Party autonomy of the spouses under the Rome III Regulation in Estonia – can private international law change substantive law?

Abstract

At the moment Estonia is preparing to join 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 (hereafter: Rome III Regulation). Article 5 of the Rome III Regulation gives limited party autonomy to the spouses in divorce matters. However, regardless of the applicable law chosen by the parties, under Article 13 of the Rome III Regulation the Estonian courts would not have to grant a divorce if Estonian substantive law does not deem the marriage in question to be valid for the purpose of divorce proceedings. The present article evaluates the discretion of the Estonian judges to rely on Article 13 of the Rome III Regulation and the alternative courses of action for the spouses in order to avoid the application of the said provision. By using the Rome III Regulation as an example, the author takes the position that the extension of party autonomy in one field of Estonian private international law should lead to a gradual expansion of party autonomy in other fields of Estonian law, which at the moment is rather conservative in its treatment of non-traditional forms of marriage.

1. Party autonomy of the spouses as an underlying principle of the Rome III Regulation

Party autonomy has become a central concept in modern European private international law. The new European private international law regulations all proceed from the notion that the parties to legal relationships should (at least to a certain extent) be able to choose the law which is applicable to their relationship as such freedom advances legal certainty, predictability and flexibility in commercial and non-commercial relationships. Such autonomy is the widest in commercial law and especially in contract law. For example, under the Rome I Regulation the contractual parties are free to choose the law of any state as being applicable to their contract, subject to the limitations provided by the mandatory rules of the states involved and the public policy of the forum. Similarly, the Rome II Regulation provides the parties with wide autonomy to choose the applicable law for dealings arising out of non-contractual obligations. In European private international family law party autonomy has traditionally been more limited but has nevertheless served as the starting point for the determination of the law which is applicable to various family relationships. For example, the Maintenance Regulation in conjunction with the corresponding Hague 2007 Protocol enables limited party autonomy for choosing the applicable law for the international maintenance obligations. In addition, the European Commission’s draft proposals on the regulations dealing with the law applicable to the matrimonial property of the spouses and to the property consequences of the registered partners foresee the right of the parties to choose between the laws of the states which have a close connection with the parties to such relationships. Whether the gradual expansion of party autonomy to the new fields of family law is due to the legislative domino effect caused by the previous regulations, the general will to protect the self-determination of the parties or, as one author has put it, the needs of integration in the European Union, which favour the law of the forum as a compromise between different legal systems, the principle of party autonomy has undoubtedly gained a steady foothold in modern European private international family law.

In the spirit of the general trend favouring party autonomy, Article 5 of the Rome III Regulation allows spouses to choose the law which is applicable to their divorce or legal separation provided that the chosen law is either the law of the state which has a substantial connection with the marriage, or the law of the forum and provided that such an agreement corresponds with the formal requirements as laid down by Article 7 of the Rome III Regulation. However, the scheme of the Rome III Regulation is too numerous to extensively refer to in this footnote. However, for a critical reference to the relevant provisions of the Rome I Regulation, see S.A.S. Lorenzo, ‘Choice of Law and Overriding Mandatory Rules in International Contracts after Rome I’, Yearbook of Private International Law (12) 2010, pp. 67-91.

1 But see Yetano who argues that party autonomy in contracts is actually more limited because it is not protected by fundamental rights, is compensated by international mandatory rules, is limited to cross-border contracts and is protected against fraudulent conduct. T.M. Yetano, ‘The Constitutionalisation of Party Autonomy in European Family Law’, Journal of Private International Law (6) 2010, p. 155 at p. 167.


3 The literature on party autonomy as an underlying concept on the Rome I Regulation is too numerous to extensively refer to in this footnote. However, for a critical reference to the relevant provisions of the Rome I Regulation, see S.A.S. Lorenzo, ‘Choice of Law and Overriding Mandatory Rules in International Contracts after Rome I’, Yearbook of Private International Law (12) 2010, pp. 67-91.


5 On the specific limitations on such freedom, see Art. 14 of the Rome II Regulation.


7 But see Yetano who argues that party autonomy in contracts is actually more limited because it is not protected by fundamental rights, is compensated by international mandatory rules, is limited to cross-border contracts and is protected against fraudulent conduct. T.M. Yetano, ‘The Constitutionalisation of Party Autonomy in European Family Law’, Journal of Private International Law (6) 2010, p. 155 at p. 167.


9 Hague 2007 Protocol Art. 8 gives a limited choice for the maintenance creditor and the debtor as to the applicable law.


Regulation provides for several additional safeguards, which have been put in place in order to ensure that the exercise of party autonomy by the spouses will not contradict certain fundamental values of the forum state.

1.1 Limitations on the party autonomy relating to the preconditions for the divorce

As stressed by Recital 16 of the Rome III Regulation the law chosen by the parties must be consonant with the fundamental rights recognised in the European Union. This means that if the parties have chosen a law which does not make any provision for the divorce or legal separation on grounds of the sex of the spouses, the law of the forum can be applied instead (Art. 10 of the Rome III Regulation). In addition, if under the applicable law the divorce is made subject to excessively onerous conditions, the courts could, in theory under Article 12 of the Rome III Regulation, rely on the public policy of the forum and refuse to apply the destined foreign law if the forum has adopted a liberal approach towards divorce (favor divortii). Thus, even if the parties have chosen a law which makes the divorce impossible or excessively difficult, the Estonian courts could resort to Estonian domestic law, which has traditionally been very sympathetic in its treatment of the spouses’ right to divorce, and grant the divorce under Estonian law as the law of the forum. Such a liberal attitude towards the institution of divorce in Estonia is evidenced by the Estonian case law as the law of the forum. The Estonian courts have tended to grant a divorce simply when a continuation of the marital relationship is deemed to be ‘impossible’. Such ‘impossibility’ has been interpreted by the courts as meaning that the marriage cannot continue because one of the spouses wishes to end it by applying for a divorce. In practice, the exercise of party autonomy by the spouses would probably reduce the need of the courts to resort to Articles 10 or 12 of the Rome III Regulation. Since under Article 5(2) of the Rome III Regulation the agreement designating the applicable law may be concluded at any time, but at the latest at the time when the court is seized, it is to be hoped that if the spouses have already agreed upon the law which is applicable to their divorce, the courts would not be faced with situations where the foreign law makes divorce impossible or excessively difficult. Simply put – when the spouses can agree upon the law which is applicable to their divorce they have probably also agreed that divorce is something that they both want and, thus, it is to be expected that they would not agree upon the law which does not provide for a simple divorce. Of course, this might not be the case when the choice has been made long before the divorce proceedings have even started.

In general, however, the exercise of party autonomy should decrease the need to resort to the forum’s public policy in the Member States (like Estonia) which have adopted a liberal stance towards divorce. It can even be said that the underlying presupposition of the Rome III Regulation could, as one commentator has put it, be the idea that a right to divorce exists. This, in turn, could affect the substantive laws of the Member States which favour the system where a divorce is harder to obtain.

1.2 Limitations on party autonomy relating to the forum’s definition of ‘marriage’

The exercise of party autonomy by the spouses in the context of divorce proceedings could, however, prove to be problematic if the law applicable to divorce contains a different notion of ‘marriage’ than the domestic law of the forum or the law applicable to the marriage as determined by the forum’s conflicts rules. This problem is expressed by Article 13 of the Rome III Regulation, which provides for an indirect limitation on the freedom of the spouses to choose the law which is applicable to their divorce. If the forum would not grant a divorce because it does not regard the parties as being married, the freedom of the spouses to choose the law which is applicable to their divorce becomes meaningless. The Rome III Regulation is based on the notions that international couples can marry and that there is a possibility (from the forum’s perspective) to conclude marriages abroad. If the forum rigidly regards certain foreign marriages as being void for the purposes of divorce proceedings (even though such marriages would be valid in the eyes of the foreign state), it is not possible to talk of any party autonomy of the spouses to shape their family relationships by obtaining a certain status abroad.

Article 13 of the Rome III Regulation allows the courts of the Member State to refuse to grant a divorce if the laws of the Member State in question do not deem the marriage in question to be valid for the purpose of divorce proceedings. Three observations can be made based on the text of Article 13 of the Rome III Regulation.

(a) Firstly, the wording of Article 13 seems to indicate that the term ‘marriage’ as used in the other provisions of the Rome III Regulation should be interpreted autonomously and that such a notion could, in principle, involve non-traditional forms of marriage. Otherwise the cautious wording of Article 13 would become meaningless – if the concept of ‘marriage’ in the context of the Rome III Regulation would depend on the forum’s own definition of ‘marriage’ there would be no need for the courts to resort to Article 13 of the Rome III Regulation. Of course, the exact meaning of the term ‘marriage’ or the term ‘spouses’ in the context

14 On the methodological problem posed by the conflict between the favor divortii and favor matrimonii approaches, which the Rome III Regulation Arts. 10 and 12 seek to solve, see N.A. Baarsma, ‘European Choice of Law on Divorce (Rome III): Where Did It Go Wrong?’, NIPR 2009, p. 9 at p. 13.
15 Under the Family Law Act Subsection 67(1) the court can grant a divorce if the conjugal relations between the spouses have been definitely terminated. This is deemed to be happened if the spouses do not live in matrimonial cohabitation and there is reason to believe that they would not restore the cohabitation in the future.
16 Rapla County Court decision of 19 November 2003, No. 2-31/03; Tallinn Circuit Court decision of 9 December 2003, No. 2-2/161/2004.
19 It is widely accepted that the terms in the European private international law regulations should be interpreted autonomously. See, for example, ECJ 27 November 2007, Case C-453/06, ECR 2007, p. 1-I-10411, NIPR 2008, 1, para. 46 (C). On the autonomous interpretations in family law matters, see C.P. Rodriguez, ‘Characterization and Interpretation in European Family Law Matters’, in: Malatesta et al. (eds.) 2008, p. 337 at pp. 347-352 (supra note 13).
of the Rome III Regulation would have to be resolved by the Court of Justice of the European Union.\(^{20}\)

(b) Secondly, the interpretation of the terms ‘marriage’ or ‘spouses’ should be consistent with the interpretation of the same term found in the other European regulations on private international law.\(^{21}\) Similar problems have already arisen in the context of the Brussels II bis Regulation,\(^{22}\) which regulates jurisdiction in divorce matters. It is generally accepted that the concept of ‘marriage’ in the context of the Brussels II bis Regulation should be interpreted autonomously.\(^{23}\) However, it has been highly disputed among the commentators whether such an autonomous definition could involve other non-traditional forms of marriages such as same-sex marriages\(^{24}\) with the slight tendency in recent years in favour of those wishing to keep an open mind on the issue.\(^{25}\) The text of the Brussels II bis Regulation is ambiguous on this point and refers only to ‘marriages’, although Annex I of the Brussels II bis Regulation explicitly refers to the ‘wife’ and the ‘husband’. It should be kept in mind that if divorce cases involving non-traditional unions (such as same-sex couples) would be excluded from the courts’ competences by the Brussels II bis Regulation, the need to turn to Article 13 of the Rome III Regulation could only arise in very exceptional circumstances where the jurisdiction was determined under the residual rules or where the question of the validity of divorce arose outside divorce proceedings as a preliminary issue.\(^{26}\) This exclusive application of the Rome III Regulation does not seem to correspond with the opinion of the Member States who felt that there was a pressing need to use enhanced cooperation in order to draw up the Rome III Regulation and wished to include Article 13 in the proposed Regulation.\(^{27}\)

(c) Thirdly, the reference to the law of the Member State in Article 13 of the Rome III Regulation seems to be intended to refer to the conflicts rules of the Member State in question and not to the domestic substantive law. This is so because, according to the Recital 10 of the Rome III Regulation, the preliminary question of the validity of a marriage should be determined by the conflict-of-laws rules applicable in the Member State concerned. In this respect, Article 13 of the Rome III Regulation is aimed at achieving the uniformity of decisions within the Member State in question, but not necessarily between the courts of different Member States. That is, if the notion of ‘marriage’ as a preliminary question in divorce proceedings is determined under the conflicts rules of the lex fori, the marriage in question would always be held invalid regardless of whether the forum is conducting divorce proceedings or whether the validity of the marriage arises in the context of some other dispute. Of course, if the foreign state’s conflicts rules accord with the forum’s own conflicts rules, the uniformity is also achieved between the decisions of the courts of different jurisdictions. However, at the moment, the conflicts-of-laws questions relating to the prerequisites of or the grounds for the invalidity of marriages have not been regulated on the international level and it is highly unlikely that the consensus on such fundamental notions could be reached any time soon in the European Community. Currently the Member States differ considerably in their treatment of non-traditional unions as marriages – at the one end of the scale are the highly conservative states such as Latvia which has felt the need to amend its Constitution in order to affirm that a marriage can only be concluded between a man and a woman.\(^{28}\) At the other end of the scale are those Member States which have taken a highly liberal stance towards same-sex marriages. For example, in the Netherlands ‘marriages’ between same-sex partners were already legalised in 2001.\(^{29}\)

2. The current position in Estonian substantive family law regarding non-traditional forms of marriage

At the moment Estonia is not a party to the Rome III regime. The reasons why Estonia initially chose not to take part in the Rome III Regime were not clear. It has been explained by the authorities that at the time of the drafting of the Rome III Regulation, the government of Estonia simply felt that enhanced cooperation in private law would ‘diffuse’ European law and make it more difficult for Estonian judges

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\(^{20}\) There are various ways as to how the Court could solve this problem, see M. Bogdan, ‘Registered Partnerships and EC Law’, in: K. Boele-Woelki and A. Fuchs (eds.), Legal Recognition of Same-Sex Couples in Europe, Antwerp: Intersentia 2003, p. 171 at pp. 176-177.

\(^{21}\) This is necessitated by Recital 10 of the Rome III Regulation.


\(^{25}\) See Šhülleabhün 2010, p. 114 (supra note 24).

\(^{26}\) Art. 7 of the Brussels II bis Regulation allows the courts in exceptional cases to base their jurisdiction on national rules. However, in these cases, the notion of ‘marriage’ found in national jurisdictional rules would most probably correspond with the notion of ‘marriage’ found in the domestic substantive law and such cases would similarly be thrown out in the jurisdictional phase as not dealing with the ‘divorce’ of ‘marriage’. Additionally, the situations where the courts are faced with the need to determine the law applicable to divorce outside the actual divorce proceedings should be rare as mostly in these situations the foreign divorce is recognised via a foreign judgment.

\(^{27}\) The following Member States have chosen to join the Rome III Regulation: Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Luxembourg, Malta, Romania, Portugal, Slovenia and Spain. See Council Decision of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ 2010 L 189, pp. 12-13. Member States which are not yet parties to the regime of the Rome III Regulation but wish to participate therein may do so in accordance with the second or third subparagraph of Art. 331(1) of the Treaty on the Functioning of the European Union.


to understand it.” The Ministry of Justice has announced that it is working on the bill, which would enable the Republic of Estonia to join the Rome III Regulation in 2012. However, so far, there have been no public or academic discussions in Estonia on the prerequisites or problems involved in joining the Rome III regime.

It is to be expected that the provisions of the Rome III Regulation regulating the law applicable in the absence of a choice by the spouses would not pose a great obstacle to the integration of the Republic of Estonia with the Rome III Regulation as these provisions generally follow the logic of the domestic conflicts-of-laws rules currently in force in Estonia. Derived from Sections 60 and 57 of the Estonian Private International Law Act the law applicable to divorce is generally held to be the law of the state of the common residence of the spouses. If the spouses reside in different states, the applicable law is the law of the state of the common nationality of the spouses. If the spouses do not possess a common residence or a common nationality, the law applicable to divorce is the law of the state of the last common residence of the spouses, provided that one of them still resides in this state. If the applicable law cannot be determined by these connecting factors the law of the state with which the spouses are otherwise most closely connected will be applied. Such a most closely connected law could, for example, be the law of the nationality of one of the spouses if the nationality in question is the Estonian nationality.32 The decisive question for Estonia would thus, when evaluating the pros and cons of joining the Rome III Regulation, not be posed by the general choice-of-law provisions of the Rome III Regulation, but by the extent of discretion allocated to the Estonian courts by Article 13 of the Rome III Regulation as Estonia is currently among those Member States whose substantive law has traditionally taken the Rome III Regulation, not be posed by the general choice-of-law when evaluating the pros and cons of joining the Rome


32 Harju County Court decision of 22 November 2011, No. 2-11-48978.
35 Perekonnaseadus, RT 11994, 75, 1326.
36 Perekonnaseadus, RT 1, 27.06.2012, 12.
39 The latest initiative on this topic came from the Ministry of Justice at the end of 2011 when it was announced that the Ministry would start working on the so-called Cohabitation bill. However, so far no working text has been presented although the proposal has sparked vivid discussions in the media. Ministry of Justice Press Release, ‘Justitsministeerium hakkab järgmisel aastal looma kooseluseaduse eelnõu’ (Next year Ministry of Justice will start working on the draft legislation on cohabitation), 24 October 2011, available at <www.just.ee/55682> (visited August 2012).
40 For example, this was the position in Sweden before the same-sex marriage was legalised: M. Jänterä-Jareborg, ‘Parenthood for Same-Sex Couples: Challenges of Private International Law from a Scandinavian Perspective’, in: Eraw et al. 2006, p. 75 at p. 84 (supra note 24).
Family Law Act in the future. In this respect Estonia differs from the other Baltic States where a unwillingness to recognise same-sex marriages and same-sex unions has sparked a constitutional debate. For example, in Latvia a specific amendment was made to the Constitution in 2006 to include a constitutional definition of marriage as a union between a man and a woman. Similarly, the Lithuanian Constitution does not contain any definitions of marriage and the commentators on the Constitution remain ambivalent as to whether non-traditional unions could be considered as falling under the constitutionally protected forms of marriage.

In the context of administrative proceedings the courts have already considered same-sex unregistered partnerships as protected forms of family, which is illustrated by the case S. O. v. Viimsi Vallavalitsus. In this case a same-sex Estonian couple who were raising three children applied for child benefit from the local government. The couple were initially refused the benefit since the local government felt that the couple and the children did not qualify as a ‘common household.’ The courts overruled the decision of the local government and obliged the local government to award the children of the couple the same benefits as children of other families in the municipality. In addition, certain protection for same-sex couples has already been given by various Estonian administrative and public regulations. For example, under the Imprisonment Act Subsection 25(1) a prisoner is entitled to receive long-term visits by a ‘cohabitee’ who is defined as someone who has children with the prisoner or has lived together with the prisoner for at least two years.

Compared to the other Baltic States the need to take a positive stance towards same-sex unions could in practice become more pressing in Estonia due to the recognition given to such unions in the Nordic States with which Estonia has a closer connection than Latvia and Lithuania. Recent years have witnessed a rapid rise in the number of Estonians emigrating from Estonia to Finland, which is the most popular destination among young Estonians due to its closeness and the similarities between the Estonian and Finnish languages. Finland currently recognises same-sex registered partnerships. The second most popular emigration destination for Estonians – the United Kingdom – also allows same-sex couples to enter into civil partnerships and another overseas neighbour of Estonia – Sweden – has legalised same-sex marriages. Thus, although there is no domestically accepted method for registering same-sex unions in Estonia the Estonian courts might be faced with the need to recognise foreign registered partnerships or same-sex marriage entered into by Estonians as more and more young Estonians are heading to states where such unions are domestically recognised. How these unions will be treated by the courts will depend on how the Estonian courts will apply the Rome III Regulation Article 13 and local conflicts rules to which Article 13 refers. In the case of Estonia such rules are contained in the Private International Law Act, which came into force in 2002 as a result of the general reform of private international law.

3. Discretion of the Estonian courts to apply Article 13 of the Rome III Regulation

Recital 10, in conjunction with Article 13 of the Rome III Regulation, makes it clear that the preliminary question of the validity of marriage should be determined by the conflict-of-laws rules applicable in the Member State concerned. The wording of Recital 10 of the Rome III Regulation should, however, not mean that Article 13 of the Rome III Regulation excludes any recourse to the substantive law of the Member State in question. Such recourse can take place in two ways. Firstly, in exceptional cases, the courts should be able to make use of the public policy clause found in Article 12 of the Rome III Regulation if the marriage is not deemed to be valid under the forum’s substantive law. Second, the courts could take the forum’s substantive law into account if the conflicts rules of the forum explicitly allow recourse to the forum’s substantive law. For example, if the Estonian court is faced with the need to determine whether a marriage concluded abroad is valid for the purpose of divorce proceedings, it will determine the applicable foreign law to such marriage under its conflicts rules. One of those conflict rules is contained in Section 7 of the Estonian Private International Law Act, which contains a general public policy clause and which, subject to certain conditions, explicitly allows recourse to Estonian substantive law. This public policy clause has been worded slightly differently to its counterpart in the Rome III Regulation. Under Article 12 of the Rome III Regulation an application of a provision of the law designated by virtue of the Rome III Regulation may only be refused if such application is manifestly incompatible with the public policy of the forum. The exceptional nature of Article 12 is stressed further by Recital 25 of the Regulation, which allows the application of a provision of a foreign law to be only disregarded in ‘exceptional circumstances’. In contrast, the public policy clause in Section 7 of the Estonian Private International Law Act enables the court to refuse to apply the foreign law if the application of the foreign law would lead to a result which is ‘manifestly incompatible’ with ‘the essential principles of Estonian law’. Thus, if the result of applying the destined foreign law would lead to a solution which contradicts general principles of Estonian family law, the Estonian court could, in theory, apply its domestic public policy clause and deem the marriage to be void under Article 13 of the Rome III Regulation in conjunction with Section 7 of the Estonian Private International Law Act without the need to resort to the public policy clause found in Article 12 of the Rome III Regulation.

The question whether the Estonian courts should actually use the public policy clause as a bar to recognising foreign marriages has so far been left open by the Estonian case law and the Estonian legal literature. However, it is possible to predict certain considerations that the courts should take into account when making such decisions.

41 Supra note 28.
43 Eesti Vabariigi Põhiseadus, RT I 2004, 2701.
45 See the decision of the Tallinn Circuit Court of 15 June 2010, No. 3-09-1489.
46 Vangistusseadus, RT I 2000, 58, 376.
49 Before 2002, the private international law provisions were contained in the old General Part of the Civil Code Act, RT I 1994, 53, 889.
50 See further T. Helms, Reform des internationalen Scheidungsrecht durch die Rom III-Verordnung, Zeitschrift für das Gesamte Familienrecht 2011, p. 1765 at pp. 1771-1772.
Firstly, the courts would probably start with the wording of Section 7 of the Estonian Private International Law Act and the relevant travaux préparatoires as the starting point for making their decision on the need to apply the public policy exception. Section 7 of the Private International Law Act refers to the ‘essential principles of Estonian law’ which have to be taken into account in order to assess whether the application of foreign law should be refused. Such principles would presumably include the constitutional values and the principle of good faith and fair dealing.\(^\text{51}\) The exact meaning of the concept ‘essential principles of the Estonian law’ has been left open by the Private International Law Act. According to the official report accompanying the draft bill for the Private International Law Act the following would be in conflict with the essential principles of Estonian law: foreign laws limiting the basic rights and freedoms of persons, allowing same-sex marriage or polygamy.\(^\text{52}\) However, one should take into account that the Private International Law Act was drafted over a decade ago and that the notion of essential principles of Estonian law as contained in Section 7 of the Private International Law Act could change over time, depending on the values upheld as fundamental in Estonian society.\(^\text{53}\) As stressed before, there is nothing in the Estonian Constitution explicitly prohibiting the inclusion of non-traditional unions under the general concept of ‘marriage’ and the administrative case law has already chosen to extend a certain degree of protection to cohabitation between same-sex couples.\(^\text{54}\)

Secondly, the court should take into account the proximity of the dispute with Estonia. If the connections with Estonia are not strong, it is questionable whether the Estonian courts should refuse to grant divorces simply because the notion of marriage in Estonian substantive law differs from that of the applicable foreign law.\(^\text{55}\) Thus, if the question of the validity of a marriage between a same-sex couple arises in the course of the proceedings as a preliminary question, Estonian legal theory seems to suggest that such marriages should be upheld provided that the foreign marriage has been duly registered abroad.\(^\text{56}\) However, it is to be expected that in cases where the Estonian courts are faced with the need to grant a divorce the dispute would usually have some kind of substantial connection with Estonia.\(^\text{57}\)

Thirdly, the court should take into account the implications that refusing to apply the foreign law can have for the relevant third parties. In the course of divorce proceedings the justified expectations of relevant third parties would probably not be as crucial as in the case where the validity of same-sex marriages has to be evaluated as a preliminary question of disputes over succession or maintenance matters. Thus, in the course of divorce proceedings the need to consider such marriages invalid due to domestic values might not be as pressing as in cases where the divorce is not a central question of the dispute. However, they should be considered when making a decision on whether a foreign marriage can be upheld as valid in the eyes of the Estonian courts.

Fourthly, the Estonian courts should take into account the need to avoid so-called limping relationships in which case the spouses are deemed to be married in the eyes of one jurisdiction but not in the eyes of other Member States. On this point the Estonian courts should first and foremost consider the general trends in the neighbouring Nordic Member States where the majority of Estonians emigrants have been heading during the last decade. In these states the attitudes towards non-traditional forms of marriages are crucially different from the current practice in Estonia. The refusal to recognise such unions by the Estonian courts would constitute an obstacle to returning Estonians who have previously moved to these Member States and who have made use of the legal protection awarded to same-sex couples in these Member States. The idea of attracting Estonians who have left Estonia during the last decade has gained wide support in Estonian society. For example, the Estonian President has launched an official campaign called ‘Talents back home’ (Talendid koju)\(^\text{58}\) to attract those who have emigrated from Estonia. The social situation has thus considerably changed compared to 2002 when the drafters of the bill on the Private International Law Act felt the need to explain that the recognition of same-sex marriages would violate Estonian notions of public policy. Today, public opinion might be more prone to welcoming back those who have some kind of connection with Estonia and who have concluded non-traditional marriages abroad. In addition, it would be difficult for the Estonian courts to refuse to recognise the (registered) marital status of a person obtained in another Member State in the light of the case law of the Court of Justice of the European Union, which concerns a somewhat similar issue – a person’s name. According to this case law the refusal by the authorities of one Member State to recognise the name of a person as determined and registered in another Member State would constitute a breach of his freedom to reside and


\(^{54}\) Tallinn Circuit Court decision of 15 June 2010, No. 3-09-1489.


\(^{57}\) The purpose of Arts. 3-7 of the Brussels II bis Regulation is to ensure that the courts deal with divorce cases with which they have a certain substantial connection. The residual rules referred to by Art. 7 of the Brussels II bis Regulation would only be applied by the Estonian courts in exceptional cases, but even in these cases the court would not have jurisdiction unless there was some kind of substantial connection (such as the nationality of one spouse) between the dispute and the Republic of Estonia. For the residual rules referred to by the Brussels II bis Art. 7 see Section 102 of the *Tsiviilkohtumenetluse seadustik* (Code of Civil Procedure), RT I, 28.12.2011.44.

\(^{58}\) See further <www.talendidkoju.ee/> (visited August 2012).
move freely within the European Union. By the same line of reasoning it could be argued that the refusal to recognise a person’s marital status would similarly constitute a breach of his freedom to reside and move freely within the European Union.

(e) Lastly, the Estonian courts should consider the general need to do justice to the parties when considering marriages concluded abroad to be invalid. If the Estonian courts would opt in favour of not granting a divorce to couples in non-traditional forms of marriage for the reason that such a ‘marriage’ is not considered to be a ‘marriage’ by Estonian substantive law, the courts would have to invent other techniques in order to do justice to the parties to such unions.

4. The consequences of the application of Article 13 of the Rome III Regulation by the Estonian courts

If the spouses are not deemed to be married in the eyes of the Estonian authorities, the main consequence is that they are free to (re)marry in Estonia. However, there are other consequences that the parties to such non-traditional unions might be interested in achieving through applying for a divorce in Estonia. These may relate to the division of property, the obligations to pay maintenance or even to the procedural advantages which one of the parties wishes to gain by initiating divorce proceedings in Estonia, for example, if the forum’s jurisdictional rules allow the joining of different disputes between the same parties as is, for example, done by Article 3(c) of the Maintenance Regulation. According to Article 3(c) of the Maintenance Regulation, in matters relating to maintenance obligations in Member States the jurisdiction lies with the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless jurisdiction is based solely on the nationality of the parties. In the context of the Maintenance Regulation the term ‘maintenance obligation’ is to be interpreted widely, encompassing maintenance obligations arising from ‘a family relationship, parentage, marriage or affinity’ (Art. 1(1) of the Maintenance Regulation). Although the drafters of the Maintenance Regulation and the corresponding Hague 2007 Protocol have been careful not to take any position towards the exclusion or inclusion of same-sex marriages in the scope of the two instruments, it is possible that even when the forum does not consider the couple to be ‘married’ within the meaning of the Maintenance Regulation, the maintenance obligation between the partners in such unions can still arise from a ‘family relationship’ in the sense of Article 1(1) of the Maintenance Regulation. This approach would be in line with the latest case law of the European Court of Justice, which has considered it artificial to maintain that a cohabitating same-sex couple living in a stable de facto partnership cannot enjoy ‘family life’ for the purposes of Article 8 of the European Convention on Human Rights.

If the Estonian courts will not consider a marriage to be valid for the purpose of divorce proceedings, the parties to such relationships may be required to claim other forms of legal protection for the rights relating to their previous cohabitation. For example, it has been suggested that a same-sex partner who wishes to claim part of the assets of the other partner in Estonia can frame his claim towards the other party as contractual or as based on unjust enrichment. Devising such alternatives, which would ensure a fair balance between the interests of both partners, would require much more inventiveness from judges than would be the case if such marriages were simply held to be valid in the eyes of the Estonian courts. In addition, resorting to contractual and other measures might be emotionally difficult to understand for spouses who, after concluding a marriage or registered partnership abroad, might have lived for many years believing that their relationship would be recognised as a marriage during divorce proceedings.

On the other hand, refusing to recognise same-sex unions as marriages in Estonia could actually increase the party autonomy of the partners to such unions. If the Estonian authorities require same-sex couples to frame their claims against each other as contractual or as claims for unjust enrichment, a certain amount of control is lost over the property consequences of such family unions as the parties to commercial transactions traditionally enjoy wider party autonomy than is evidenced in the family law. For example, in the case of traditional marriages, if the spouses wish to conclude a marital property agreement in Estonia they have to abide by certain domestic formal requirements which are designed to ensure that the spouses are informed before concluding such an agreement. Similarly, if such a marital agreement concluded abroad, it has to correspond to certain formal requirements laid down for such agreements in the corresponding foreign state in order for it to be given any force by the Estonian courts. No such formal requirements would be necessary if same-sex spouses would be entitled to shape their property relationships by contractual mechanisms. However, it would be much easier for the Estonian courts to treat such same-sex unions in a similar fashion to traditional marriages than awarding them any special treatment.

5. Conclusion

Party autonomy does not simply underlie Article 5 of the Rome III Regulation. Instead, for the Member States like Estonia, party autonomy should be considered to be the fundamental concept of the whole Rome III Regulation. The Rome III Regulation is designed to determine the applicable law in relation to divorces which have international elements. One such international element could be the fact that the

60 See also Art. 12(1) of the Brussels II bis Regulation. It is, however, far from clear whether same-sex couples could benefit from the scheme of Art. 12(1) in a similar fashion as traditional spouses.
64 According to Section 60 of the new Family Law Act, such an agreement has to be registered by an Estonian notary.
65 Subsection 58(2) of the Private International Law Act. This requirement has been softened by the case law as the courts have tended to uphold such agreements depending on whether both parties rely thereon in court and regardless of whether the necessary formal requirements were fulfilled. See Estonian Supreme Court decision of 4 April 2006, No. 3-2-1-18-06.
relevant marriage has been concluded abroad. By recognising foreign marriages for the purpose of divorce proceedings a door has been opened for the autonomy of the parties to first choose a more open-minded marriage regime abroad and later to apply for a divorce back home. Whether the forum should recognise the autonomy of the parties to make use of the more tolerant marriage regime abroad or whether the forum should instead employ different techniques allowed by the Rome III Regulation to strike such marriages down is a problem which is solved depending on the weight that the forum gives to different considerations starting from the deep-rooted social opinions and ending with respect for the self-determination of the individual as to his or her personal status. What is certain, however, is that if private international law mechanisms would enable the Estonian courts to shake off the conservative notions of family relationships in Estonian law and society, then the way has been paved for Estonian substantive law to follow. As argued above, making use of the possibility to refuse to recognise foreign non-traditional forms of marriages should be something that the Estonian courts should be very cautious about. This allows for the hope that Estonian substantive law will one day move to a more liberal approach towards the institution of marriage.