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EUFAMS II

FACILITATING CROSS-BORDER FAMILY LIFE:
TOWARDS A COMMON EUROPEAN UNDERSTANDING

REPORT ON THE SWEDISH EXCHANGE SEMINAR

ULF MAUNSBACH

22 JULY 2019

A joint project of the Institute for Comparative Law, Conflict of Laws and International Business Law at Universität Heidelberg, Universitat de València, Università di Verona, Università degli studi di Milano, Lund University, the University of Osijek, the Max Planck Institute Luxembourg for Procedural Law and the Asociación Española de Abogados de Familia

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SUMMARY

The Swedish Exchange Seminar and the result of the survey¹ conducted within the EUFams II project indicate that there is need for further collaboration in the field of European private international law in family and succession matters. The knowledge as regards the different instruments can be improved and more developed collaboration among actors from different Member States should be encouraged. In many countries, as is the case in Sweden, the number of cases containing real private international law issues is limited. Hence, the number of experts that are able to spend time with private international law issues on an everyday basis is low. In this regard it would be appreciated if experience could be shared among interested actors in the European Union (EU), providing a more developed source of information. The lack of general knowledge in this area indicates that it may be relevant to consider specialised courts and/or more developed alternative dispute resolutions.

From the discussion during the seminar it became evident that legislation in this fields has its own characteristics. As is the case with much EU-derived legislation, the imbedded nature of political compromises tends to make the legislative output complex and fragmented.

Despite this complexity it was also evident that the ongoing harmonization of private international law instruments in the area of European family law is appreciated and regarded as a positive development among those actually working with these issues. In general, the instruments seem to work quite well, although some issues still need to be further considered.

One such issue is the relationship between EU regulations in the field of private international law and the ECHR; another issue concerns the question whether same-sex marriages can be considered to be marriages for the purposes of the relevant regulations.

¹ Cf. *Lobach/Rapp*, An Empirical Study on European Family and Succession Law (<http://www2.ipr.uni-heidelberg.de/eufams/index-Dateien/microsites/download.php?art=projektbericht&id=2>).

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A. INTRODUCTION

I. SHORT DESCRIPTION OF THE SEMINAR

On 11 April 2019, Lund University hosted the EUFams II Swedish National Exchange Seminar, entitled “Family First”. The full-day conference, arranged at the Faculty of Law at Lund University, began with a morning coffee and mingle at 10:00 am and ended at 04:30 pm with concluding remarks.

The conference was conducted in English and divided into four themes:

- Theme 1 – From an Academic Perspective (Michael Bogdan, Senior Professor of Comparative and Private International Law): European private international law in family and succession matters – Mapping the landscape and pinpointing potential problems
- Theme 2 – From the Legislator’s Perspective (Elisabeth Hovmöller, Deputy Director, Ministry of Justice, Division for Family Law and the Law of Contracts, Torts and Personal Property): Negotiation and legislative initiatives as regards European private international law in family matters and matters of matrimonial property regimes and property consequences of registered partnerships
- Theme 3 – From a Practitioner’s Perspective (Johan Sarvik, Lawyer at Advokaterna Nyblom & Sarvik in Malmö, Fellow of the International Academy of Family Lawyers, and Thed Adelswärd, Senior Judge, Head of Division at Lund District Court): Challenges when applying European private international law in family and succession matters
- Theme 4 – From the Perspective of the Child (Eva Ryrstedt, Professor in Private Law, and Ulf Maunsbach, Associate Professor in Private International Law): The best interest of the child in the Child convention, European private international law and Swedish law

Each lecture was followed by a discussion session in order to capture important issues and concerns, but also as an opportunity to provide additional perspectives. All presenting speakers were from Sweden. They were selected and invited due to their specific expertise and in order to facilitate coverage of perspectives that included a wide variety of experiences.

The attendees at the National Exchange Seminar were both academics and practitioners as well as representatives from the Swedish government. They were a total of 21 and came from Sweden, Norway, Finland, and Germany. The general organizational policy concerning attendees was invitation only, but the invitation could be passed on within the invitee’s network. However, to attend one had to register. The invitation was also posted on the Faculty of Law’s web page² with a link to the entry form.

II. STRUCTURE OF THE SEMINAR

As is evident from the above the Swedish Exchange Seminar was structured around four different themes, not directly related to the different specific instruments. Proceeding in this manner facilitated a more dynamic discussion. It should be noted

² Available at <http://www.jur.lu.se>.

that Sweden is a small country as regards the number of published cases that include private international law aspects. As a consequence, there are few experts that work directly, on an everyday basis, with specific private international law instruments. This will become evident in the report below, where most of the discussions regards the Brussel II bis Regulation. From a Swedish perspective little can be said about most of the other instruments due to the fact that they are rarely applied (if at all).

So, the choice was a thematic structure with an ambition to highlight different perspective and with a certain focus to capture relevant practical aspects. The first theme gave an important background and presented broader views as regards private international law in general. Theme 2 aimed at pinpointing specific experiences from the perspective of the legislator. This session covered discussions regarding the process of negotiating instruments in the field of private international law and it provided insightful examples regarding the negotiations preceding the Property Regimes Regulations. It also contained an up-date as regards the negotiations that preceded the Brussels II bis Recast. The third theme aimed at pinpointing relevant practical problems that occur when applying private international law in family and succession matters. The session was jointly chaired by a lawyer and a judge and this created an interesting and dynamic discussion as regards practitioners' perspectives. The last theme was specifically focused on problems that may occur when the best interest of the child becomes an argument in private international law cases. The best interest of the child is a prevailing interest addressed in Art. 24 ECHR³ and it is a concept that can be relevant in a number of situations covered by the different regulations in the field of private international law. The child and its interest, however, are primarily relevant in relation to the application of the Maintenance Regulation (including the 2007 Hague Maintenance Protocol) and the Brussels II bis Regulation.

III. SURVEY

As regards the EUFams II survey⁴ it is a bit difficult to draw specific conclusions. In total, Sweden received 30 responses, but many of them were not complete and few responses include specific comments.

However, some conclusions can be derived. The Brussel II bis Regulation is rather well known. One half of the responses in the survey, which have actually provided an answer, state that the knowledge of the Brussel II bis Regulation is spread, ranging from basic to excellent. The knowledge about the Brussels II bis Recast Proposal does not seem to be great at all. The survey contains only one affirmative answer describing the anticipation that the recast will be able to offer improvements.

As with the Brussels II bis Recast Proposal, the knowledge of 2007 Hague Maintenance Protocol does not seem to be very extensive. Only seven out of 30 respondents know about the instrument and the spread between these individuals is at the same level as with Brussels II bis Regulation, ranging from basic to excellent.

As regards other instruments no specific comments were provided.

³ European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁴ Cf. *Lobach/Rapp*, An Empirical Study on European Family and Succession Law (<http://www2.ipr.uni-heidelberg.de/eufams/index-Dateien/microsites/download.php?art=projektbericht&id=2>).

IV. GENERAL OBSERVATIONS

Private international law is a relatively new field of European law, but today it is almost dominated by it. The European legislator has realized that differences in private law can be an obstacle to European integration. There is no uniform European Civil Code in sight and it would not even be desirable, because private law, especially family law, is part of national culture, just like music or food. This increases the importance of uniform rules of conflict of laws, promoting uniform outcomes despite the differences in substantive private law.

European private international law is basically statutory and has two main sources. The most powerful source is formally the primary European law, in particular TFEU, which is directly applicable in the Member States. One such primary rule is Art. 18 TFEU, which prohibits, “within the scope of application of the Treaties”, any discrimination between EU citizens on grounds of nationality. Nevertheless, nationality remains a legitimate connecting factor in the private international law of the Member States.⁵ Another rule of private international law relevance is Art. 21 TFEU, which is understood to prohibit, in principle, any differences in family law that would directly or indirectly preclude or deter EU citizens from using their right of free movement within the EU.⁶ The interplay between Art. 18 and 21 TFEU makes it sometimes necessary to find a compromise between the *lex patriae* and the *lex domicilii*, as insisting on the former could violate Art. 18 TFEU and insisting on the latter could violate Art. 21 TFEU. One such compromise is found e.g. in Art. 21 and 22 Succession Regulation.

The second principal source of European private international law in family and succession matters is much more voluminous. It consists of numerous regulations, directly applicable in the courts of the Member States, the most important are (in chronological order):

- Brussels II bis Regulation⁷ (to be replaced by a recast adopted in 2019)
- Maintenance Regulation⁸
- Rome III Regulation⁹
- Succession Regulation¹⁰
- Matrimonial Property Regimes Regulation¹¹

⁵ Cf. CJEU 02.10.2003, C-148/02 (Avello).

⁶ Cf. CJEU 05.06.2008, C-673/16 (Coman).

⁷ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

⁸ 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.

⁹ Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

¹⁰ Regulation (EU) No 650/2012 of the European Parliament and of the Council 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.

¹¹ 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.

- Regulation on Property Consequences of Registered Partnerships¹²
- Public Documents Regulation¹³

The legal basis for this secondary European legislation is today found in Art. 81 TFEU, which in 2009 replaced Art. 65 EC. Art. 81 TFEU increased the competence of the EU to legislate on private international law compared to Art. 65 EC by replacing “insofar as necessary” with “particularly when necessary”, and “promoting” compatibility with “ensuring”. The use of regulations rather than directives indicates the ambition to achieve total private international law uniformity.

Today, the EU is a member of the Hague Conference on Private International Law. Some Hague Conventions have become, in one way or another, parts of European private international law, e.g.

- 1980 Hague Child Abduction Convention¹⁴, referred to in and made more efficient by Art. 11 Brussels II bis Regulation
- 1996 Hague Child Protection Convention¹⁵, acceded by Member States “in the interest of the Community”
- 2007 Hague Maintenance Convention¹⁶
- 2007 Hague Maintenance Protocol¹⁷, incorporated by Art. 15 Maintenance Regulation.

Remaining areas still not regulated include paternity/parenthood, validity of marriages, adoptions, personal names, and marriage-like cohabitation.

Not all Member States participate to the same extent. Denmark does not participate at all, UK and Ireland have an opt-in right, only about half of the Member States participate in enhanced cooperation on Rome III Regulation, and only 18 participate in the enhanced cooperation in the field of matrimonial/partnership property.

In this regard the Nordic cooperation should be mentioned.¹⁸ In relation to a number of instruments there are so-called Nordic exemptions, allowing the Nordic countries to maintain specific Nordic regulations in some areas. These exemptions are primarily

¹² 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.

¹³ Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012.

¹⁴ Convention on the Civil Aspects of International Child Abduction, drafted by the Hague Conference on Private International Law and concluded at The Hague on 25 October 1980.

¹⁵ Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, drafted by the Hague Conference on Private International Law and concluded at The Hague on 19 October 1996.

¹⁶ Convention on the international recovery of child support and other forms of family maintenance, drafted by the Hague Conference on Private International Law and concluded at The Hague on 23 November 2007.

¹⁷ Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, drafted by the Hague Conference on Private International Law (HCCH).

¹⁸ The Nordic Region consists of Denmark, Norway, Sweden, Finland, and Iceland, as well as the Faroe Islands, Greenland, and Åland.

politically important and there still is a close collaboration among the Nordic countries, also in the field of private international law.¹⁹

As regards the legislative process it was stated that negotiations are a complex process that takes place in a political context, and this is particularly so when the initiative is EU-derived. The process in these situations is usually initiated by a proposal from the Commission. In Sweden such proposals are, as a principal rule, forwarded to different stakeholders (e.g. courts, universities etc.) in order to get informed feedback. This consultation provides important input in the preparation for working group sessions in Brussels when the proposed instruments are being discussed. Simultaneously, there is an on-going consultation between different branches of the Swedish government (e.g. ministry of justice and ministry of social affairs etc.), meaning that some compromises are already negotiated before the Swedish standpoint can be prepared for further negotiations in Brussels. Before a final decision in the Council, the Swedish position is passed by the Swedish parliament. So negotiating in this regard is a long and thorough process that involves a lot of different actors.

As regards Swedish case law in this area it has already been observed that the number is limited. It is nevertheless relevant to note that Sweden has general courts and administrative courts. Both general and administrative courts have three instances.²⁰ A majority of family law cases are adjudicated by the general courts, but the courts are general in the sense that they also deal with other types of cases, mostly criminal cases. Among the family law cases very few contain real private international law problems.

From a practitioners perspective it was stated that the complexity of private international law cases often surpasses fiction. This complexity may be one additional explanation as to why not many lawyers have thorough experience with private international law. The few cases that appear are quite frequently forwarded to specialized colleagues, and there are few such specialists in Sweden.

As regards specialization it may also be noted that few judges have extensive experience from adjudicating cases in the field of private international law.

The practice of private international law is further complicated by the fact that the material is complex by nature. And the number of European and international instruments, applicable in Sweden, are rapidly growing.

In the everyday work with private international law one of the most important assets is the access to functioning networks. The possibility to contact specialists from other countries, who are able to quickly provide information as regards e.g. the content of a specific foreign law, is a crucial resource in private international law cases.

¹⁹ As regards Nordic Co-operation, cf. <https://www.norden.org/en>.

²⁰ As regards the Swedish court-system, cf. <http://www.domstol.se/Funktioner/English/>.

B. BRUSSELS II BIS REGULATION

I. OVERVIEW

The Brussels II bis Regulation is the most applied instrument in the field of European family law in Sweden. The Brussels II bis Regulation seems to function well and there are few specific concerns. However, some specific issues remain, one of which is if same-sex marriages are to be seen as marriages for the purposes of European private international law and whether the Brussels II bis Regulation applies to them.

As regards the survey result, it can be concluded that the Brussels II bis Regulation is the most applied instrument as well as the most well-known.

II. BEST INTEREST OF THE CHILD

As regards the Brussels II bis Regulation the best interest of the child is recognised and emphasised in Recital 33 with reference to Art. 24 CFR²¹.

Within the Brussels II bis Regulation the best interest of the child may be an issue in relation to:

- jurisdiction in cases regarding parental responsibility (e.g. Art. 8-9 Brussels II bis Regulation when assessing the child's habitual residence);
- jurisdiction in cases of child abduction (e.g. Art. 10-11 Brussels II bis Regulation and Art. 11 (2) Brussels II bis Regulation referring to Art. 13 of 1980 Hague Child Abduction Convention);
- prorogation of jurisdiction (Art. 12 Brussels II bis Regulation)
- transfer to a court better placed to hear the case (Art. 15 Brussels II bis Regulation, “where this is in the best interests of the child”); and
- grounds of non-recognition for judgments (Art. 23 (a) Brussels II bis Regulation if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child).

There are some relevant cases underpinning the best interest of the child in relation to:

- jurisdiction in cases regarding parent responsibility²²;
- jurisdiction in cases of child abduction²³;
- prorogation of jurisdiction²⁴;
- transfer to a court better placed to hear the case²⁵; and
- grounds of non-recognition for judgments²⁶.

²¹ Charter of Fundamental Rights of the European Union.

²² CJEU 02.04.2009, C-523/07 (A); CJEU 22.12.2010, C-497/10 PPU (Mercredi); CJEU 28.06.2018, C-512/17 (HR); CJEU 17.10.2018, C-393/18 PPU (UD v XB).

²³ CJEU 11.07.2008, C-195/08 PPU (Rinau); CJEU 01.07.2010, C-211/10 PPU (Povse); CJEU 09.10.2014 C-376/14 PPU (C v M).

²⁴ CJEU 19.04.2018, C-565/16 (Saponaro).

²⁵ CJEU 27.10.2016, C-428/15 (Child and Family Agency v. JD).

²⁶ CJEU 19.11.2015, C-455/15 PPU (P v Q); CJEU 16.01.2019, C-386/17 (Liberato).

As regards the assessment of the best interest of the child it can be concluded that the CJEU has provided more “substantive” guidance regarding habitual residence than regarding “the best interest of the child”. It is generally acknowledged that the best interest of the child shall be a primary concern (with reference to Art. 24 Brussels II bis Regulation) but it is also acknowledged that substantive questions regarding the best interest of the child are, as a principal rule, to be assessed by the competent court first seized (i.e. on a national level).

In this regard it may be relevant to note that public policy is to be applied restrictively (and enforcement to be performed expediently) – not really a platform for claims regarding “child interests”.

As regards the procedure in national courts (first seized) the best interest of the child becomes an integral part of the substantive assessment of the case at hand. For Swedish measures this assessment will be conducted in relation to relevant Swedish substantive provisions (e.g. the Children and Parents Code in relation to which the best interests of the child is a decisive element in all decisions of legal custody, residence and access).

When the assessment in Swedish courts is conducted, special weight shall be given to the risk of the child or any other family member being subjected to abuse; the risk that the child is abducted, detained, or in another way harmed and the fact that the child’s need to have a close and good contact with both parents. In this regard the child’s perspective is to be taken into account while considering the child’s age and maturity.

A closer inquiry into the practice in Sweden reveals that parents’ use of the concept is coloured by their own needs and wishes and that the child’s right to be heard may be abused in order to promote the parents’ interests rather than those of the child.

III. PUBLISHED SWEDISH CASE LAW

1. Divorce

In one case²⁷, the Supreme Court found that there was no Swedish jurisdiction to deal with a divorce application filed by a Swedish citizen living in France against a Cuban citizen living in Cuba. This decision was based on a preliminary ruling from the CJEU²⁸ which had made it clear that Art. 6 and 7 Brussels II bis Regulation are to be interpreted in the sense that even though the defendant is neither domiciled nor is a national of a Member State, the national court’s (*in casu* Sweden’s) national jurisdictional grounds for divorce must not be used, if the court of another Member State (*in casu* France) has jurisdiction under Art. 3 Brussels II bis Regulation. In the present case, French jurisdiction under Art. 3 Brussels II bis Regulation could be based on the applicant’s French residence for at least one year or, alternatively, on the couple’s last joint residence with the applicant’s continued residence in France.

²⁷ NJA 2008, p. 71.

²⁸ CJEU 29.11.2007, C-68/07 (Sundelind Lopez v. Lopez Lizazo).

In another case²⁹, a Swedish court of appeal held that pursuant to autonomous Swedish jurisdictional rules there was Swedish jurisdiction to deal with a divorce petition filed by a Philippines national with habitual residence in Sweden against her husband living in the Philippines. It is submitted that relying on autonomous Swedish jurisdictional rules was incorrect, as Swedish jurisdiction followed rather from Art. 3 (1) Brussels II bis Regulation (cf. Art. 7 (1) Brussels II bis Regulation).

2. Parental responsibility

In one case³⁰, a Swedish court of appeal agreed, without providing any justification of its own, with the court of first instance that a child abducted from Finland to Sweden had to be returned in accordance with Swedish legislation implementing the 1980 Hague Child Abduction Convention. In addition to that legislation, the court of first instance referred to Art. 11 (4) Brussels II bis Regulation, stipulating that the return of abducted children must not be refused if it is proven that appropriate measures have been taken to ensure the child's protection after the return.

A Supreme Administrative Court's ruling³¹ did not deal with private international law in a narrow sense, but rather with social (public welfare) law. The issue in the case was whether there was Swedish jurisdiction to decide on the taking into public care, pursuant to Swedish welfare legislation, of children in a problematic situation when the child in question resided abroad. The Court answered this question on the basis of autonomous Swedish law. This appeared to be wrong in view of the subsequent CJEU judgment³² where the CJEU, through an autonomous interpretation of the concept of "civil matters" in Art. 1 (1) Brussels II bis Regulation, concluded that the Regulation applied to the taking of children into public care by Swedish authorities despite the fact that such measures are in Sweden perceived as being of a public-law nature.

In another case³³, a Swedish court of appeal dealt with a child that had been abducted to Sweden, but did not discuss the return of the child because no application for such return had been made by the deprived parent in Greece. The question raised concerned whether Art. 10 Brussels II bis Regulation did not hinder Swedish jurisdiction to rule, against the objections of the deprived parent, on the abducting parent's petition for custody. The court of appeal affirmed the decision of the court of first instance, which noted that the child had been residing in Sweden for more than a year after the deprived parent had become aware of the child's whereabouts. Swedish jurisdiction was therefore found to exist.

The Supreme Court³⁴ had to determine the habitual residence of a child under Art. 8 Brussels II bis Regulation, which makes such residence the main basis of jurisdiction in matters of parental responsibility. The case concerned Swedish jurisdiction to decide a custody dispute regarding a child that had moved to Indonesia together with

²⁹ RH 2013:46.

³⁰ RH 2006:60.

³¹ RÅ 2006 ref. 36.

³² CJEU 27.11.2007, C-435/06 (C).

³³ RH 2010:85.

³⁴ NJA 2011 p. 499.

the mother who was sole custodian at the time. The Court noted that Art. 8 Brussels II bis Regulation was applicable even though the case had no connection with any Member State other than Sweden. It referred to the reasoning of the CJEU³⁵ and concluded that despite the short time elapsed since the move, the child could no longer be considered to have its habitual residence in Sweden. The Court relied on the fact that the mother was entitled to decide where the child would live and that the circumstances, such as the enrolling of the child in an Indonesian school, showed that she intended to establish herself and, for the foreseeable future, have the center of her interests there. Since no other Member State had jurisdiction under the Regulation, Swedish jurisdiction had, pursuant to Art. 14 Brussels II bis Regulation, to be determined in accordance with Swedish jurisdictional rules, but these were based on the child's habitual residence as well. The Court confirmed that the Swedish concept of habitual residence corresponds in principle to that of European law. The father's petition for custody was thus dismissed because of lack of jurisdiction.

Another Supreme Court decision³⁶ dealt with the same parties as in the aforementioned case. As described above, the mother, who was the sole custodian, had lawfully moved to Indonesia together with the child. The father, living in Sweden, was granted certain rights of access by a Swedish court and petitioned the court for the enforcement of these rights by an injunction under the threat of a fine. The mother objected and claimed that there was no Swedish enforcement jurisdiction. While the subordinate courts dismissed the father's petition, the Supreme Court came to an opposite decision. It pointed out that Swedish enforcement jurisdiction does not quite coincide with Swedish adjudication jurisdiction and that international law does not prohibit ordering a parent who has moved abroad to respect the other parent's rights to access. In view of the child's need for contact with both parents, the main principle must be that there is Swedish competence when it comes to enforcing rights to access granted by a Swedish decision. An injunction can constitute an effective means of pressure even if the custodian lives abroad, provided he or she has retained connections with Sweden. Since the mother in the present case did not completely lack connection with Sweden, the Court held that there was Swedish jurisdiction to rule on the father's enforcement application. It is worth noting that the Court spoke merely of enforcement of Swedish decisions, but it is submitted that the same applies to decisions made in the other Member States, because Art. 47 (2) Brussels II bis Regulation stipulates that such decisions are to be enforced under the same conditions as if they had been issued in the executing Member State.

In another Supreme Court case³⁷, a father residing in the Czech Republic demanded that his children, which had been brought by their mother from Czech Republic to Sweden and detained there, be returned to the Czech Republic in accordance with 1980 Hague Child Abduction Convention. A return order presupposed i.a. that the children were resident in the Czech Republic at the time of detention and that the detention was contrary to the father's rights under Czech law. The court of appeal

³⁵ CJEU 02.04.2009, C-523/07 (A); CJEU 22.10.2010, C-497/10 (Mercredi).

³⁶ NJA 2011 p. 507.

³⁷ NJA 2012 p. 269.

stated that the children were habitually resident in the Czech Republic and that according to Czech law, the parents had joint decision rights, making the one-sided move of the children to Sweden by their mother illegal. The Supreme Court agreed in principle with these conclusions but rejected, nevertheless, the father's demands. During the proceedings in the Swedish Supreme Court, the mother procured a Czech court's decision whereby she was granted an interim right to stay with the children in Sweden. Despite the fact that the Czech ruling was merely provisional and not final, the Supreme Court regarded it as equal to such ex-post approval of the detention which can be taken into account in accordance with Art. 13 (a) of 1980 Hague Child Abduction Convention.

IV. MAIN FINDINGS

- Brussel II bis Regulation seems to function well.
- It still remains to be resolved how questions regarding same-sex marriages are to be handled.
- The contradiction between speed and accuracy is still a challenge as regards the assessment of the best interest of the child.

C. BRUSSELS II BIS RECAST PROPOSAL

During the seminar, the Brussels II bis Recast Proposal was discussed primarily in relation with the assessment of the best interest of the child. One important novelty in the recast is that the best interest of the child is to be promoted even further, linking the provisions in the Brussels II bis Regulation more closely to the Charter. Among other things a general obligation to give children the possibility to express their opinions will be included. In this regard it is important to note that the Brussels II bis Regulation does not provide for a harmonized method how children should be heard. This is still something that is dealt with on a national level and there are obvious national differences as regards how and when children are to be heard.

D. ROME III REGULATION

The Rome III Regulation is not applicable in Sweden. Hence, there is no information to report as regards this instrument.

E. MAINTENANCE REGULATION AND 2007 HAGUE MAINTENANCE PROTOCOL

I. OVERVIEW

Although the Maintenance Regulation is generally applicable in Sweden there are still no publicly available cases that directly concern the Regulation. The Regulation has been well received in Sweden partly due to the fact that its general principles are consistent with prior Swedish practice.

II. PUBLISHED SWEDISH CASE LAW

The Supreme Court rejected³⁸ an application for declaration of enforceability regarding a Polish default judgment on maintenance, since in the Polish process the defendant had not been properly served and consequently did not have a real chance to defend himself. The Court applied both the Swedish legislation implementing the 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations and Art. 34 (2) Brussels I Regulation³⁹ (the case pre-dated the Maintenance Regulation) and found that the repeated service attempts made according to Polish law were not sufficient under any of the two instruments. The Court noted in particular that the plaintiff had been aware of the defendant's address in Sweden but had fraudulently failed to communicate it to the Polish court.

³⁸ NJA 2012 N 20.

³⁹ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

**F. MATRIMONIAL PROPERTY REGIMES REGULATION AND REGULATION ON PROPERTY
CONSEQUENCES OF REGISTERED PARTNERSHIPS**

The Property Regimes Regulations are both applicable in Sweden but there are no publicly available cases to report and no specific comments derived from the survey. This is likely due to the fact that the Regulations entered into force quite recently and only apply in relation to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 29 January 2019.

Thus, most cases that would be of relevance are still handled in accordance with the Swedish rules⁴⁰ which were (and to a large extent still are) applicable before the Property Regimes Regulations.

As regards the negotiations preceding the Property Regimes Regulations one important issue was how to handle same-sex marriages. Sweden had (and still has) a strong opinion in this regard that there should be no discrimination. The solution/compromise was that the instruments do not provide for a harmonized definition of marriage.

⁴⁰ Lag (1990:272) om internationella frågor rörande makars och sambors förmögenhetsförhållanden [Act (1990:272) on questions of international nature regarding spouses and cohabitants property regimes].

G. SUCCESSION REGULATION

The Succession Regulation was not discussed during the seminar and it was not specifically commented in the survey. In general, it can be said that the Succession Regulation seems to have been well received in Sweden. Some concerns were raised in relation to its adoption regarding the strengthened (compared to prior Swedish practice) focus on domicile as a prevailing connecting factor. These concerns, however, have not yet given rise to any published Swedish cases.

H. PUBLIC DOCUMENTS REGULATION

The Public Documents Regulation was not discussed during the seminar and it was not specifically commented in the survey. In general, it can be said that the Public Documents Regulation is primarily handled by the Swedish Tax Authority⁴¹, which is appointed as coordinating authority by a Swedish implementing statute.⁴² Hence, it is the Tax Authority that handles questions and requests from foreign authorities as regards e.g. population registration certificates and birth and marriage certificates.

The Public Documents Regulation does not seem to give rise to any specific problems in Sweden.

⁴¹ Cf. <http://www.skatteverket.se>.

⁴² Förordning (2018:1199) med kompletterande bestämmelser till EU:s handlingsförfordning [Regulation (2018:1199) complementing the EU Public Documents Regulation].

I. **CONCLUSION AND OUTLOOK**

During the seminar a wide variety of topics were addressed leading to both general and specific conclusions. From a general point of view it was widely acknowledged that there is a lack of knowledge on private international law and that interactions like the exchange seminar are a much appreciated way to build knowledge and understanding. To put it simply, collaboration is important.

It was also quite evident that different categories of actors (academics, lawyers, judges and the legislator) tend to have a different focus. Issues that are widely discussed in academia may not be as relevant for lawyers and/or judges. It is important to bridge this kind of differences.

From the discussion during the seminar it was also evident that legislation in European family and succession law has its own characteristics. As is the case with much EU-derived legislation the embedded nature of political compromises tends to make the legislative output complex and fragmented. In this regard collaborations and knowledge-building activities have a positive impact in the long term perspective. Legislation is still unnecessarily complex, but further collaborations could improve the situation.

A potential goal could be the total unification of European private international law, but it can be concluded that such unification would require a unified general part (*ex officio* application, *renvoi*, public policy, preliminary and incidental questions etc.). *Ordre public* reservations are found in all major private international law regulations. They refer to the public policy of the Member State, not of the EU. Nevertheless, some elements of an European *ordre public* appear to exist (e.g. Art. 10 Rome III Regulation, perhaps also the ECHR). On the other hand, the right of the Member States to rely on their public policy is restricted, e.g. by Art. 24 and 25 Brussels II bis Regulation.

As regards the legislative process in this field it was concluded that negotiations – in Brussels and in national governments – are an art in itself which is rarely covered by the traditional “law program syllabus”. Skills are mostly learned underway. At the end of the day, negotiations provide a possibility to make a difference in the sense that good arguments may prevail even though they are put forward by representatives from small countries.

Another general conclusion is that family law cases often benefit from being handled outside courtrooms. Mediation is frequently a favorable dispute resolution mechanism. It is acknowledged that there may be a trend in favor of new types of dispute resolution in this field and in this regard it can be discussed in what way private international law matters in these out-of-court circumstances.

Another issue that was discussed is the fact that the complex private international law cases may benefit from being handled by specialized courts.

It was generally concluded that there are major differences between different countries as regards the practice in family law cases. One illustrative example is the use and status of prenuptial agreements in Sweden. This kind of agreements are considered as strong evidence in Sweden although they are usually quite plain and

simple in their wording. This is not the case in other countries and this kind of differences cause problems in international cases.

During the seminar it was further concluded that enhanced cooperation may be a disappointing outcome of negotiations in Brussels, but that it is important that this possibility exists so that cooperation can proceed in situations when not all Member States agree.

It was also generally acknowledged that EU is not a party to the ECHR and that the relationship between European private international law and ECHR is complicated by the existence of two supreme European courts. For example, the return of abducted children under the Brussels II bis Regulation is so efficient that it can collide with the ECHR⁴³.

As regards more specific conclusions it was acknowledged that there remain a number of issues that need to be considered further.

One such issue is whether same-sex marriages can be considered marriages for the purposes of European private international law. Does the Brussels II bis Regulation apply to them?⁴⁴

Another issue regards European private international law's attitude towards evasion (*fraude à la loi*). Recital 26 Succession Regulation provides: "Nothing in this Regulation should prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of private international law". Is this a general principle of European private international law?⁴⁵

It was also discussed whether it is time to reconsider the connecting factors used in European private international law in light of the fact that the structure of immigration has changed and that most immigrants continue to cultivate close ties with their country of origin, made possible by e.g. new information technologies. Is the expectation of integration being replaced by multi-culturalism potentially resulting in more weight being given to nationality?

Another conclusion concerns the best interest of the child. In order to live up to the ambitions of the child convention it is necessary to build knowledge and provide guidance as regards the assessment of the best interest of the child. It is also of interest to support the development of an efficient procedure as regards the process in relation with the child's right to be heard which ensures that the hearing really is focused on the child's interest (and not its parents). In achieving this goal, more refined European guidelines could be helpful.

A final remark and a last concluding comment concerns the question whether there is too much of European private international law. Proliferation of voluminous and repetitive texts, fragmentation, inconsistencies and multiplication of conflict rules

⁴³ Cf. the 2011 judgment of the Strasbourg court in the case of *Šneerson v. Italy*, application no. 14737/09.

⁴⁴ Cf. Recital 17 Matrimonial Property Regulation: "This Regulation does not define "marriage", which is defined by the national laws of the Member States".

⁴⁵ CJEU 09.03.1999, C-212/97 (*Centros*).

create problems for citizens, judges, attorneys, students and teachers. A potential cure for this dramatic development should potentially be discussed in great detail.