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Codifying European Union private international law: The Swiss Private International Law Act – a model for a comprehensive EU private international law Regulation?

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The following contribution builds on the Swiss experience in order to reflect on the idea of codifying private international law in the EU. The Swiss Federal Act on Private International Law with its 225 articles is possibly the most complete codification of private international law (PIL) worldwide. It covers jurisdiction, international civil procedure, applicable law, and the recognition and enforcement of foreign judgments. It represents therefore a comprehensive codification of PIL. This contribution argues that having a comprehensive PIL codification has numerous advantages when compared with having PIL rules distributed over a large number of separate acts or regulations. A comprehensive codification makes all PIL rules readily accessible in one place, helps to avoid friction between the rules on jurisdiction on the one hand and applicable law on the other, promotes a uniform view of the whole matter, favours clarity and coherence between the different sets of rules, reduces complexity, increases legal certainty, and considerably adds to the user-friendliness of the rules on PIL. Based on these findings, the author recommends the commencement of preparatory work for the enactment of a comprehensive PIL regulation in the EU.

Keywords: codification; Swiss Private International Law Act; EU private international law codification; comparative private international law; general part

A. Introduction

In the European Union, the number of private international law (PIL) regulations has been increasing at a breath-taking speed over the last two decades. On the one hand, these new regulations have remedied many uncertainties that resulted from the fact that, in different EU Member States, different PIL rules applied. On the other hand, new challenges and complexities are emerging: the scopes of

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application of the EU PIL regulations are becoming more difficult to determine and sometimes overlap; furthermore, the same legal terms are used in different ways in different regulations, and complex questions regarding the interaction between rules on procedure and applicable law are also emerging.[1] In short, the European Union PIL system as a whole is increasingly difficult to handle and is at risk of losing its coherence. Currently, even specialists in this field risk losing their bearings.

At the same time, cases presenting a foreign element and raising issues of PIL are becoming more and more frequent. The reality of our everyday lives does not take account of the fact that the system of legal rules that should coordinate the diversity of national laws is regarded by many, if not most, jurists as overly complicated. Lawyers working in an international context (ie almost any lawyer today) need to be able to tell their clients with certainty where they can bring a potential claim, which law(s) will apply, what outcome they may expect and according to which rules and under which conditions foreign judgments will be recognized and enforced, even if they do not belong to the narrow circle of PIL specialists. Judges, who only occasionally deal with cross-border scenarios, need a system of private international law in which they can easily find their way and conflict of laws rules that they can handle and apply easily. In the international context, legal certainty and predictability of the outcome is just as necessary as in purely domestic situations.

As outlined above, much of the current complexity is due to the fact that there are an ever increasing number of regulations. The question thus arises of whether PIL in the EU has reached a point where a new legislative act is needed. Should the EU institutions continue enacting more separate regulations or has the time come to consolidate, in one coherent act of legislation, all of the rules on PIL that are currently distributed over a large and still rapidly increasing number of EU PIL regulations?

This question is currently widely discussed among PIL specialists in Europe.[2] One of the conferences dealing with this issue took place in autumn 2014 at the University of Freiburg in Germany.[3] One of the questions raised there was

[1]For an overview, see D Wiedemann, "Convergence and Divergence in the EU's Judicial Cooperation in Civil Matters: Pleading for a Consolidation through a Uniform European Conflict's Codification", Max Planck Private Law Research Paper No 15/14 (Hamburg, 2015) and in E Vaz de Sequeira and G de Almeida Ribeiro (eds), *Católica Graduate Legal Research Conference 2014 – Conference Proceedings*, (Lisbon, 2015), 175–198, in particular 180–192.

[2]See eg the study by X Kramer, *A European Framework for Private International Law: Current Gaps and Future Perspectives, Study for the Directorate-General for Internal Policies* (2012), www.europarl.europa.eu/document/activities/cont/201212/ 20121219ATT58300/ 20121219 ATT58300EN.pdf, accessed 28 September 2015.

[3]www.jura.uni-freiburg.de\\institute\\ipr3\\tagung (organised by J von Hein and G Rühl), accessed 28 September 2015; see also the conference on 29 and 30 June 2012 in Bayreuth: "Brauchen wir eine Rom 0-Verordnung? Überlegungen zu einem Allgemeinen Teil des

whether the legislation of countries that already have comprehensive PIL acts, and in particular Switzerland, could serve as a source of inspiration for the EU when considering a comprehensive EU regulation on private international law.[4]

The Swiss Federal Act on Private International Law (*Bundesgesetz über das Internationale Privatrecht/Loi sur le droit international privé*) was adopted on 18 December 1987 and entered into force on 1 January 1989.[5] Today, it contains 225 articles, including a General Part with 38 provisions. It covers jurisdiction, international civil procedure, applicable law, and the recognition and enforcement of foreign judgements. The Swiss Federal Act on Private International Law (hereafter: Swiss PIL Act) is therefore an all-inclusive, *comprehensive codification* of private international law.

This paper will first give a comparative overview of the existing comprehensive private international law codifications. It will demonstrate that, both in Europe and beyond, there is a clear trend towards this kind of all-inclusive PIL codification, comprising rules on jurisdiction, recognition and enforcement of foreign decisions, and applicable law (section B). This contribution will then identify requirements that a European Union private international law regulation should meet (section C). The focus will then be on the Swiss Private International Law Act, its structure and particular strengths, and on the experiences of comprehensive PIL codification in Switzerland (section D) before turning to the question

europäischen IPR" (Do we need a Rome 0-Regulation? Considerations on a General Part of European Private International Law) (organised by J Leible and H Unberath).

[4]On the possibility of a comprehensive European Union private international law regulation, see also the contributions in M Fallon, P Lagarde and S Poillot Peruzzetto (eds), *Quelle architecture pour un code européen de droit international privé* (Peter Lang, 2011); J Basedow, "Kodifizierung des europäischen Internationalen Privatrechts" (2011) 75 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 671; F Pocar, "Révision de Bruxelles I et ordre juridique international: quelle approche uniforme?"(2001) *Rivista di diritto internazionale privato e processuale* 591: he notes "un corps imposant d'actes normatifs, susceptible de conduire à l'adoption d'un véritable code européen de droit international privé"; C Nourissat, "La codification de l'espace judiciaire civil européen", in M Douchy-Oudot (ed), *La justice civile européenne en marche* (Dalloz, 2012), 175, 182 *et seq*; D Wiedemann, *supra* n 1, 192 *et seq*; see also X Kramer, *supra* n 2, 71: "The academic debate in some Member States appears to be very much in favour of the creation of a code on private international law". For a critical view, *idem*, 71–73: "In the current situation the step towards a code on private international law may not be the most promising option . . . for the time being an approach on three different areas may lead to quicker results", 81 *et seq.*

[5]Unofficial English translation available at: andreasbucher-law.ch/images/stories/pil_act_1987_as_amended_until_1_7_2014.pdf, accessed 28 September 2015. For an assessment of the Swiss PIL Act on the occasion of the 20th anniversary of its entry into force, see the contributions in A Bonomi and E Cashin Ritane (eds), *La loi fédérale de droit international privé: vingt ans après* (Schulthess, 2009). For an assessment after 25 years, see the contributions in (2015) *Schweizerische Zeitschrift für internationales und europäiches Recht/ Revue Suisse de droit international et européen* 347–412.

of what lessons the EU could learn from the comparison with the situation in Switzerland and the experience there (section E).

B. Comprehensive private international law acts in a comparative perspective

In the late 1970s and early 1980s of the last century, the first three comprehensive PIL codifications were enacted in Europe: the Hungarian Regulation on Private International Law, the Yugoslav Act on the Settlement of Conflicts of Laws with the Regulations of Other Countries in Certain Circumstances, and the Turkish Private International Law Act.

The 1979 Hungarian Regulation contains 75 provisions, 9 of which are to be found in a General Part, followed by 44 rules on the applicable law and 21 provisions on jurisdiction, procedure and recognition and enforcement of foreign judgments.[6] The 1982 Turkish PIL Act included a mere 48 rules, of which the first 26 were dedicated to applicable law, followed by 7 articles on jurisdiction and 12 on recognition and enforcement of foreign judgments.[7] In the Yugoslav Act of 1982, the matter is governed by the significant number of 108 rules with a General Part (13 articles), followed by provisions on applicable law (31 articles), jurisdiction and procedural issues (40 articles) and the recognition and enforcement of foreign judgments and arbitral awards (16 rules).[8]

In 1987, the Swiss PIL Act was adopted. With more than 200 articles, to this day it remains the most comprehensive private international law codification worldwide. Following the Swiss model, comprehensive codification was further achieved in Romania in 1992 (183 articles),[9] Italy in 1995 (74

[6]Text with German translation in W Riering, *IPR-Gesetze in Europa* (CH Beck, 1997) 364; on the Hungarian Act, see L Burián, "Hungarian Private International Law" (1999) *Yearbook of Private International Law* 157; FA Gabor, "A Socialist Approach to Codification of Private International Law in Hungary: Comments and Translation" (1980–81) *Tulane Law Review* 63; F Mádl and L Vékás, "Über das ungarische IPR-Gesetz in rechtsvergleichender Betrachtung" (1982) *Zeitschrift für Europarecht, internationales Privatrecht und Rechtsvergleichung* 266.

[7]Text with German translation in W Riering, *IPR-Gesetze in Europa*, *supra* n 6, 338; on the Turkish PIL, see eg G Tekinalp, "Der türkische 'Gesetzentwurf über internationales Privatrecht und Zivilverfahrensrecht'" (1983) *Rabels Zeitschrift* 26; G Tekinalp, "Das türkische Gesetz über internationales Privatrecht und Zivilverfahrensrecht von 1982" (1984) *Rabels Zeitschrift* 47; H Krüger and F Nomer-Ertan, "Neues internationales Privatrecht in der Türkei" (2008) *Praxis des Internationalen Privat- und Verfahrensrechts* 281.

[8]Text with German translation in (1985) *Rabels Zeitschrift* 544; on the Yugoslav Act, K Firsching, "Das neue jugoslawische IPR-Gesetz" (1983) *Praxis des Internationalen Privat- und Verfahrensrechts*, 1; A. Lipowschek, "Das neue jugoslawische Internationale Privat- und Prozessrecht im Bereich des Vermögensrechts" (1985) *Rabels Zeitschrift* 426.

[9]Text with German translation in Riering, *IPR-Gesetze in Europa*, *supra* n 6, 132; on the Romanian PIL Act, O Capatina, "Das neue rumänische Internationale Privatrecht"

articles),[10] Belgium in 2004 (with roughly 127 articles),[11] Bulgaria in 2005 (125 articles),[12] the Ukraine (82 articles)[13] and Albania in 2011 (89 articles).[14] In 1999 and 2007, Slovenia (119 articles)[15] and Macedonia (124 articles)[16] enacted modernized versions of the Yugoslav PIL Act. In 2007, in Turkey a modernized version of the PIL Act was brought into force, once more providing a comprehensive code of private international law (66 articles).[17]

Outside Europe, the Civil Code of the Canadian province of Québec of 1994 contains a codification of PIL which is in many respects strongly influenced by the Swiss PIL Act[18] and is similarly comprehensive (192 rules contained in Articles

(1994) *Rabels Zeitschrift* 465. Replaced by new PIL rules in book 7 of the new Romanian Civil Code of 2009.

[10]Text with German translation in Riering, *IPR-Gesetze in Europa*, *supra* n 6, 42; (1996) *Praxis des Internationalen Privat- und Verfahrensrechts* 356; on the Italian PIL Act, see eg T Ballarino and A Bonomi, "The Italian Statute on Private International Law of 1995" (2000) *Yearbook of Private International Law* 99; G Broggini, "La nouvelle loi italienne de droit international privé" (1996) *Schweizerische Zeitschrift für internationales und europäisches Recht* 1; A Giardina, "Les caractères généraux de la réforme" (1996) *Revue critique de droit international privé* 1.

[11]English translation in (2004) *Yearbook of Private International Law* 319; (2006) *Rabels Zeitschrift* 358; on the Belgian PIL Act, eg S Francq, "Das belgische IPR-Gesetzbuch" (2006) *Rabels Zeitschrift* 235.

[12]German translation in (2007) *Rabels Zeitschrift* 457; on the Bulgarian PIL Act, C Jessel-Holst, "The Bulgarian Private Internatinal Law Code of 2005", (2007) *Yearbook of Private International Law* 375; J Zidarova and V Stanceva-Minceva, "Gesetzbuch über das Internationale Privatrecht der Republik Bulgarien" (2007) *Rabels Zeitschrift* 398; B Musseva, "Das neue internationale Zivilverfahrensrecht Bulgariens in Zivil- und Handelssachen" (2007) *Praxis des Internationalen Privat- und Verfahrensrechts* 256.

[13]For a critical analysis, see A Dogvert, "Codification of Private International Law in Ukraine" (2005) *Yearbook of Private International Law* 131, in particular 144 *et seq.*

[14]On the Albanian Act, A Gugu Bushati, "The Albanian Private International Law of 2011" (2013–2014) *Yearbook of Private International Law* 509.

[15]German translation in (2002) *Rabels Zeitschrift* 748; on the Slovenian Act, K Puharič, "Private International Law in Slovenia" (2003) *Yearbook of Private International Law* 155; M Geč-Korošec, "Die Reform des slowenischen Internationalen Privat- und Verfahrensrechts und seine Anpassung an das Recht der Europäischen Union" (2002) *Rabels Zeitschrift* 710.

[16]On the Macedonian Act, T Deskoski, "The New Macedonian Private International Law Act of 2007" (2008) *Yearbook of Private International Law* 441; C Jessel-Holst, "Zum Gesetzbuch über internationales Privatrecht der Republik Mazedonien" (2008) *Praxis des Internationalen Privat- und Verfahrensrechts* 154.

[17]English translation in (2007) *Yearbook of Private International Law* 583; on the new Turkish PIL Act, G Tekinalp, "The 2007 Turkish Code Concerning Private International Law and International Civil Procedure" (2007) *Yearbook of Private International Law* 313; T Ansay, "Anatomie des neuen türkischen IPR-Gesetzes" (2010) *Rabels Zeitschrift* 393.

[18]J Talpis and G Goldstein, "The Influence of Swiss Law on Quebec's 1994 Codification of Private International Law" (2009) *Yearbook of Private International Law* 339.

3076–3168 of the Civil Code). Another comprehensive PIL codification that is influenced by the Swiss Act is the *Code de droit international privé* of Tunisia of 1998.[19]

In South America, there also exists a trend towards comprehensive codification containing rules on both jurisdiction, procedure, and the recognition and enforcement of foreign judgments on the one hand, and applicable law on the other.[20]

Conversely, the 2001 PIL Act of Korea contains only one very broad rule on international jurisdiction, followed by rules on applicable law.[21] The new PIL Act of China (2010)[22] and the reformed Japanese Act (2006)[23] contain rules on

[19]Text with German translation in J Kropholler et al, *Außereuropäische IPR-Gesetze* (Deutsches Notarinstitut, 1999), 854.

[20]See in relation to Uruguay: D Opertti Badan and C Fresnedo de Aguirre, "The Latest Trends in Latin American Private International Law: The Uruguayan 2009 General Law on Private International Law" (2009) *Yearbook of Private International Law* 305; for Venezuela: GE Parra-Aranguren, "The Venezuelan Act on Private International Law of 1998" (1999) *Yearbook on Private International Law* 103; T de Maekelt, "Das neue venezolanische Gesetz über das Internationale Privatrecht" (2000) *Rabels Zeitschrift* 299; English translation of the Venezuelan Act in (1999) *Yearbook of Private International Law* 341.

[21]German translation in (2006) *Rabels Zeitschrift* 342; on the Korean Act, KB Pissler, "Einführung in das neue Internationale Privatrecht der Republik Korea" (2006) *Rabels Zeitschrift* 279; K-J Tsche and J Mörsdorf-Schulte, "Neuregelung des koreanischen IPR und IZPR" (2007) *Praxis des Internationalen Privat- und Verfahrensrechts* 473.

[22]English translation in (2010) *Yearbook of Private International Law* 669; (2011) *Praxis des Internationalen Privat- und Verfahrensrechts* 203; on the Chinese Act, C Weizuo, "Chinese Private International Law Statute of 28 October 2010" (2010) *Yearbook of Private International Law* 27, and the contributions by J Huang, Y Guo, Y Gan, Q He, G Tu, W Liang and W Zhu in (2012–2013) *Yearbook of Private International Law* 269–384; Q He, "The EU Conflict of Laws Communitarization and the Modernization of Chinese Private International Law" (2012) *Rabels Zeitschrift* 47; KB Pissler, "Das neue Internationale Privatrecht der Volksrepublik China – Nach den Steinen tastend den Fluss überqueren" (2012) *Rabels Zeitschrift* 1.

[23]English translation in J Basedow, H Baum and Y Nishitani (eds), *Japanese and European Private International Law in Comparative Perspective* (Mohr Siebeck, 2008) 405; (2006) *Yearbook of Private International Law* 427; on the Japanese Act, the contributions in Basedow, Baum and Nishitani, *ibid*; Y Okuda, "Reform of Japan's Private International Law Act on the General Rules of the Application of Laws" (2006) *Yearbook of Private International Law* 145; Y Nishitani, "Die Reform des internationalen Privatrechts in Japan" (2007) *Praxis des Internationalen Privat- und Verfahrensrechts* 552; Y Sakurada and E Schwittek, "Die Reform des Internationalen Privatrechts Japans" (2012) *Rabels Zeitschrift* 86. On the rules on international civil procedure in the Japanese Civil Procedure Act and in the Civil Provisional Remedies Act, see Y Okuda, "New Provisions on International Jurisdiction of Japanese Courts" (2011) *Yearbook of Private International Law* 367; Y Nishitani, "Die internationale Zuständigkeit japanischer Gerichte in Zivil- und Handelssachen" (2013) *Praxis des Internationalen Privat- und Verfahrensrechts* 289.

applicable law exclusively. In Europe, this is the case of the PIL Acts of Estonia of 2002[24] and Poland of 2011.[25]

In Lithuania (2000),[26] Russia (2001, revised in 2013),[27] Romania (2009),[28] and The Netherlands (2011)[29] the rules on PIL were incorporated into the national civil codes and these rules unsurprisingly focus on applicable law rather than issues of procedure. The same is true for Germany, where the domestic private international law rules on applicable law are still found in the Introductory Act to the German Civil Code.

In the European Union, it is not an option to include PIL rules in a (European) civil code in the foreseeable future. For the EU the choice is thus between an ever increasing number of private international law regulations on the one hand or a comprehensive private international law regulation on the other.

With respect to this choice, it is remarkable that, *in Europe*, the national legislators that have codified or reformed their private international law rules *in dedicated private international law acts* during the last few decades have, in a large

[24]Following the Swiss approach to PIL codification was considered in Estonia. However the legislator eventually followed the German and the Austrian model. Rules on procedure are thus to be found in the Code of Civil Procedure, in force since 01.01.2006; see K Sein, "The Development of Private International Law in Estonia" (2008) *Yearbook of Private International Law* 459.

[25]English translation in (2011) *Yearbook of Private International Law* 641; on the Polish Act, see T Pajor, "Introduction to the New Polish Act on Private International Law of 4 February 2011" (2011) *Yearbook of Private International Law* 381; M Pazdan, "Das neue polnische Gesetz über das internationale Privatrecht" (2012) *Praxis des Internationalen Privat- und Verfahrensrechts* 77; U Ernst, "Das polnische IPR-Gesetz von 2011" (2012) *Rabels Zeitschrift* 597. The rules on international procedure are found in the Polish Code on Civil Procedure which was also reformed by the law of 05.12.2008, see T Pajor, *ibid*., at 382; U Ernst, *ibid*., at 605.

[26]PIL is regulated in Book 1 of the Civil Code of 2000, International Procedure is regulated in the Code of Civil Procedure of 2002; see V Mikelenas, "Reform of Private International Law in Lithuania" (2005) *Yearbook of Private International Law* 161.

[27]Rules on PIL are found in Part 3, Section 4 of the Russian Civil Code and in the Family Law Code. English translation in (2002) *Yearbook of Private International Law* 349; German translation in (2003) *Rabels Zeitschrift* 341; see S Lebedev, A Muranov, R Khodykin and E Kabatova, "New Russian Legislation on Private International Law" (2002) *Yearbook of Private International Law* 117; B Dutoit, "Le droit international privé russe revisité" (2014) *Revue Suisse de droit international et européen* 619; O Sadikov, "Die Kodifikation des Internationalen Privatrechts Russlands" (2003) *Rabels Zeitschrift* 318; C Mindach, "Zum Stand der IPR-Kodifikation in der GUS" (2009) *Praxis des Internationalen Privat- und Verfahrensrechts* 94.

[28]Book 7 of the new Civil Code (*Codul civil): Dispoziţii de drept international privat*, see D Borcan and M Ciuruc, *Nouveau Code Civil Roumain*, (Dalloz, 2013) 655.

[29]Book 10 of the Dutch Civil Code (*Burgerlijk Wetboek*): Internationaal privaatrecht, English translation in (2011) *Yearbook of Private International Law* 657; see AVM Struycken, "The Codification of Dutch Private International Law" (2014) *Rabels Zeitschrift* 592; MH ten Wolde, "Codification and Consolidation of Private International Law: The Book 10 Civil Code of the Netherlands" (2011) *Yearbook of Private International Law* 389.

majority, opted for a *comprehensive codification*, just like the Swiss legislator. There are only very few exceptions to this trend, namely the PIL Acts of Estonia and Poland.[30]

The following considerations show that there are indeed good reasons for this trend towards all-inclusive, comprehensive codification of private international law in Europe.

C. Private international law: an area of law that is perceived as complex and difficult to access

In the European Union, the rules of private international law are increasingly found in EU law, spread over a large number of EU regulations with scopes of application that overlap and are sometimes hard to distinguish.[31] Other PIL rules are found in international conventions, especially the Hague Conventions.[32] Finally, for issues not governed by international conventions or EU law, national PIL rules apply. Depending on the applicable legal system, the latter may be scattered over a variety of national sources. The area is thus often regarded not only as highly technical and complex, but also as confusing, even for specialists. A book published in the US in 1995 was therefore aptly titled: *Conflict of Laws in Western Europe – A Guide through the Jungle*.[33] Were the book to be republished today with a new edition, it would certainly have to be thoroughly revised due to the now established EU regulations in the field. Its title, however, would still describe the situation in European Union PIL perfectly well.[34]

It is also important to remember that PIL is a required subject in only a few European universities. Even in Switzerland, where cross border cases are very common, it is currently compulsory in only four of the nine law

[30]Its structure follows that of the Polish Civil Code of 1965, see U Ernst, (2012) 76 *Rabels Zeitschrift* 597 at 605.

[31]For details, see the contributions in J von Hein and G Rühl (eds), *supra* *; see also X Kramer, *supra* n 2, 80–81.

[32]List of Conventions and Contracting States at www.hcch.net, accessed 28 September 2015.

[33]M Reimann, *Conflict of Laws in Western Europe – A guide through the jungle* (Transnational Publishers, 1995).

[34]See also D Wiedemann, *supra* n 1, 180: "a massive body of provisions which, especially for practitioners such as lawyers and judges as well as interested parties, is difficult to survey", quoting: T Rauscher in *idem*, *EuZPR/EuIPR* (2010), Einf EG-ErbVO-E n. 9: "mountain of regulations without a system"; HP Mansel, K Thorn and G Wagner, "Europäisches Kollisionsrecht 2012: Voranschreiten des Kodifkationsprozesses – Flickenteppich des Einheitsrechts", (2013) *Praxis des Internationalen Privat- und Verfahrensrechts* 1: a "rag rug"; J Basedow, "Kodifizierung des Europäischen Internationalen Privatrechts?", (2011) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 671: "many trees which do not resemble a forest"; J Adolphsen, "Konsolidierung des Europäischen Zivilverfahrensrechts", *Festschrift Kaissis* (2012), 1, 8: "jungle" (all translated from German by D Wiedemann).

faculties.[35] In England, PIL is completely absent from many law schools; in others it is only taught as an optional subject. Most European practitioners therefore lack a specialized training in this matter and many do not even have a basic knowledge of PIL. Most judges only occasionally deal with questions of PIL. When this happens, they must then familiarize themselves in an *ad hoc* fashion with a complex area of law and find their bearings in a jungle of rules that are distributed over many sources.

In the light of all this, it seems extremely important that the EU legislator makes access to the area and the rules on PIL in its legislation as easy and user-friendly as possible. This is important both from the perspective of the legal practice and the judiciary and, of course, from the perspective of the law-seeking citizen.[36]

D. The Swiss Private International Law Act: a statute that focuses on the needs of its users to have easily accessible, clear and consistent rules

The Swiss Private International Law Act of 1987 achieves the goal of facilitating access to the subject matter and implementing a coherent and comprehensive regime of PIL rules in an exemplary way.

1. *The scope of application of a comprehensive private international law act*

Article 1 of the Swiss PIL Act determines its scope of application with great clarity:

> "(1) In cases presenting a foreign element, this Act determines:
> a) jurisdiction . . .;
> b) the applicable law;
> c) the conditions for recognition and execution of foreign decisions;
> . . .
> (2) International treaties prevail."

When dealing with cases that present a foreign element, Article 1 of the PIL Act is the starting point for any analysis. It provides a first precise point of reference, not

[35]This is the case in St Gallen, Neuchâtel, Lausanne and Geneva. In Zurich, Bern, Luzern and Fribourg PIL is an optional course at Master's level. In Basel, it is not a required course either.

[36]D Wiedemann, *supra* n 1, 194: "Only where the relevant legal provisions are easily accessible, people are able to enforce their rights which protect their individual freedom. In light of the present systematic incoherencies, particularly the number of procedural options spread through numerous regulations, the right to access to justice as the procedural part of the creditor's individual freedom turned out to be a chimera". The aim of increasing transparency and accessibility of the subject matter is also the motivation for national legislators when they proceed to codification of PIL, see X Kramer, *supra* n 2, 63 (for Belgium and the Netherlands).

only for specialists but also for those judges and practitioners who seldom deal with private international law issues: in order to find an answer in the PIL Act, a situation or relationship involving more than one jurisdiction, or – as the PIL Act states – a case presenting a foreign element, is needed. For such situations or relationships, the act provides the practitioner with rules determining (a) jurisdiction, (b) applicable law, and (c) recognition and enforcement of foreign decisions. Pursuant to Article 1, and according to the understanding in Switzerland, private international law thus addresses not only issues of the applicable law, but also as matter of course all questions raised by a private law situation involving a foreign element. Accordingly, the PIL Act provides answers to all these matters and issues.

Pursuant to Article 1(2) of the PIL Act, the application of the Act is subject to the condition that there is no prevailing international treaty that is applicable. In Switzerland these are mainly the Lugano Convention[37] and some Hague Conventions for questions of jurisdiction, and a large number of Hague Conventions for questions of applicable law.

Once again the PIL Act is extremely user-friendly: first, Article 1, section 2 of the PIL Act reminds the judge that he has to carefully double-check if there is an international convention that may prevail over the application of the Act; in addition, the sections of the PIL Act that deal with specific subject matters contain specific references to prevailing international treaties. In fact, the PIL Act contains a number of explicit references to specific Hague Conventions that take precedence over the PIL Act. This allows the practitioner to locate the relevant rules accurately and avoid overlooking them and making mistakes.

The European Union legislator would arguably be well-advised to include a similar Article 1 in a comprehensive EU private international law regulation. The legislator could hereby provide legal practitioners in Europe with a first general guide and facilitate access to the subject matter and to the solution of the case in question.

The provision in Article 1(2) of the PIL Act could also serve as a model for a European Union codification in that it would provide judges in Europe with guidance, in particular regarding Hague Conventions that might be in force in their respective Member States and might take precedence over the European PIL regulation.[38]

[37]Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, current version signed in Lugano on 30.10.2007, in force in Switzerland since 01.01.2011.

[38]See eg Art 25 (1) of the Rome I Regulation or Art 28 (1) of the Rome II Regulation. It is true that the situation regarding the relationship between EU PIL regulations and international conventions that are in force in the 28 Member States is naturally more complex than the current situation in Switzerland. The rule giving priority to international conventions may thus need to be more nuanced, giving priority to the respective convention insofar as the convention so requires. Whether, under the relevant convention, an EU

It might also be worth considering – both in the Swiss PIL Act (in its next version) and in a comprehensive EU PIL Regulation – adding a further (in fact, a very first) section in Article 1 that gives priority to uniform substantive law where applicable. The reason is that, where uniform substantive law applies, there is no need for PIL rules. This article would apply in particular to international sales scenarios and give priority to the Convention on Contracts for the International Sale of Goods (CISG), provided that the case falls within the CISG's scope of application, as defined for the relevant EU Member State.

2. *General Part: a must*

All the above-mentioned recent national PIL Acts contain a General Part that contains rules that apply to all of the subject matters governed by the Special Part – and so of course does the Swiss PIL Act. Having a General Part avoids the repetition of principles that apply throughout the whole act of legislation and help achieve coherence throughout. As the comparative overview has shown, it is today part of the international *acquis* when it comes to codifying PIL in a separate statute. Not having a General Part would thus be a step backwards with respect to the national PIL law Acts that have come into force over the past decades.

The General Part of the Swiss PIL Act first contains general rules on *international jurisdiction* and *procedural law*. Here we find, for example, rules on prorogation of jurisdiction (Articles 5 and 6 PIL Act, just as in Articles 25 and 26 of the recast Brussels I Regulation). They are followed by rules on the primacy of arbitration agreements (Article 7), on jurisdiction for counterclaims (Article 8), on party joinder (Article 8(a)–(c)) and on other procedural matters such as *lis pendens* (Article 9). These general rules are similar to those found in Articles 8 and 29 *et seq* of the recast Brussels I Regulation.

The General Part then provides *general rules on applicable law*, such as rules on *renvoi* (Article 14), followed by a general exception clause (Article 15), a rule establishing the duty of the courts to research the content of foreign law *ex officio* (Article 16), a rule on *public policy* (Article 17) and on mandatory rules of the *lex fori* and of foreign law (Articles 18 and 19). This is followed by legal definitions of domicile and habitual residence of natural and legal persons (Articles 20 and 21) as well as rules for certain situations such as double or multiple nationalities (Article 22–24).

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instrument has, for certain issues, priority over the convention will then be determined according to the convention's rules. A nuanced priority rule in an EU PIL regulation should also be accompanied by a (regularly updated) annex, listing the relevant international conventions and the EU Member States that are Contracting States to these conventions. See also *infra*, E4.

Thirdly, in Articles 25–32, there are general rules on *recognition and enforcement of foreign decisions*. The subject matters governed here are similar to those covered by Articles 36–51 of the recast of the Brussels I Regulation.

The *structure* of the General Part of the PIL Act thus follows the guidelines in its Article 1: first, there are general rules on jurisdiction, then on applicable law and finally on the recognition and enforcement of foreign judgments.

Where, in the European Union PIL regulation, exceptions to general principles stated in the General Part are necessary, they will then be provided for in the relevant section of the special part[39] – just as this is the case in the Swiss PIL Act.[40]

3. *Special Part: striving for maximum clarity*

The different sections of the Special Part of the Swiss PIL Act also contain rules for each particular subject on (a) jurisdiction, (b) applicable law and, where necessary, (c) special provisions on the recognition and enforcement of foreign decisions for the particular subject matter.

(a) *First example: international marriages*

"Chapter 3: Marriage" of the Swiss PIL Act might serve as a first example: the first provision in the section on "effects of marriage in general", Article 46 of the PIL Act, contains a provision on *international* and *internal jurisdiction*.[41]

In Articles 48 and 49 follow rules on the *law* that is in principle *applicable* in respect of the general effects of marriage.[42] With regard to the determination of the law applicable to maintenance obligations between spouses, which is in practice possibly the most important general effect of marriage, Article 49 of the PIL Act expressly refers to the relevant Hague Convention.[43]

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[39]One might think, for example, of the provision regarding *renvoi* in Art 34 of Regulation 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.

[40]See eg Art 14 (1) of the Swiss PIL Act (on *renvoi*): "When the applicable law refers back to Swiss law or to another foreign law, such *renvoi* shall be taken into account *only if this Act so provides [in its Special Part]*. (2) In matters of personal or family status, a *renvoi* from the foreign law to Swiss law is accepted" (emphasis added).

[41]Art 46. I. Jurisdiction. 1. Principle: The Swiss judicial or administrative authorities of the domicile or, in the absence of a domicile, those of the habitual residence of either spouse have jurisdiction to entertain actions or other measures relating to the effects of marriage. (For the source of this and the following translations, see *supra* n 5.)

[42]Art 48. II. Applicable Law. 1. Principle: The effects of marriage are governed by the law of the state in which the spouses are domiciled. When the spouses are not domiciled in the same state, the effects of marriage are governed by the law of the state of the domicile with which the case has the closest connection.

[43]Art 49. 2. Maintenance obligations: Maintenance obligations between spouses are governed by the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance

Last but not least, Article 50 contains a special provision on the *recognition of foreign decisions* regarding the general effects of marriage.[44]

When it comes to determining jurisdiction and the law that is applicable with respect to the effects of marriage in general, the PIL Act uses the criteria of "domicile" and "habitual residence" of one or both spouses. Both notions are defined in the General Part of the PIL Act. This general definition applies for purposes of determining both jurisdiction and applicable law, and it applies in principle to all subject matters governed by the PIL Act.

In order to achieve clarity and user-friendliness, the Swiss PIL Act thus –

1. provides all relevant legal rules in one single act of legislation, ie contains a comprehensive PIL codification covering both jurisdiction, applicable law, and recognition and enforcement of foreign decisions;
2. presents the relevant provisions on jurisdiction and applicable law for each subject matter in one single section and in close vicinity to each other (in the first example, the rule on jurisdiction regarding the effects of marriage in general in art. 46 and the rule on the applicable law in Articles 48 and 49);
3. provides in the same section explicit references to the relevant international conventions (in the example, Article 49 explicitly refers to the Hague Convention on the law applicable to maintenance obligations);
4. and, last but not least, defines general notions (such as, in the example, the notions of "domicile" and of "habitual residence") in its General Part and, to the greatest extent possible, in a uniform way for the purposes of both jurisdiction and applicable law.

(b) *Second example: contract law*

The sections on other matters in the Special Part of the PIL Act follow the same structure. With regard to contractual obligations, the PIL Act first provides rules on *international jurisdiction*, followed by those on *applicable law* and finally specific rules on *recognition and enforcement* of foreign decisions.

Thus, Article 112 provides, for contractual matters, the general jurisdiction at the domicile or the habitual residence of the defendant, which is followed by rules on jurisdiction at the place of performance (Article 113), on consumer contract disputes (Article 114) and on employment contract disputes (Article 115).[45] Then

Obligations. (In a European Union PIL regulation, such reference would be to the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations with an indication that is does not apply in Denmark or the UK.)

[44]Art 50. III. Foreign decisions or measures: Foreign decisions or measures relating to the effects of marriage shall be recognized in Switzerland provided that they were rendered in the state of domicile or habitual residence of either spouse.

[45]In Switzerland, some of these provisions are now largely obsolete because of the Lugano Convention. Others, such as the rule on jurisdiction in general in Art 112 PIL Act, apply in

follow rules on applicable law in general (Article 116 *et seq*) and on consumer and employment contract disputes in particular (Articles 120 and 121). The final rule in this section contains a special provision on the conditions for the recognition of foreign decisions relating to obligations (Article 149).

(c) *Third example: extra-contractual liability*

For non-contractual liability, this structure is repeated in Articles 129–142 PIL Act containing rules on:

- general jurisdiction (Article 129 section 1 first sentence),
- special jurisdiction for tort matters in general (Article 129 section 1 second sentence), and for claims in relation to nuclear energy (Article 130 sections 1 and 2) and claims against liability insurers (Article 131),
- applicable law (Article 132 *et seq*);
- and a specific provision on the recognition and enforcement of foreign decisions with respect to extra-contractual liability (Article 149 *et seq*, in particular 149 section 2(f)).

In order to achieve greater clarity and accessibility, the Swiss legislator allows occasional repetitions: this can be seen in the jurisdictional rules, as for any particular matter there is initially a provision for general jurisdiction, followed by specific rules for the specific subject matter.

4. *Swiss experiences of a comprehensive private international law codification*

The experiences of the Swiss comprehensive PIL Act have been very positive. For one thing, its structure greatly helps to *identify the interactions* between rules on jurisdiction and on applicable law as it treats both under the same set of rules. The Swiss PIL Act *avoids friction*, prevents conflicting interpretations, and *promotes a uniform view* of the whole matter. For example, if a term were to be interpreted differently with respect to jurisdiction on the one hand and applicable law on the other, then such a departure would need to be justified; likewise, the same could be said for terms defined differently for the various topics in the Special Part.[46]

The quality, clarity and *user-friendliness* of the Swiss comprehensive codification contribute significantly to *legal certainty* and ensure that there is relatively little need to debate in court over the interpretation of the PIL Act.[47]

order to determine the internal jurisdiction of the Swiss courts if their international jurisdiction is given according to the Lugano Convention.

[46]D Wiedemann, *supra* n 1, 196: in the EU "the creation of the code should be the occasion to rethink differently framed concepts and definitions".

[47]Zur "Anwendung des IPRG in der Praxis", D Girsberger and A Buhr, "Zwanzig Jahre IPRG", in A Bonomi and E Cashin Ritaine (eds), *supra* n 5, 11, 20 *et seq*.

In cases where the interpretation of the PIL Act is contentious, then the decisions of the Swiss Federal Supreme Court are usually extraordinarily clear. When reading these decisions it is obvious that the clarity of the codification – both in terms of its structure and the individual rules – is reflected in the persuasiveness of the case law on the PIL Act.

Last but not least, the qualities of the PIL Act facilitate the teaching of the subject. During the Freiburg conference, the current level of complexity of the EU PIL system gave repeated cause for concern with respect to the teachability of the subject in the EU. In Geneva, where the system of the Swiss PIL Act is taught to approximately 250 students per year, teachability of the PIL system is not an issue. At the end of the three hour per week, one semester course on PIL, almost every student is in a position to solve even complex issues in all core areas of PIL. To be able to efficiently teach the subject, or – from the perspective of students and future legal practitioners – to efficiently learn it, in turn helps future lawyers and judges to reliably handle the matter in their later practical life.

Swiss students occasionally compare the precision of the PIL Act, the transparency of its structure and rules, the smooth interaction of its Special and its General Part and the coexistence and interaction of international conventions and the national PIL Act to mathematics. Foreign students are reminded of the slick functioning of Swiss watches. They probably do not think of confusion and chaos, but rather the opposite: a well-coordinated, coherent, consistent system of rules smoothly interacting with each other and which often lead to clear and predictable results.[48]

E. Lessons for the EU?

What conclusions could be drawn for the EU from the above analysis?

1. *Comprehensive private international law codifications: avoiding friction and promoting a coherent view on the whole subject matter*

National legislators in Europe who decided in the last 30 years to proceed towards a new codification of their PIL rules in a separate legislative act (as opposed to

[48]For the benefits of a comprehensive codification in Switzerland, see also eg A Bucher and A Bonomi, *Droit International Privé* (Helbing Lichtenhahn, 3rd edn, 2013), § 46: "Le législateur de la LDIP a doté la Suisse d'un régime fédéral uniforme sur la compétence internationale des tribunaux suisses et sur les conditions de la reconnaissance et l'exécution des décisions étrangères, simplifiant ainsi sensiblement les relations internationales de droit privé entre la Suisse et les autres pays". "La LDIP détermine de manière spécifique et complète la compétence internationale des autorités et des tribunaux suisses en droit international privé. Dans le droit antérieur, les solutions devaient être dégagées, le plus souvent par le biais d'une interprétation extensive, ou par analogie, des règles de compétence destinées à régir des situations internes et intracantonales"; F Knoepfler and P Schweizer, *Droit international privé suisse* (Staempfli, 2nd edn, 1995), § 723: "Avant le LDIP, la situation était nébuleuse".

introducing them in their civil codes), have – like the Swiss legislator – chosen in an overwhelming majority the path of an all-inclusive, comprehensive codification, including, in the same legal act, rules (a) on jurisdiction, (b) applicable law, and (c) recognition and enforcement of foreign decisions. In respect of countries that have adopted a separate private international law act during the past decades, the comparative overview shows a clear commitment to *comprehensive codification*.

The experiences in EU consumer law, but also increasingly in PIL, show that the fragmentation of a subject matter over a whole series of legislative acts leads to inconsistencies.[49] In contrast, the Swiss experience of comprehensive codification of PIL shows that the common treatment of rules on jurisdiction and procedure on the one hand and on rules determining the applicable law on the other avoids friction and conflicting interpretations and promotes a uniform view on the whole subject matter. A comprehensive codification also favours interaction between rules on jurisdiction and procedure and applicable law. Friction and conflicts are therefore an exception in a comprehensive codified PIL system.[50]

2. *General Part*

All the above mentioned comprehensive national PIL codifications contain a General Part. A second lesson from the comparative analysis could therefore be that a modern European Union PIL Act should – obviously, as one is tempted to say from a comparative law perspective – contain a General Part.[51]

[49]See eg D Wiedemann, *supra* n 1, 187: "Deviations between the regulations . . . are not always the result of objective reasons but also the result of the political power structure within the Council and corrections of shortcomings of earlier regulations . . . A coherent system should answer general questions of private international law in a uniform way, and, only where objectively necessary, provide for exceptions for individual areas of law".

[50]See with respect to PIL in the EU X Kramer, *supra* n 2, 80: "An important facet of codification on the European level is reduction of the volume of legislation . . . At the national level . . . the prevailing idea is that a 'code' will help the systematisation of law". – For the EU there is one slight caveat: the benefits mentioned above are achieved only where this comprehensive system applies – having in mind that an EU regulation may (at least initially) not cover all fields of PIL, and given that some EU Member States would require the possibility to opt out of certain parts of the regulation. Also, frictions might continue to exist where international treaties to which some, but not all, EU Member States are parties, continue to apply and prevail over the regulation.

[51]On the possibility of a so-called Rome 0 Regulation, S Leible and M Müller, "The Idea of a 'Rome 0 Regulation'" (2012–2013) *Yearbook of Private International Law* 137; E Jayme and C Zimmer, "Brauchen wir eine Rom 0-Verordnung – Überlegungen zu einem Allgemeinen Teil des Europäischen IPR – Symposium an der Universität Bayreuth" (2013) *Praxis des Internationalen Privat- und Verfahrensrechts* 99; see also the proposal by P Lagarde, "Embryon de Règlement portant Code europeén de droit international privé" (2011) *Rabels Zeitschrift* 673; L de Lima Pinheiro, "The Methodology and the General Part of the Portuguese Private International Law Codification: A Possible Source of

The Swiss example shows that the General Part could – or should, as one is tempted to say against the backdrop of the Swiss experience – first include general rules on jurisdiction, followed by rules on applicable law, and finally by general rules for the recognition and enforcement of foreign judgments. This also promotes uniform interpretation of terms, which in turn helps avoid friction and inconsistencies.

For most of the topics dealt with in the General Part of the Swiss PIL Act, similar general provisions already exist in the PIL regulations of the EU (in particular the Rome I–IV regulations); for many topics such rules even can be found in several regulations in parallel.[52] This diversity could – just as in the PIL Act – be reduced to one single rule or, where necessary, a couple of rules, in the General Part of a comprehensive EU PIL regulation.

Where rules which can be found in the Swiss PIL Act are still missing in the EU PIL regulations – such as a general definition of domicile and habitual residence of natural persons – a comprehensive European PIL regulation would present an opportunity to fill these gaps. The Swiss PIL Act could hereby serve as a source of inspiration, both in terms of the topics to include as well as, possibly, the content of some of the rules. Further inspiration could be drawn from other national codifications in particular regarding issues not addressed by the existing EU regulations or the Swiss PIL Act, such as characterisation (addressed by the Tunisian PIL Act and the Romanian and Quebec civil codes, for instance[53]), evasion of law (covered eg by the Belgian PIL Code[54]), preliminary questions (addressed by the Dutch Civil Code, for example[55]), foreign judgments used as evidence (a provision on this issue is found in the Belgian Civil Code[56]), etc.

3. *Structure of the Special Part*

If the structure of the Swiss PIL Act presented above were applied in the Special Part of a European Union PIL regulation, the section of the EU regulation on contract law would, for example, first of all contain rules on *international jurisdiction*, namely

Inspiration for the European Legislator" (2012–2013) *Yearbook of Private International Law* 153.

[52]See eg X Kramer, *supra* n 2, 80–81; D Wiedemann, *supra* n 1, 180–192.

[53]Art 27 of the Tunisian Code of Private International Law (Loi n° 98–97 du 27 novembre 1998, portant promulgation du Code de droit international privé); Art 3 of the Code of Private International Law of Romania (Law n° 105 of 22 September 1992); Art 3078 of the Civil Code of Québec. For further comparative references, see R Boukhari, "La qualification en droit international privé", (2010) *Les cahiers de droit* 159–193.

[54]Art 18 of the Belgian Law of 16 July 2004 establishing the Code of Private International Law (Loi du 16 juillet 2004 portant sur le Code de droit international privé).

[55]Art 10:4 of the Dutch Civil Code.

[56]Art 26 of the Belgian PIL Code, *supra* n 54.

- a general rule on jurisdiction (corresponding to Article 4 of the recast Brussels I Regulation), followed by
- a rule on jurisdiction at the place of performance of the contract (Article 7 (1) of the recast Brussels I Regulation),
- rules on jurisdiction for insurance claims (Article 10 *et seq* of the recast Brussels I Regulation),
- for consumer issues (Article 17 *et seq* of the recast Brussels I Regulation),
- for employment law issues (Article 20 *et seq* of the recast Brussels I Regulation),
- and finally, for example, rules on exclusive jurisdiction for contract claims (see eg Article 24(1)of the recast Brussels I Regulation).

Next would be rules on the *applicable contract law*, corresponding to the current Article 3 *et seq* of the Rome I Regulation.

The rules on *recognition and enforcement of judgments* from other EU Member States could, in principle, be included in the last section of the General Part of a comprehensive European PIL regulation. They could, in essence, state that decisions from EU Member States will generally be recognized and enforced without further requirements in all other EU Member States.

In the Special Part, these general rules could, where necessary, be complemented by specific provisions for the *recognition and enforcement of judgments* regarding contract claims. It would possibly also be worth considering including special rules on the recognition and enforcement of judgments from third countries in the matter in question, if and so far as this is politically feasible.

The same structure could be applied for all other topics.[57] In the EU PIL regulations, provisions already exist that correspond to those contained in the Swiss PIL Act,[58] but they are currently spread over a large and ever increasing number of regulations. Starting with the existing *acquis communautaire*,

[57] An *alternative* could be to subdivide even more and provide subsections for each specific type of contractual relationship, with each subsection containing the respective rules on jurisdiction, followed by special rules on applicable law and, where necessary, on the recognition and enforcement of foreign decisions. There could, eg, be such a subsection on consumer contracts with rules on jurisdiction and applicable law in consumer contracts, another subsection on insurance contracts, employment contracts, etc. The legislature of the Swiss PIL Act has not adopted such a further division into subsections; the section on contracts (Art 112 *et seq*) is subdivided in rules on jurisdiction on the one hand (Arts 112–115) and on applicable law (Arts 116–126) on the other. The specific rule on jurisdiction for consumer contracts is thus to be found in Art 114 of the Swiss PIL Act, the rule on the law applicable to consumer contracts in Art 120; the specific rule on jurisdiction for employment contracts in Art 115, the rule on the law applicable to employment contracts in Art 121 and so on. The Swiss example demonstrates that the structure of a codification can be perfectly clear even in the absence of further subdivisions.

[58] Although not for all of them, see J Basedow in J von Hein and G Rühl (eds), *supra* *, 2–25.

supplemented by some new rules that would fill the gaps, it should arguably be possible in the future to implement a comprehensive European Union PIL regulation, which would have a clear and concise structure similar to that achieved in the Swiss PIL Act. Just like the Swiss PIL Act, a comprehensive EU PIL regulation could first contain a General Part with general rules on international jurisdiction, applicable law, and recognition and enforcement of judgments in general (the latter may be limited to decisions from other Member States of the EU), followed by a Special Part also with specific rules on jurisdiction and procedure, on applicable law, and, where adequate, with specific rules on recognition and enforcement, for each topic.

4. *Unique complexity of the situation regarding the applicable set of rules in the EU*

It is true that the situation in the EU is more complicated than in Switzerland insofar as some EU Member States may opt out of certain issues covered by a comprehensive regulation.[59] Prominent examples are provided by the Brussels I Regulation with respect to Denmark[60] or the EU Successions Regulation with respect to the UK, Ireland and Denmark.[61] In a comprehensive EU regulation, the Member States that have opted out of particular issues covered by the regulation could be listed either in the relevant section or in annexes to the regulation.

For the current PIL regulations, it is part of the *acquis communautaire* that they shall not affect the application of international conventions to which one or more EU Member States and non-EU Member States are party at the time of adoption of the relevant regulation and which concern matters covered by the regulation.[62] In a comprehensive PIL regulation, the relevant international Conventions could be mentioned in the pertinent section of the regulation – just as the relevant Hague conventions are mentioned in the Swiss PIL Act. Furthermore, where Hague Conventions or other international conventions prevail in their Contracting States over certain sections of a comprehensive EU regulation, the EU Member States that are Contracting States to the relevant convention could be listed, either in a specific article of the relevant section or in an annexe to the regulation. Bilateral

[59]See also D Wiedemann, *supra* n 1, 195 *et seq* "Technical Questions".
[60]Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation, recast), recital 41.
[61]Regulation 650/2012 of 4 July 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. The Regulation is in force in all EU Member States except the UK, Ireland and Denmark, see recitals 82 and 83.
[62]Compare Art 25(1) of the Rome I Regulation, Art 28(1) of the Rome II Regulation, and Art 75 of the Succession Regulation.

conventions that prevail and the relevant Contracting States could also be listed in an annexe.

In Member States that have opted out of parts of the comprehensive European PIL regulation, and in which the issue is not covered by an international or bilateral PIL convention, the domestic PIL systems would continue to apply.[63] The same would be true for issues not covered by the (ideally, comprehensive) EU regulation.

All these are technical issues that could without any doubt be addressed satisfactorily in a future comprehensive EU PIL regulation. Once again, a maximum degree of transparency and user-friendliness should be the guiding principle.

5. *A comprehensive private international law codification: not "if" but "how" should be the question*

At the beginning of this paper, it was pointed out that over the last 30 years, the legislators in many jurisdictions have enacted comprehensive PIL codifications that include rules on jurisdiction, applicable law, and recognition and enforcement of foreign decisions. All these codifications comprise both a General and a Special Part.

That being said, compared with the Swiss PIL Act, the other comprehensive codifications are somewhat less sophisticated: the Special Parts of the other codifications are – unlike in the Swiss PIL Act – each basically divided in two sections. Some codifications first contain rules on applicable law on the one hand and – and in a separate part – rules on international jurisdiction and the recognition and enforcement of foreign judgments on the other. (This is the structure of the codifications of Hungary of 1979, Yugoslavia of 1982, Turkey of 1982 and 2007, Romania of 1987, the Canadian province of Quebec of 1994, Slovenia of 1999, Ukraine of 2005, Macedonia of 2007, and Albania of 2011.) Other comprehensive codifications include, in the opposite order, first rules on jurisdiction and procedure and then – and again, separately – rules on applicable law. (This is the case of the PIL Acts of Italy of 1995 and of Tunisia of 1998.) A third model is found in the Bulgarian PIL Act of 2005; first there are rules on jurisdiction and procedure, then on applicable law, and finally on recognition and enforcement of foreign judgments.

[63] It is assumed (and suggested) that the UK, Ireland, and Denmark would have the possibility to opt into/or out of parts of the PIL regulation in the same way as they may opt into/or out of PIL regulations under Arts 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union; Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union. In the same sense D Wiedemann, *supra* n 1, 196: "A possible solution would be the opt in of UK and Ireland for the whole code and a spatial restriction of some of its provisions where the UK and/or Ireland do not wish to take part".

As we have seen above, the Swiss PIL Act is structured differently and already contains in its General Part general rules on jurisdiction, procedure, applicable law, and on the recognition and enforcement of foreign judgments. In its Special Part, this structure is repeated for the different subject matters.

Against the comparative background and the experiences notably in Switzerland, and given the high complexity and the current loss of coherence in the PIL of the EU, the answer to the question of whether there is a need for a comprehensive EU regulation on PIL seems clear: Europe would be well advised to commence preparatory work for the enactment of a comprehensive PIL regulation. The main question should be whether a comprehensive PIL regulation in the EU should follow the example set by the somewhat less sophisticated subdivision of the codification in some countries into (a) rules on jurisdiction, procedure, and recognition and enforcement on the one hand, and (b) on applicable law on the other, or whether the example set by the Swiss PIL Act with its finer mechanics is preferable. The question should no longer be *whether* a comprehensive PIL regulation is needed, but *how* it should be structured and achieved.

It might still be argued that, notwithstanding the many Codes of PIL in Europe, the movement towards codification has so far received little support in the common law world. However, the idea of partial codification is not totally foreign to private international law in the UK, and most of the PIL of torts was successfully codified well before the arrival of the Rome II Regulation.[64] What is more, it seems that the UK and Ireland have managed perfectly well with the legal certainty and the predictability of outcomes that has been achieved over the past decades by the relevant EU PIL regulations. Last but not least, some of the most important academic work on these regulations was published by English or Irish authors.[65]

Also, experience in the legislative procedures that have led to the existing PIL regulations and the success of these regulations have shown that it is infinitely easier to reconcile the European national systems and national interests in the field of PIL than in any matter of substantive law. While it is certainly true that preparing a comprehensive European PIL codification would not be a simple task,[66] it would, from a political point of view, however, be infinitely easier than any legislative step towards harmonisation or unification of rules on substantive law.

[64]See the Private International Law (Miscellaneous Provisions) Act 1995 that replaced the English common law rules on PIL of tort, except for defamation claims.

[65]See eg P Stone, *European Private International Law* (Edward Elgar, 3rd edn, 2014); A Dickinson, *The Rome II Regulation: The Law Applicable to Non-contractual Obligations* (Oxford University Press, 2008); W Binchy and J Ahern (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New Tort Litigation Regime* (Martinus Nijhoff, 2009).

[66]D Wiedemann, *supra* n 1, 197: "not a task for one afternoon, but a long path"; X Kramer, *supra* n 2, 81, 83–84, 89–93, therefore recommends to first fill the gaps and only then address the issue of an EU PIL regulation.

6. *Looking to the future*

A few weeks after the conference in Freiburg in Germany, a meeting of PIL specialists took place in Fribourg in Switzerland. It addressed the need for reform of the Swiss PIL Act[67] and it was, *inter alia*, discussed whether and to what extent inspiration might be taken from the PIL regulations of the EU. With regard to a series of specific questions, it indeed seems worth taking inspiration from EU law in Switzerland.

In this paper, the proposal goes in the opposite direction. In respect of designing a future European Union PIL regulation, it would arguably be wise for the EU to take inspiration from the Swiss PIL Act. This applies first of all to the question of *whether* a comprehensive PIL regulation is needed, comprising rules on jurisdiction, procedure, and recognition and enforcement of foreign decisions on the one hand, and on applicable law on the other. It also arguably applies to the question of *how* a comprehensive EU PIL regulation should be structured and designed.

Almost 30 years after its adoption and more than 25 years after its entry into force, and despite a series of legislative updates,[68] the Swiss PIL Act is still coherent, user-friendly and works perfectly well in practice. Many of the positive effects are due to the fact that Switzerland has the most comprehensive codification of PIL worldwide. Indeed, having a comprehensive PIL codification has numerous advantages when compared with having the PIL rules distributed over a large number of separate acts or regulations: a comprehensive codification makes all PIL rules readily accessible in one place, helps to avoid friction between the rules on jurisdiction on the one hand and applicable law on the other, promotes a uniform view of the whole matter, favours clarity and coherence between the different sets of rules, reduces complexity, increases legal certainty, and considerably adds to the user-friendliness of the rules on PIL.

It is submitted that the same benefits could be achieved for private international law in the EU. In the search for clarity, coherence and user-friendliness, the comprehensive Swiss PIL Act could well serve as a guide out of the jungle.

[67] See the contributions to the conference in Fribourg, Switzerland in (2015) *Schweizerische Zeitschrift für internationales und europäisches Recht/Revue Suisse de droit international et européen* 347–412.

[68] For an overview, see D Girsberger and A Buhr, *supra* n 47, 11, 13 *et seq.*