



universität  
wien

# **Empowering European Families**

## **Towards more Party Autonomy in European Family and Succession Law**

Christiane Wendehorst

ELI Annual Conference, 4 September 2015

## European citizens in the 21st century ...



... make active use of their freedom of movement and work, live, marry, have children, get divorced, die ... outside their country of origin.



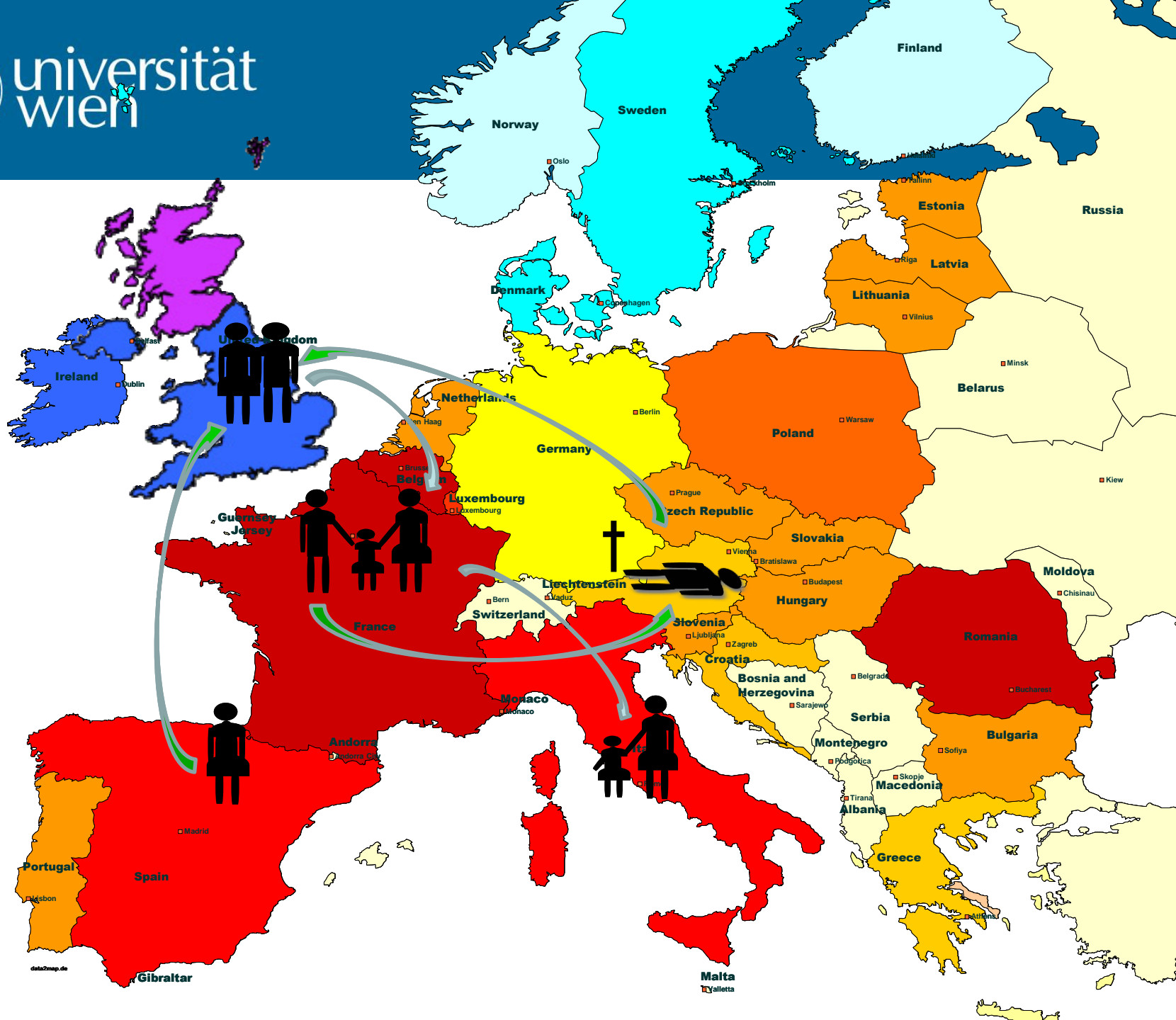
- More than 16 million international couples in the EU
- 13% of new marriages in the EU concern bi-national couples
- 20% of registered partnerships concern bi-national couples
- Each year, 450,000 successions with an international dimension are opened for a value of 123 billion euros

Source: [http://www.notaries-of-europe.eu/plan2020/pdf/CNUE\\_Brochure2020\\_WEB\\_En.pdf](http://www.notaries-of-europe.eu/plan2020/pdf/CNUE_Brochure2020_WEB_En.pdf)



Financial costs created by various problems associated with the property relations of international couples are estimated at 1.1 billion euros per annum.

Source: [http://ec.europa.eu/justice/civil/files/ia\\_on\\_mpr\\_main\\_report\\_en.pdf](http://ec.europa.eu/justice/civil/files/ia_on_mpr_main_report_en.pdf)



## **Problem No 1: Bad surprises after a change of habitual residence**

*Franz, living in Austria with his wife Theresia and their children, takes on a permanent position in Germany and instigates his family to follow him. He falls in love with a colleague and files an action for divorce under German law after one year of factual separation. German law has, under the Rome III Regulation, become the law applicable to divorce. Under Austrian law, Theresia could successfully have objected to the divorce for up to six years of separation.*

*Nik and Lara had been cohabiting in Ljubljana without being formally married. The couple later moves to Austria, where, after some years, Lara is killed in a car accident and dies intestate. Under Slovenian law, Nik would have enjoyed the same inheritance rights as a spouse. However, according to the Successions Regulation, Austrian law has become the law applicable to succession. Under Austrian law a cohabiting partner normally does not have any succession rights.*



## Problem No 2: Patchwork of forums and applicable laws

*Stefan and Monika live and marry in Germany, but later move to Austria, together with their daughter. In Austria, they buy a family home, which is solely owned by Stefan. In the course of his midlife crisis Stefan leaves the family and starts a new life in the Netherlands, where, 13 months later, he files a petition for divorce. He had always been paying considerable sums into private pension schemes in Germany and Austria. Monika, who devoted all her time to the daughter and household, has not acquired any pension rights of her own.*

<b>Matter:</b>	<b>Jurisdiction:</b>	<b>Applicable law:</b>
<b>Divorce</b>	Netherlands	Netherlands
<b>Maintenance</b>	Austria/Netherlands	Austria
<b>Property in general</b>	Netherlands (according to 2011 Proposal)	Germany (according to 2011 Proposal)
<b>Family home etc.</b>	Netherlands (according to 2011 Proposal)	Germany/Netherlands(?) (according to 2011 Proposal)
<b>Pension schemes</b>	Germany(?)	Germany(?)
<b>Parental responsibility</b>	Austria/Netherlands	Austria



### **Problem No 3: Forum shopping and a ‘rush to court’**

*German widower Herbert and Mary from the UK, who has been living in Germany for a long time, enter into a marriage in Germany. As both own a considerable estate, and as Herbert would like to pass his estate on to his children from his previous marriage, they conclude a pre-nuptial agreement according to which there shall be no mutual obligations whatsoever in the case of a divorce. When the couple breaks up, Mary quickly re-establishes her UK domicile and starts proceedings for divorce before a London court. The court in London will not consider the pre-nuptial agreement as strictly binding, and may even disregard it, whereas it would have been fully upheld by a German court.*



Those who start an international family, or families who move to a different country, are 'flying blind' into a storm of unexpected legal effects.

- Unification of substantive family law throughout the EU > unrealistic
- Creation of an Optional European Marriage/Partnership Regime > unrealistic
- Far-reaching changes in the existing PIL instruments > largely unrealistic, but 'rush-to-court' might be addressed in a recast Brussels IIa Regulation
- Early choice of court and of applicable law within the framework of existing (and future) PIL instruments



Would already today solve problems to a large extent, even more so if choice of court, including dynamic choice, were introduced in Brussels IIa and future instruments



## Reasons why parties do not make use of the options:

- Parties are unaware of the legal situation.
- Parties are afraid they would have to seek expensive expert advice.
- People tend to postpone decisions and to avoid unpleasant thoughts.
- It is difficult to raise the issue in a relationship.
- ...





## Workstream 1:

Development of European model dispositions concerning

- choice of court
- choice of law
- (possibly) submission to family mediation

along with simple and transparent information and offering to the parties, as far as possible, a set of ‘one-stop shop packages’.



This could be very effective if parties were made aware of and provided with these models whenever a marriage is concluded, a partnership is registered a cross-border change of residence is registered, and in similar situations.

# **Empowering European Families**

**Towards more Party Autonomy  
in European Family and Succession Law**