

Resolution of the Federal Council of Germany on Green Paper concerning Matrimonial Property Regimes

The Federal Council of Germany (*Bundesrat*) has passed a resolution on the Green Paper on Conflict of Laws in Matters concerning Matrimonial Property Regimes, including the Question of Jurisdiction and Mutual Recognition.

With this Green Paper the Commission has launched "a wide-ranging consultation exercise on the difficulties arising in a European context for married and unmarried couples when settling the property consequences of their union and the legal means of solving them. The Green Paper mainly deals with issues concerning the determination of the law applicable to the property consequences of such unions and ways and means of facilitating the recognition and enforcement in Europe of judgments and formal documents relating to matrimonial property rights, and in particular marriage contracts." (cf. our older post which can be found here)

The German *Bundesrat* welcomes in principle the Commission's plan to harmonise the choice of law rules in matters concerning matrimonial property regimes, in particular in view of the increasing mobility within the European Union and the resulting high number of international marriages. The *Bundesrat* stresses the significance of co-ordinating the future instrument and already existing and planned legal instruments such as Brussels II *bis* and Rome III.

However, despite the general positive attitude towards the planned instrument, the *Bundesrat* raises doubts as to whether a sufficient competence for the enactment of choice of law rules with a universal application - meaning that the choice of law rule can designate the law of a Member State as well as the law of a third State - exists. With regard to the introduction of a registration system, the *Bundesrat* adopts an even more critical point of view and negates a sufficient competence according to Art. 65 EC since the introduction of such a registration system would touch upon substantive law which is not covered by Art. 65 EC.

The considerations stated in the resolution on some questions posed in the Green Paper can be summarised as follows:

- The scope of the instrument should be restricted to the property consequences of the marriage bond and should not cover personal aspects. (question 1 a)
- The instrument should apply to the property consequences of that bond arising while the parties are still living together, when they separate as well as when the bond is dissolved. (question 1 b)
- As a connecting factor nationality is favoured. Further, the instrument should include the possibility to choose the applicable law. (question 2 a)
- The same criteria should be envisaged both for the lifetime of the bond and for the time of its dissolution. (question 2 b)
- The *Bundesrat* opposes an automatic change of the law applicable following a change of the spouses' habitual residence. Rather, the law applicable should only change if the parties make a choice of law. (question 4)
- The possibility for the spouses of choosing the law applicable to their matrimonial property regime is supported. (question 5 a)
- According to the *Bundesrat* all legal questions arising from the dissolution of a marriage should be decided by the same court. Thus, the court having jurisdiction under Brussels II *bis* should also be vested with jurisdiction to rule on the liquidation of the matrimonial property. (question 7 a)
- With regard to the consideration to allow cases to be transferred from a court in one Member State to a court in another Member State, a rather critical attitude is adopted, *inter alia* since this might lead to delays. (question 11)
- With regard to the question whether non-judicial authorities should be incorporated, a rather restrictive point of view is taken: The instrument should include "courts" in terms of Brussels II *bis* but should not go beyond this. (question 12)
- The abolition of the exequatur for judgments is recommended. (question 15)
- The automatic recognition is in general regarded as desirable, however, it is pointed out that national provisions of property law must not be circumvented. If, for instance, additional declarations apart from the judgment are necessary according to national law in order to change the

land register, these requirements have to be fulfilled. (question 16)

- Regarding registered partnerships it is stated that uniform conflict of law rules are generally desirable. However, choice of law rules designed for the matrimonial property regime should not be applied directly. Rather, specific conflict rules for the property consequences of registered partnerships should follow concerning the contents the ones designed for the matrimonial property regime. Further, it is pointed out that the registered partnership constitutes a rather new legal form of cohabitation. Thus, not in all Member States legal rules have been established yet. (question 19 a)
- With regard to *de facto unions* (non-formalised cohabitation), specific conflict rules are not regarded as necessary since partners living in such a relationship did choose deliberately not to submit themselves to the legal consequences of a marriage. Therefore rules drafted following the ones regarding the matrimonial property regime are not regarded as appropriate. (question 22 a)

The full resolution of 24 November 2006 can be found on the website of the Federal Council of Germany.