Commission's Proposal on Applicable Law to Divorce

Yesterday, the European Commission announced that it was releasing its proposal for a Regulation laying down choice of law rules in divorce matters. For the time being, however, only a press release and a memo are available on the site of the Commission.

UPDATE: see comments for the links to the actual proposition

Freedom of choice

> *The proposal will allow international couples to choose the applicable law if they were to separate, as long as it is the law of a country to which they have a close connection (such as long-term residence or nationality). For example, it would allow a Swedish-Finnish couple living in Spain to agree that Swedish or Finnish law applies if they were to divorce.*
>
> *The proposal prevents forum shopping because the criteria for choosing the applicable law are strict. Couples must have a close connection to the country and its laws. The partners' choice of law, which must be in writing and signed by both spouses, is based on:*

1. *their common habitual residence;*
2. *their last common habitual residence if one of them still resides there;*
3. *the nationality of one of the spouses; or,*
4. *the law of the court before which the matter is brought.*

Applicable law in absence of choice

> *If the spouses themselves cannot agree on the applicable law, it is determined on the basis of the following connecting factors:*
>
> - *Divorce and legal separation are primarily subject to the law of the country where the spouses have their common habitual residence;*
> - *Failing that, where they had their last recent common habitual residence if one of them still resides there;*

- *Failing that, to the law of the spouses' common nationality; and,*
- *Failing that, to the law of the court before which the matter is brought.*

Under this formula, the law of the country where the divorce or legal separation was requested will apply in the vast majority of cases. For example, if an international couple living abroad in another EU country asks for a divorce there, the most important factor for the court would be their country of common habitual residence. That country's laws would therefore apply.

Foreign Law

Many courts currently apply the laws of other countries. The aim of today's proposal is to add more consistency in the way they decide which country's laws to apply.

The proposal could lead to the application of a foreign law in limited cases. This is a consequence of the free movement of citizens within the EU. Nevertheless, a court could choose not to apply a country's divorce law if it is manifestly contrary to the country's own public policy – if it is discriminatory, for example.

The proposal has been designed to avoid that the application of foreign law leads to delays and additional costs in divorce proceedings. If a court is called upon to apply the law of another Member State, the court can turn to the European Judicial Network in civil and commercial matters (EJN) to obtain further information on the foreign law. All Member States have designated contact points that are responsible for providing information to judges about national law.

Information about national divorce laws is already available on the EJN's website. The Commission is currently exploring other measures to facilitate the application of foreign law before the proposal enters into force.

The proposal does not in any way harmonise national divorce laws or practices, which remain very diverse for cultural and historical reasons.

These rules will apply only to international divorce – where both spouses are from different Member States or live in another Member State than that of their nationality or do not live in the same Member State. It will simply be a helpful set of rules for citizens involved in an international divorce.

Third States

The proposal may also benefit people from non-participating countries and non-EU countries whose divorce or legal separation is heard before a court of a participating Member State.

Take the example of a married American couple living in the south of France. If one spouse moves to an EU country that does not take part in the proposal, such as the Czech Republic, Poland or Slovakia, and the other stays in France, in many cases US divorce law would apply because both spouses have a common nationality, even if they had lived in France for most of their lives. However, if the husband moves to a Member State that is part of the proposal, French law would apply to the divorce because France is the last habitual residence of the spouses.

On the other hand, a couple from a participating country may be deprived of the proposal's benefits if the court that is competent to hear the divorce is located in a non-participating country. That would be the case if two French people move to the U.K. and decide to separate.

In any case, this French couple would be no worse off after the proposal takes effect in the participating Member States compared to the current situation, which offers no benefits for international marriages.

Background

The press release identified the current situation for cross-border couples as being:

5. *20 EU countries determine which country's law applies based on connecting factors such as nationality and long-term residence so that the spouses' divorce is governed by a law relevant to them.*
6. *7 EU Member States (Denmark, Latvia, Ireland, Cyprus, Finland, Sweden and the UK) apply their domestic law.*

The Commission first proposed helping international couples in 2006, but the plan (so-called "Rome III" Regulation") did not get the required unanimous support of EU governments. Since then, 10 EU countries (Austria, Bulgaria, France, Greece, Hungary, Italy, Luxembourg, Romania, Slovenia and Spain)

said they would like to use so-called enhanced cooperation to advance the measure. Under the EU Treaties, enhanced cooperation allows nine or more countries to move forward on a measure that is important, but blocked by a small minority of Member States. Other EU countries keep the right to join when they want.

The Regulation proposed today has no effect on Member States' ability to define marriage.

Way forward

EU Member States must now vote on whether the 10 countries may proceed with enhanced cooperation. The European Parliament must also give its consent. "10 governments have asked for the Commission to propose a solution. Using the enhanced cooperation procedure is a good sign that the EU has the flexibility to help its citizens, even with difficult legal issues. My goal is to ensure that citizens can take full advantage of their right to live and work across European borders," said EU Justice Commissioner Viviane Reding.

Extraterritorial Application of U.S. Laws

See this post of Roger Alford on a recent case of the Eleventh Circuit regarding the U.S. Child Sex Trafficking Laws.

Hess and Mourre on the Arbitration Exception

See the rejoinder of Alexis Mourre here.

Conference ´Civil Litigation in a Globalizing World´

On 17 and 18 June 2010, the Schools of Law of Erasmus University Rotterdam and the University of Maastricht (the Netherlands) will jointly organize a conference devoted to the subject “Civil Litigation in a Globalizing World; a Multidisciplinary Perspective”.

Globalization of legal traffic and the inherent necessity of having to litigate in foreign courts or to enforce judgments in other countries considerably complicate civil proceedings and access to justice. This triggers the debate on the need for harmonization of civil procedure. In recent years, this debate has gained in importance because of new legislative and practical developments both at the European and the global level. These developments, amongst others the bringing about of the ALI/UNIDROIT Principles of Transnational Civil Procedure (2004) and some recent European Regulations introducing harmonized procedures, as well as problems encountered in the modernization of national civil procedure and in attempts for further harmonization, require deliberation.

Papers will be presented by renowned speakers from the perspectives of legal history, law and economics, policy, private international law and private law. European and global projects in the field of harmonization of civil procedure will be discussed by experts involved in those projects. Furthermore, national papers on specific developments, problems relating to or views on harmonization of civil

procedure will be presented by experts from that jurisdiction.

For further information on the program, the speakers and to register, please click here.

On Regulation (EC) no 2201/2003, art. 20

Among ECJ decisions on Regulation (EC) no. 2201/03, there are already two, both of 2009, affecting art. 20; and another one is pending – aff. 256/09. Such situation highlights the importance of an article which has not yet been paid the attention it deserves: perhaps because much interest has already been given to its antecedent in the Convention on the jurisdiction and enforcement of judgments in civil and commercial matters of 27 September 1968 (art. 24-art. 31 of Regulation no. 44/01). But not everything that has been said about art. 24, or about art. 12 of Regulation (EC) no. 1347/00, forerunner of the current rule, applies in relation to the latter. For example, art. 20 includes two special requirements not listed in art. 24 of the Brussels Convention: urgency, and that the measure is adopted "in respect of persons or assets in that State". According to academics these textual differences do not necessarily carry consequences in terms of a different understanding of art. 20 Reg. 2201/03 and art. 31 Reg. 44/01. But the assert may be discussed: the Borrás Report to the 1998 Convention that precedes Reg. 1347/00, stated in no. 59 that the "presence" condition (persons or assets in the State) is laid down in order to limit the effect of the measures to the State in which they are adopted, whilst measures under art. 24 of the Brussels Convention do not suffer such limitation on their scope.

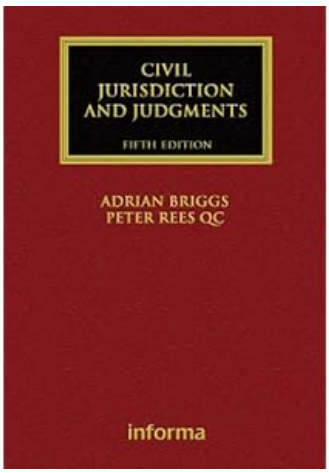
Art. 20 is also said to closely follow art. 12 of Regulation (EC) no 1347/00: in fact, that's the only useful information provided about the article in the Explanatory Report of the Proposal submitted in 2002 by the Commission [COM (2002) 222 final / 2 of 17 May 2002]. However, one may doubt whether this is true. Let's take the question of the scope of both provisions: art. 12 is said – as it was also said

before about art. 12 of the 1998 Convention – to extend to matters not covered by the Regulation. The explanation was as follows: as the main issue in Regulation (EC) no 1347/00 was that of the couple's marital status, a provision on measures concerning assets could not be understood without extending art. 12 beyond the material scope of the Community instrument. In relation to art. 20 of the current Regulation, and in light of the prominence acquired by parental responsibility, this point should be reconsidered: art. 20 could refer only to measures concerning the child's property, taken in the context of matters covered under the term "parental responsibility".

The truth is that art. 20 still raises many doubts. There is no definition of "provisional or protective *measures*", and it is debatable that the jurisprudence of the ECJ on art. 24 Brussels Convention will be enough to solve this absence. Nor is clear what *provisional* means, although we must probably rule out the ECJ's idea in aff. C-391/95, *Van Uden*, where "provisional" was said to indicate "return to the original status quo". The "urgency" condition, which must concur even if not required by the applicable national law, raises several questions: what's an emergency situation, and whether the urgency is a condition to be fulfilled only when measures are adopted by the support court, or also when they stem from the courts having jurisdiction as to the substance of the matter. The "in respect of persons or assets in the State" condition is also a controversial one: does it mean that the measure is territorially limited? Another source of discomfort turns up when it comes to considering the relationship between art. 20 and the relevant provision in the Hague Convention 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the protection of children. The issue is nevertheless unavoidable, due to the Council Decision of 5 June 2008, authorizing certain Member States to ratify or accede to the Hague Convention (OJ, L, no. 151 of 11 June 2008).

With this scenario, is not surprising that the ECJ rulings on art. 20 are awaited with interest; and that we feel a certain disappointment when reading reasonings like those of *Deticek v Sgueglia,* (2009) ECJ C-403/09 PPU. But on this subject we refer to our larger study, forthcoming in the Spanish journal *La Ley*.

Publication: Briggs & Rees, Civil Jurisdiction and Judgments (5th edn)



Just in case you have not already ordered your copy, or one for your library, the 5th edn (2009) of Briggs & Rees, *Civil Jurisdiction and Judgments* is available. Insofar as there is blurb available, here it is:

> *The new edition has been thoroughly updated to include:*
>
> - *Major decisions of the European Court on the Brussels I Regulation, especially in relation to injunctions and arbitration, but also arising in almost every other area of civil jurisdiction and judgments*
> - *The re-worked provisions for service out of the jurisdiction*
> - *Countless new cases from the English courts*
> - *Damages claims for breach of agreements of jurisdiction and choice of law*

That doesn't really do justice to the work, or the work put into its revision (it last appeared in 2005, so some of the changes are very significant). It isn't cheap, though: £395 from either Informa or Amazon. But delve deeply, for this is worth every penny.

French Case on Foreign Mandatory Rules

There are very few cases ruling on the application of foreign internationally mandatory rules (*lois de police*). Readers of this blog should therefore be interested by this recent decision of the French *Cour de cassation* discussing the application of a mandatory law of Ghana to a contract governed by French law.

 A French company had sold frozen meat (beef) to a buyer based in Ghana. The goods were carried to Ghana by sea, but they could not be delivered because Ghana had passed a law providing for an embargo of French beef. The goods had thus to be repatriated to Le Havre, France. The seller sued various parties involved in the carriage for breach of contract.

In the French proceedings, nobody disputed that the law governing the contract of carriage was French law. But the carrier argued that the contract was void for illegality because it violated the embargo law of Ghana. More specifically, the carrier argued that the contract was void pursuant to one of the provisions of the French Civil code avoiding contracts for illegality, namely Article 1133 which provides that contracts with an illegal *cause* are void. In other words, the carrier argued that the contract was void pursuant to French law, but as the consequence of the existence of the foreign embargo law. This did not convince the Court of appeal of Angers which ruled that the law of Ghana did not govern the contract, that it had thus no authority over the parties, and that the argument that the contract was void, as a matter of French law but because of the law of Ghana, had to be dismissed.

In a decision of March 16th, 2010, the *Cour de cassation* ~~affirmed~~ reversed the decision of the Court of appeal. It held that the Court of appeal should have explored whether the law of Ghana was a mandatory rule in the meaning of Article 7.1 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, and should thus, as such, have produced effect in France.

The *Cour de cassation* referred explicitly to the first sentence of Article 7.1, which provides

> *When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract.*

It then ruled that the Court of appeal should have explored whether "effect should have been given" to the foreign law pursuant to Article 7.1. The words "giving effect" were probably chosen with care. The preparatory report written by one of the members of the *Cour de cassation* makes clear that the *Cour de cassation* was well aware of the fact that the issue in the case might not have been to actually *apply* foreign law, but rather to take into consideration its existence and impact on the contract for the purpose of applying French law. It seems indeed that the carrier had not argued that the embargo law governed the issue of the validity of the contract, but rather that it should be taken into consideration for the purpose of applying French law to that issue.

Finally, it does not seem that the argument that foreign law might have been taken into consideration for the purpose of assessing whether the *performance* of the contract was possible was made before any of the courts.

Many thanks to Horatia Muir Watt for the tip-off.

Publication: Fentiman on International Commercial Litigation

Richard Fentiman's treatise on *International Commercial Litigation* (OUP, 2010) is now out. The blurb:

> *The legal framework of cross-border commercial disputes is important and complex in practice, but it is increasingly difficult to discern the subject's structure and assumptions. This book is a definitive account of the law and practice of international commercial disputes in the English courts, which summarises the present state of the law, and articulates its underlying principles. It is intended to be accessible to non-specialist practitioners.*
>
> *The book offers an account of the subject which is comprehensive, yet also concise and highly focused, designed to reflect the perceptions and concerns of practitioners. A feature of the book is its emphasis on evolving areas of practice, and issues of difficulty. Such topics as the developing law of cross-border injunctions, and the relationship between national and community law are extensively explored. Where the law is uncertain or controversial, the rival arguments are examined and assessed. The emphasis is on the solution of current (or future) problems, in addition to explaining contested issues. It is as much concerned with the impact of litigation on cross-border transactions – including prospective planning and risk-avoidance – as it is with dispute resolution. It examines the scope of party choice, and the legal risks associated with cross-border business. Consideration is given as to how these risks might be avoided or reduced by planning or agreement, by adopting particular business structures, or by opting for alternative forms of dispute resolution.*

We hope to publish a short review of the book in the next few weeks but, in the meantime, here are the necessary purchase details: £175 from OUP, or you can buy it for **£124.99** from Amazon.

Design Tweaks

In an effort to speed up the blog, I have tweaked the design. Most notably, the 'asides' category in the second menu column has disappeared (all those posts can now be found in the main post area with all the others), as indeed has the second menu column itself. All other content from that column has moved into the first column, which you can see to your left. ((Yes, yes, I *know* it's now on the right;

the posts are our focus, and so it makes perfect sense for those to be the first thing you see when you arrive, hence the switch.)) The *Journal of Private International Law* logo has (temporarily) been removed; it's a fairly big graphic, which slows down the website. On the basis that 1) you would rather see what you want to see *quickly*, and 2) have probably already subscribed to the Journal (if not, you should), it will not come back until I am sure that it will not impact upon performance.

So, please excuse my dust whist I am 'optimising.' As usual, by all means get in touch if you have any questions/issues.

French Conference on the Lisbon Treaty

The Seminar of European Law of the University of Urbino will host a conference on the Impact of the Lisbon Treaty on Private International Law (*L'entrée en vigueur du Traité de Lisbonne et le droit international privé*) on March 27th in Paris.

The main speaker will be Didier Boden, who lectures at Paris I University. The speech will be followed by a debate chaired by Professors Marie-Elodie Ancel (Paris Est University) and Dany Cohen (Sciences Po).

The graduation ceremony of the attendees to the 2009 Urbino Seminar will follow.

When: March 27th, 2010, at 4 pm

Where: Hôtel de Galliffet, Istituto Italiano di Cultura di Parigi, 50 rue de Varennes, 75007 Paris

Admission is free, but registration is compulsory at ceje.urbino@gmail.com