The Results of the JHA Council Session on Rome III, Maintenance and Rome I

Following swiftly on from our post on the JHA Council Session taking place today and tomorrow (19 – 20 April 2007), the Council have issued a **Press Release** with the main results of the council after today's deliberations. Here are their conclusions:

On **Rome III** (**Jurisdiction and applicable law in matrimonial matters**: see the related section of our site), they stated:

> *The Council discussed certain important issues of this proposal, in particular the rules regarding the choice of court by the parties, the choice of applicable law, the rules applicable in the absence of choice of law, the respect for the laws and traditions in the area of family law and the question of multiple nationality.*
>
> *A very large majority of delegations agreed on the guidelines proposed by the Presidency according to which the Regulation should contain a rule on a limited choice of court for divorce and legal separation by the spouses and on conflict-of-law rules. On this regard, the Regulation should contain, firstly, a rule giving spouses a limited possibility of choice of law for divorce and legal separation and, secondly, a rule applicable in the absence of choice. The Council took note of the position of two delegations that recalled that, in the absence of choice of law by the parties, the court seized should apply lex fori. However, such delegations underlined that they are prepared to continue the negotiations on this instrument. The Council recognised that the draft Regulation should not imply modifications of the substantive family law of the Member States with respect to divorce or legal separation. One delegation underlined however that the respect of the national legal order should not jeopardise the coherent application of Community law.*

They "gave mandate" to continue work on Rome III subject to guidelines on the *"choice of court by the parties (Article 3a)", the "choice of the applicable law by*

the parties (Article 20a)", the "rules applicable in the absence of choice of law (Article 20b)", the "respect for the laws and traditions of the Member State in the area of family law" and "multiple nationality". See pages 10 – 15 of the Press Release for the full discussion of those points.

On **Jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations** (see our related posts here and here),

The Member States confirmed their "shared will" to successfully complete the project. The Council also endorsed

> *abolition of the exequatur procedure for all maintenanceobligation decisions covered by the Regulation, on the basis of the introduction of certain common procedural rules, accompanied by harmonisation of conflict-of-laws rules.*

as well as agreeing to,

> *…the principle of introducing a system for effective practical cooperation between central authorities in maintenance obligation matters, the details of which will still have to be worked out.*

For bilateral agreements by Member States with non-Member States, the

> *…Presidency suggests that Member State s may retain such agreements in line with the system set out in Article 307 of the Treaty and following the precedent in this area of Regulation (EC) No 44/2001 (Brussels I). It is therefore clear that such agreements should not compromise the system established by the proposed Regulation.*

Rome I on the Law Applicable to Contractual Obligations (see the related section of our site). The Council discussed several key provisions:

(a) Principle of choice of law by the parties to the contract (Article 3)

> *As in the Rome Convention, the basic rule for the law applicable to a contract is the choice of the law of a country by the parties. This rule respects party autonomy and is particularly appropriate in the area of contractual obligations*

which are created and governed by the parties to the contract (Article 3). However, where all other elements relevant to the situation are located in a country otherthan the country whose law has been chosen, the choice of law does not allow parties to avoid the application of provisions of the law of that country which cannot be derogated from by agreement (Article 3(4)). Concerning rules of Community law which cannot be derogated from by agreement, the Commission proposed that those rules should prevail wherever they would be applicable to the case. However, since the majority of delegations took the view that it would be appropriate to treat rules of national law and of Community law which cannot be derogated from by agreement on an equal footing, as in the Council Common position on the Rome II-Regulation, the Council agreed to follow this approach.

(b) Law applicable in the absence of choice (Article 4)

In the absence of a choice of law by the parties, Article 4 provides essentially for two connecting factors: the habitual residence of the party who is required to effect the characteristic performance, if such performance can be determined (Article 4(1) and (2)), or otherwise the closest connection of the contract with a specific country (Article 4(4)). Delegations agreed that in order to achieve more legal certainty, some of the most typical contracts should be explicitly mentioned in Article 4(1). Where the contract does not fall under Article 4(1), in particular if it does not fall within the scope of one of the typical contracts listed in that paragraph, the court has to apply Article 4(2). Member States also recognised the need for an "escape clause" allowing for flexibility where the connecting factors in Article 4(1) or (2) would exceptionally lead to an unsatisfactory result because it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country (see Article 4(3)). The Council confirmed the structure and the content of Article 4 as set out in the Addendum, with the exception Article 4(1)(j1) which still needs to be further discussed by the Committee on Civil Law Matters (Rome I).

(c) Individual employment contracts (Article 6)

Delegations agreed that, as in the Rome Convention, a special rule should provide for the appropriate connecting factors concerning individual contracts

of employment in the absence of a choice of law. However, where a choice of law is made by the parties, the employee should not lose the protection given to him by the rules of the law of the country whose law would have been applicable in the absence of the choice and which cannot be derogated from by agreement.

The Council also agreed on the text of a number of other provisions (Articles 1 and 2, deletion of Article 7, Articles 9, 10, 14, 15, 16, 17, 19, 20 and 21).

See pages 25 – 26 of the Press Release for some general remarks on a **future common frame of reference for European contract law**. View the full Press Release **here**.