Federal Council of Germany adopts Resolution on Rome III Proposal

The Federal Council of Germany (*Bundesrat*) has adopted a resolution on the Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters ("**Rome III**").

The Federal Council adopts – in contrast to the UK and Ireland (see our older post) – in principle a positive attitude towards the proposal and welcomes the harmonisation of choice of law rules on divorce. However, the Federal Council makes also some reservations concerning the concrete approach. In particular there are criticisms that the proposal did not facilitate sufficiently a synchronism between jurisdiction and choice of law rules. Such a synchronism, which should be achieved by choosing the same connecting factors as well as the same hierarchy with regard to jurisdiction rules as well as choice of law rules, is regarded as a possibility to enhance the quality of judicature since then the *lex fori* would be applied in all cases which would lead to a speeding up of proceedings due to the fact that expert opinions would not be necessary anymore.

With regard to the individual provisions of the proposal the Federal Council took *inter alia* the following points of view:

1.) Art. 1 (2) Proposal (Art. 3a (1) new Regulation)

- The possibility of choice of court agreements is welcomed.
- With regard to the possibility to choose a court of the place which has been the spouses' last common habitual residence for a minimum period of three years it is remarked critically that in come cases a sufficient link to the present situation of the spouses might be lacking.
- In general Art. 3a (1) is criticised for not facilitating a sufficient synchronism with the rules on jurisdiction.

2.) Art. 1 (2) Proposal (Art. 3a (2) new Regulation)

- The possibility to conclude a jurisdiction agreement simply in written form is criticised. For the sake of legal certainty and the protection of the weeker party a notarial documentation of the choice of court agreement is suggested.

3.) Art. 1 (7) Proposal (Art. 20a (1) new Regulation)

- The possibility of choice of law agreements is welcomed.
- The importance of a synchronism between jurisdiction rules and choice of law rules is stressed.
- Art. 20a (1) (d): Since the applicable law was unclear if the spouses choose the law of the Member State "where the application is lodged" at the beginning of their marriage, the possibility to choose the law of this State should be restricted to a specified time.

4.) Art. 1 (7) Proposal (Art. 20b new Regulation)

- According to the Federal Council, priority should be given to "nationality" as the connecting factor since it was more stable than "habitual residence" and easier to ascertain – in particular in view of the increasing international mobility.
- Further it is noted critically that, according to the wording of Art. 20b, the applicable law is mutable – even after the divorce proceeding has been instituted – which was contrary to legal certainty. Therefore it is suggested that the applicable law should be immutable as soon as the divorce proceeding has been instituted. Concerning the question when a court shall be deemed to be seised a reference to Art. 16 Brussels II *bis* is suggested.

5.) Art. 1 (7) Proposal (Art. 20e new Regulation)

- The inclusion of a public policy reservation is supported.

The full resolution (Drs. 531/06) of 3 November 2006 is available here.