide for direct referral of the habitual residence,[57] the closest connection principle in case that nationality is the connecting factor[58] and the principle of direct referral in the case of any other connection factor as the last option.[59]

A further question arises, if the limitations on the choice of law apply also to the inter-local of conflict of laws.[60] The views in the literature so far seem to consider the application of the limitations on the applicable law to the choice of the legal order of a concrete unit within the complex state to be given.[61] That also means that in case when the choice of law is permitted on the basis of the nationality of the respective person, e.g. the spouse in accordance with Art 5 (1)c of the Rome III Regulation or the deceased in accordance with Art 22 (1) of the Succession Regulation, it is not allowed to choose the legal order of the particular unit within that state, but just the state as a whole.[62] The only exception is the choice of the territorial unit to

56 There is at least one situation left unregulated by the provisions of the Rome I and II, and that is the case when the parties agreed on the law of a complex state as the applicable law and did not refer to a particular legal order of a territorial unit within that state. As the main rule, the will of the parties shall be honored to the extent possible; *Martiny*, in: MüKo BGB, Art. 22 Rom I-VO, para. 3.

57 Art. 36 (2)a of the Succession Regulation; Art. 16 (1)c of the Hague Protocol, Art. 33 (2)a of the Regulation on matrimonial property and the Regulation on the property consequences of registered partnerships.

58 Art. 36 (2)b of the Succession Regulation, Art. 16 (1)d and e of the Hague Protocol, Art. 33 (2)b of the Regulation on matrimonial property and the Regulation on the property consequences of registered partnerships.

59 Art. 36 (2)c of the Succession Regulation; Art. 16 (1)a of the Hague Protocol, Art. 33 (2)c of the Regulation on matrimonial property and the Regulation on the property consequences of registered partnerships; The subsidiary provisions of the Rome III Regulation are somewhat different, because the Art. 14 (a) Rome III Regulation follows the model of direct reference as the main rule.

60 *Leible/Müller*, YPIL 2012–2013, p. 148.

61 This seems also to be suggested by the wording of the German text of Art. 14 (c) Rome III Regulation, providing for the territorial unit chosen by the parties, or the closest connection in "absence of the possibility of choice" ("Mangels einer Wahlmöglichkeit"), whereas in English version the formulation is "in absence of choice" and the French "en l'absence de choix"; *Budzikiewicz*, in: Jauernig (ed.), Anmerkungen zu den Art. 5–16, para. 2; *Von Mohrenfels*, in: MüKo BGB, Art. 14 Rom III-VO, para. 2; *Süß,* in: Süß (ed.), para. 147; Differently *Franzina*, Cuadernos de Derecho Transnacional 2011/2, p. 119; *Eichel*, in: Leible/Unberath (eds.), p. 414.

62 *Süß*, in: Süß (eds.), para. 147; Differently *Von Mohrenfels*, MüKo BGB, Art. 14 Rom III-VO, para. 3, who argues that in case there are no internal conflict-of-laws rules, the parties can choose freely. This view cannot be supported as Art. 14 c) Rome III Regulation, allows the parties to choose only in case there are no internal conflict-of-laws rules. Consequently, the fact that there are no such rules cannot be used as an argument that Article 5 Rome III is not applicable to the choice of a territorial unit.

which the case has the closest connection, as this is the subsidiary rule in case when there are no internal conflict-of-laws rules and nationality is the connecting factor.[63]

3. Legal gaps

Finally, the EU PIL Regulations despite their overwhelming detailedness still leave important legal gaps. The General part of EU PIL should contain a rule on legal gaps. Considering the goal of EU uniform interpretation and application, the rule should suggest applying the general principles of EU PIL first, and only if there are no such principles only then a reference to national private international law would be justified. Here, Art 7 (2) CISG may serve as a good starting point for a debate. Such a rule opens the question if the general part should not also contain some regulation of the general principles which refer to connecting factors used in the EU PIL such as party autonomy, habitual residence or closest connection.[64] Such principles could then be used to fill the gaps. It would certainly be practicable and would not hurt the theoretical differentiation between principles related to connecting factors and general institutes of PIL for solving international cases.

E. Conclusion

The general part in EU PIL is regulated with many unjustified discrepancies, despite the early warnings in the literature. In a legal field which is know for its complexity, contradictions in its general part which usually holds all special parts together should be avoided. Several general institutes are left unregulated which is a further indication for a need to regulate the general part of EU PIL. Ideally, the EU would adopt a comprehensive PIL Regulation amending the existing ones at least with regards to the applicable law and with a general part that applies to all or most provisions of the special parts. But we are not living in time in which any codification dreams would find support. A less ambitious separate regulation on the general part of EU PIL would invite much less opposition and would do enough. Even an identical chapter of the general part included in all regulations would be sufficient, if the EU legislator truly keeps it identical in the future regulation. The regulation of EU PIL so far shows that in almost every new regulation the authors were inspired to adopt a different rule, as the temptation to include its own ideas in the general provisions was obviously stronger than the consciousness of the need for uniformity. The topic certainly does inspire most prominent researchers and invites diverging opinions, but the time has come to put it into one single piece of legislation.

63 Art. 36 (2)b of the Succession Regulation, Art. 16 (1)d of the Hague Protocol and Art. 14 (c) of the Rome III Regulation; *Dutta*, in: MüKo BGB, Art. 36 EuErbVO, para. 11.

64 *Leible/Müller*, YPIL 2012–2013, p. 145.

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