

# Maintenance Obligations: EP JURI Committee's Draft Opinion on the Commission's Proposal

On 11 April 2007 **Diana Wallis, in her capacity of draftsman** appointed by the European Parliament's Committee on Legal Affairs (JURI) **for the maintenance obligations regulation**, has released a Draft opinion to be discussed at the committee's meeting of 2-3 May 2007.

Pursuant to Rule 47 of the European Parliament's Rules of Procedure (provisional version - January 2007), the maintenance regulation is subject to the **enhanced cooperation between committees**, since its subject matter "falls almost equally within the competence of two committees" (as determined in Annex VI to the Rules of Procedure), and it is under the primary responsibility of the Committee on Civil Liberties, Justice and Home Affairs (LIBE).

The amendments proposed by Mrs Wallis in her Draft opinion are thus intended to be incorporated, after adoption in the JURI Committee, in the Draft Report to be prepared by the rapporteur in the LIBE Committee (Genowefa Grabowska): according to Rule 47,

*the committee responsible shall accept without a vote amendments from the committee asked for an opinion where they concern matters which the chairman of the committee responsible considers, on the basis of Annex VI, after consulting the chairman of the committee asked for an opinion, to fall under the competence of the committee asked for an opinion, and which do not contradict other elements of the report.*

Mrs Wallis has presented 37 amendments to the original Commission's proposal. Some of them will be addressed in the following, and deal with the legal basis, jurisdiction and applicable law: as stated by the draftsman in the "short justification" that opens the Draft opinion,

*The solutions she proposes are pragmatic and intended to be acceptable to the broadest range of Member States. They may offend purists, but in her view the*

*interests of litigants in having a speedy resolution of a problem which causes real hardship, also and in particular to children, must outweigh all other considerations, having due regard to the needs of maintenance debtors and the rights of the defence.*

Mrs Wallis made a similar statement commenting the EP Second Reading on Rome II (see our post on the debate in the Parliament, where she called on the other institutions to bring “the subject of private international law out of the dusty cupboards in justice ministries and expert committees into the glare of public, political, transparent debate”), and some of the proposed amendments to the maintenance regulation are likely to raise a controversial debate vis-à-vis the Council’s and Commission’s solutions, especially if the codecision procedure will be finally established for the adoption of the act, as envisaged by the Parliament itself and the Commission (see below).

### **Legal basis**

At present, the adoption of the maintenance regulation is subject to an unanimous vote in the Council, after the consultation of the European Parliament: the codecision procedure, ordinarily set out by the second indent of art. 67(5) of the Treaty for all measures provided for in art. 65, is in fact not applicable to measures involving “aspects relating to family law”.

The situation is deemed unsatisfactory by the Commission itself, that in December 2005 presented a Communication to the Council calling on it to transfer maintenance obligations from the unanimity to the codecision procedure, using the “passerelle” provided for by art. 67(2) TEC. The Commission stressed

*the hybrid nature of the concept of maintenance obligation - a family matter in origin but a pecuniary issue in its implementation, like any other claim.*

The same view is obviously shared by the Parliament (see the letter from the JURI Committee to the LIBE Committee of 14 February 2007) and reflected in the amendments of the legal basis of the proposed regulation (see amendments 1, 2 and 3 of the JURI Draft opinion).

### **Jurisdiction (artt. 3-11 of the Commission’s Proposal)**

The draftsman's main concern is to ensure that any prorogation of jurisdiction has been freely and consciously agreed by the parties, being aware of its legal consequences, and that an *ex ante* choice of forum "is still relevant having regard to the situation of the parties at the time when the proceedings take place" (see amendment 6 to recital 11): it is thus proposed to confer to the court seised a discretionary power to assess the jurisdiction agreement, adding a new paragraph 2a to art. 4 ("Prorogation of jurisdiction"), according to which

*The court seised must be satisfied that any prorogation of jurisdiction has been freely agreed after obtaining independent legal advice and that it takes account of the situation of the parties at the time of the proceedings (amendment 22).*

As regards the form of the choice-of-forum agreement, communication by electronic means is not deemed equivalent to "writing", and thus excluded from art. 4(2) (see amendment 21).

### **Applicable law (artt. 12-21 of the Commission's Proposal)**

A number of important modifications are envisaged by the draftsman in the provisions concerning the applicable law. The law of the country of the creditor's habitual residence is maintained as basic rule, but an almost systematic application of the law of the forum is advocated by art. 13(2) and (3), as resulting from the amendments. Moreover, the exception clause set out in art. 13(3) ("General rules") of the Commission's Proposal is given a wider scope, since it is possible to apply the law of another country with which the maintenance obligation is closely connected (such as the law of the country of the common nationality of the parties) also when "it would be inequitable or inappropriate" to apply the law of the country of the creditor's habitual residence or the *lex fori*.

According to the revised text of art. 13 (amendment 25: French and Italian versions differ from the English one, the latter showing some mistakes in the translation),

*1. Maintenance obligations shall be governed by the law of the country in whose territory the creditor is habitually resident.*

*2. The law of the forum shall apply:*

*(a) where it is the law of the country of the creditor's habitual residence, or*

*(b) where the creditor is unable to obtain maintenance from the debtor by virtue of the law of the country of the creditor's habitual residence, or*

*(c) unless the creditor requests otherwise and the court is satisfied that he or she has obtained independent legal advice on the question, where it is the law of the country of the debtor's habitual residence.*

*3. Notwithstanding paragraph 1, the law of the forum may be applied, even where it is not the law of the country of the creditor's habitual residence, where it allows maintenance disputes to be equitably resolved in a simpler, faster and less expensive manner and there is no evidence of forum shopping.*

*4. Alternatively, where the law of the country of the creditor's habitual residence or the law of the forum does not enable the creditor to obtain maintenance from the debtor or where it would be inequitable or inappropriate to apply that law, the maintenance obligations shall be governed by the law of another country with which the maintenance obligation is closely connected, in particular, but not exclusively, that of the country of the common nationality of the creditor and the debtor.*

The provision in art. 13(2)(a) seems not necessary; under the conditions set out in art. 13(2)(c) for the application of the law of the forum (as the law of the country of the debtor's habitual residence) it is not clear whether the creditor has a burden to expressly invoke the application of the law of the country of his habitual residence.

The preference expressed by the draftswoman for the *lex fori* is stressed by the conditions set out in art. 13(3) for this law to be discretionary applied by the court, and is clearly stated by Mrs Wallis in the justification accompanying amendment 7 to recital 14:

*The Regulation's aim of enabling maintenance creditors easily to obtain a decision which will be automatically enforceable in another Member State would be frustrated if a solution were to be adopted which obliged courts to apply foreign law where the dispute could be resolved simpler, faster and more economically by applying the law of the forum.*

*Application of foreign law tends to prolong proceedings and lead to additional*

*costs being incurred in procedures which often involve an element of urgency and in which litigants do not necessarily have deep pockets. Moreover, in some cases application of the law of the creditor's country of habitual residence could give rise to an undesirable result, as in the case where the creditor seeks a maintenance order in the country of which she is a national having sought refuge there after leaving the country in which she had been habitually resident with her husband who is of the same nationality, who is still resident there.*

*On these grounds, this amendment provides for the discretionary application of the law of the forum, whilst safeguarding against forum shopping.*

As regards the choice of the applicable law by the parties, also in respect of a choice-of-law agreement a discretionary power is given to the court seised to assess whether it “has been freely agreed after obtaining independent legal advice” (see amendment 26, inserting a new para. 1a to art. 14).

Finally, the draftswoman proposes the deletion of art. 15, on the non-existence of a maintenance obligation that the debtor may oppose to the creditor's claim under a law different than the applicable one (see amendment 27: this provision is deemed “to conflict with the principle of mutual recognition and to be discriminatory”).

### **Public policy**

An important amendment is proposed as regards the *ordre public* clause provided in art. 20: in the original Commission's proposal, public policy could not operate vis-à-vis the law of a Member State. The draftswoman advocates the deletion of this intracommunity exemption, thus allowing the application of the law of a Member State to be refused on such a ground (see amendment 29).

### **Alternative means of enforcement**

Special attention is devoted by the draftswoman to issues relating to enforcement of maintenance decisions:

*The draftswoman's chief concern in preparing these amendments to the proposal for a regulation has been to ensure that decisions relating to maintenance obligations, in the broadest sense of the expression, in cross-border cases are recognised and enforced across the Union in the quickest and*

*most effective way at the lowest possible cost. [...]*

*While suggesting improvements to the provisions of the proposed regulation, the rapporteur takes the opportunity of calling on the Member States to consider novel forms of enforcement of maintenance decisions which have been found to be highly effective in non-EU jurisdictions.*

An example of these “novel and effective means of enforcement” is given in the justification to amendment 11 (recital 19): confiscation of driving licences.

On the other hand, a new art. 35a is proposed (see amendment 34), which allows courts to “use the full panoply of measures available to them under their national law”, not being limited to the orders listed in the regulation:

*Article 35a - Other enforcement orders*

*The court seised may order all such other measures of enforcement as are provided for in its national law which it considers appropriate.*

The maintenance regulation is scheduled in the plenary session of the European Parliament on 3 September 2007 (see the OEIL page on the status of the procedure); the JHA Council agreed on some political guidelines on the matter in its recent session in Luxembourg on 19 and 20 April 2007 (see our posts [here](#) and [here](#)).

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## **Impact of Parallel Proceedings on British Columbia Litigation**

In *Lloyd's Underwriters v. Cominco Ltd.* (available [here](#)) the British Columbia Court of Appeal refused to stay local proceedings even though parallel proceedings were underway in Washington State. Counsel for the moving party was urging the court to treat the fact of parallel proceedings as virtually

conclusive on the issue of *forum non conveniens*. But the court was having none of that, correctly noting that nothing in the leading cases required such a high degree of deference to the forum where litigation was first started. Parallel proceedings were simply one of the factors to be weighed in the stay analysis.

The moving party had argued that it would be violative of comity for the court not to defer to the earlier proceedings in Washington State. The court correctly resisted this argument, noting that even with regard for comity between countries it remained open for jurisdictions to differ as to the most appropriate forum for the litigation and thus to each allow their own local action to proceed.

The decision is also interesting for its treatment of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28. This statute codifies much of what was formerly left to the common law in British Columbia, and it does make some substantive changes. There was thus some question as to whether the new statutory provisions had changed the analysis on an application for a stay of proceedings. The court concluded that “with respect to *forum conveniens*, ... the Act seems intended to codify, rather than effect substantive changes to, the previous law”. The court went on to apply the orthodox principles from *Spiliada* and *Amchem* in a reasonably straightforward manner.

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## **Court Limits Extraterritoriality of Federal Patent Law**

In a case previously blogged on this site, the Supreme Court today decided to limit the extraterritorial application of the federal patent laws. The 7-1 decision authored by Justice Ginsburg started off by noting the:

*“general rule under United States patent law that no infringement occurs when a patented product is made and sold in another country. [But,] [t]here is an exception. Section 271(f) of the Patent Act, adopted in 1984, provides that infringement does occur when one “supplies . . . from the United States,” for “combination” abroad, a patented invention’s “components.” 35 U.S.C.*

*271(f)(1). This case concerns the applicability of section 271(f) to computer software first sent from the United States to a foreign manufacturer on a master disk, or by electronic transmission, then copied by the foreign recipient for installation on computers made and sold abroad.”*

While this question seems to be one of interest only to patent law gurus and those extrapolating the narrow text of section 271(f), the Court’s decision rests on more far-reaching grounds. Justice Ginsburg noted quite frankly that:

*“Plausible arguments can be made for and against extending section 271(f) to the conduct charged in this case as infringing AT&T’s patent, [but] recognizing that section 271(f) is an exception to the general rule that our patent law does not apply extraterritorially, we resist giving the language which congress cast as section 271(f) an expansive interpretation.”*

The decision cited to the Court’s 2004 opinion limiting the extraterritorial application of the Sherman Act to foreign claims (see *F. Hoffmann-LaRoche v. Empagran S.A.*, 542 U.S. 155 (2004)), and reaffirmed its base premise that “foreign conduct is generally the domain of foreign law.” Thus, if the domestic patent-holder wishes to prevent copying in foreign countries, its remedy today (at least until Congress decides otherwise), “lies in obtaining and enforcing foreign patents.”

Today’s decision can be found [here](#), and the oral argument transcript can be found [here](#). Lots of links to other discussions of the case can be found [here](#).

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## **Short Article on Jurisdiction and the Internet**

Prashanti Ravindra has written a short article in the April 2007 *Australian Internet Law Bulletin* (vol 10 no 1, April 2007) on recent case law (French and US) regarding jurisdiction and the internet. The introduction reads, in part:



*This article examines three recent cases to determine whether there are any emerging trends or principles regarding when jurisdiction can be exercised in a cross-border online dispute. It finds that the cases suggest that courts are still struggling to come to terms with the practical effect of jurisdictional issues that arise from online transactions and to develop remedies that are effective across borders.*

The article is available online to subscribers.

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## **First Issue of 2007's Journal du Droit International**

The last issue of the French *Journal du Droit International* was released a few weeks ago. It contains two articles, written in French, which deal with conflict issues.

The first is authored by Belgian Professor Nicolas Angelet and Belgian Attorney Alexandra Weerts. Its title is "*Les immunités des organisations internationales face à l'article 6 de la Convention européenne des droits de l'homme - La jurisprudence strasbourgeoise et sa prise en compte par les juridictions nationales*" (International Organisations Immunities and Article 6 of the European Convention on Human Rights - Strasbourg Case Law and How it is Taken into Account by National Courts).

The English abstract reads:

*Many authors, as well as a number of domestic court decisions, consider that the jurisdictional immunity of international organisations is compatible with article 6 ECHR upon the condition that an alternative means, or even an alternative remedy before a fair and impartial tribunal within the meaning of article 6, is available to individuals to protect their rights. When this requirement is not met, immunity is sometimes denied in favour of the right of access to court. Yet, in its Waite and Kennedy and Beer and Regan judgements*

*of 18 February 1999 the European Court did not refer to a remedy but rather to a reasonable alternative means, and described it as a material factor but not as a prerequisite for the observance of article 6. The subsequent case law of the European Court confirms this approach and identifies a series of other criteria relevant for the appreciation of the proportionality of a restriction imposed on the right to access to court. As for the consequences of a possible conflict, the incompatibility between an international immunity and the right to access to court does not allow to set immunity aside. Rather, domestic courts face a conflict between contradictory international obligations, unsolved by international law. Insofar as the courts cannot require the executive branch to make a political choice of which obligation to comply with to the detriment of the other, litigants may seek to bring the forum State in the proceedings to make it face responsibility for the conflict. Above all, domestic courts should seek to prevent the conflict between international obligations, by adopting the balanced approach of the European Court, rather than turning the existence of an alternative remedy into a prerequisite for the observance of article 6.*

The second article is authored by Etienne Cornut, who lectures in the French University of New Caledonia. Its title is "*Forum shopping et abus du choix du for en droit international privé*" (Forum Shopping and Abuse of the Choice of Venue in International Private Law).

The English abstract reads:


*In spite of the harmonization of the rules dealing with conflicts of laws and conflicts of jurisdictions, especially at EU level, forum shopping endures, and this convergence of standards is not a remedy by itself, but can only alleviate the problem without eradicating it. The fight against forum shopping malus can only be considered on a case by case basis, but to that end the only exceptions are not sufficient. International private law has developed several instruments to close these loopholes, yet they all focus on the concept of fraud: fraud to the law, fraud to the sentence, fraud to the jurisdiction. In international private law, the sanction by exception of evasion of law arises when the creation or the alteration of an international situation, though objectively actual, does not fit the real intention of the subject, when it is not subjectively actual. Then, when the subject can enjoy the option of international competency, most often he is already in an existing international situation. He has not devised or altered the*

situation which enables him to exert a choice. Hence, the theory of fraud cannot apply, since it does not make it possible to approach the situations resulting from a pre-existing international situation. Nevertheless, exercising an option of competence, though legal and non fraudulent, can be reprimanded. In that case, the exception of abuse of rights, despite its traditional antinomy with private international private law, should lead to questioning an abusive choice of jurisdiction.

To my knowledge, these articles cannot be downloaded.

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## ICLQ Articles on *Harding v Wealands* and the Law of Domicile

There are two short articles in the private international law current developments section of the new issue of the *International & Comparative Law Quarterly* (2007, Volume 56, Number 2). 

Charles Dougherty and Lucy Wyles (2 Temple Gardens) have written a casenote on the decision of the House of Lords in ***Harding v Wealands*** [2006] UKHL 32 (see all of our relevant posts here.) Here's the introduction:

*In *Harding v Wealands*<sup>1</sup> the House of Lords had to consider the vexed question of where the dividing line between substance and procedure should lie in private international law. The specific issue before their Lordships was whether matters relating to the assessment of damages in tort should be treated as matters of substance, and thus be for the applicable law, or whether they should be treated as matters of procedure, and therefore be left for the law of the forum. The decision of the House of Lords has resolved this difficult question in favour of a procedural characterization. The result of the House of Lords decision is that in all such cases, regardless of the foreign law element, the assessment of damages will be conducted in accordance with English (Northern Irish or Scottish) law, as the law of the forum. Nonetheless, some*

*reservations do exist as to the justification for the decision and as to how likely it is to remain the last word on the subject.*

*In addition, the decision of the Court of Appeal remains of some importance in relation to the determination of the law applicable to a foreign tort. In the light of their decision on the difference between substance and procedure, the House of Lords found it unnecessary to interfere with the decision of the Court of Appeal in this regard.*

There is also a piece on **Regression and Reform in the Law of Domicile** by Peter McEleavy. Here's a taster:

*In the United Kingdom the law pertaining to domicile has the rather dubious distinction that, although subjected to concerted criticism from commentators and law reformers alike for over half a century, it has largely remained unchanged. Common law jurisdictions around the world have succeeded in passing legislation which, to varying degrees, has modernized the concept, yet in Britain a series of initiatives have either failed to complete the legislative process or not even made it to Parliament.<sup>3</sup> The reason in each instance was less the substance of the proposals, but rather political expediency in the face of pressure from the overseas business community resident in the United Kingdom, who feared extended fiscal liability if the connecting factors were attributed with a less legalistic interpretation.*


*The consequence is that 19th and early 20th century values continue to apply, but they do so in a world where, inter alia, individual mobility is taken for granted, migration has reached unprecedented levels<sup>6</sup> and there is a greater awareness of and respect for other legal traditions. Trends in case law appear to suggest new approaches have emerged but have failed to take hold. To a certain degree this is not surprising as domicile, like habitual residence, applies in a variety of distinctive areas and is therefore prey to contrasting policy considerations,<sup>10</sup> with result selection long regarded as playing an implicit role in many cases.<sup>11</sup> However, in contrast to habitual residence domicile faces the added burden, at least formally, of remaining a unitary concept with a single meaning whatever the area of law in which it might apply.*

Links to both pieces, and the rest of the issue, can be found on the ICLQ

homepage (for those with online access.)

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# Jersey's New Private International Law Rules for Trusts

Professor Jonathan Harris has written an article in the *Jersey Law Review*  entitled, "**Jersey's new private international law rules for trusts - a retrograde step?**" (Jersey L.R. 2007, 11(1), 9-19). Here's the abstract:

*Discusses amendments made by the Trusts (Amendment No.4) (Jersey) Law 2006 to the Trusts (Jersey) Law 1984. Criticises difficulties with the amendments on the scope of application of matters which are to be determined exclusively by the law of Jersey and the non recognition of foreign judgments.*

In the same issue, Daniel Hochberg defends the amendments with a rejoinder to Professor Harris' article: "**Jersey's new private international law rules for trusts - a response.**" (Jersey L.R. 2007, 11(1), 20-27).

Access to the *Jersey L.R.* is for those with a subscription.

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# The Meaning of Maintenance in the Brussels I Regulation

*James Bernard Moore v Kim Marie Moore* [2007] EWCA Civ 361 (handed down on 20 April 2007).

**A former husband's application to the Spanish court was an application**

**for the division of the wealth or assets to which the former married couple had a claim and was not related to maintenance within the meaning of Regulation 44/2001 Art.5(2).**

The appellant husband (H) appealed against a decision giving his former wife (W) leave to apply for orders for financial relief pursuant to the Matrimonial and Family Proceedings Act 1984 Part III. H and W had separated after being married for the last five years of a relationship lasting over 15 years. They had three children. They had emigrated to Spain for tax reasons. H had filed for divorce in Spain. He had offered to pay W £6 million in addition to such properties as were registered in her name. W issued a divorce petition in England, which was stayed in accordance with the provisions of Council Regulation 1347/2000. H then applied for the Spanish court to deal with the financial aspects of the divorce but on the basis that English law applied.

The Spanish court declined to deal with the financial claims and H appealed against that decision. Meanwhile W had obtained leave under s.13 of the 1984 Act to apply for financial relief after an overseas divorce. H applied to set aside that leave. The judge confirmed the leave obtained by W, holding that H's application in Spain was not a claim for maintenance within Regulation 44/2001 Art.5(2) and that there was a close connection with England, which made England the appropriate venue. H submitted that (1) the judge had been wrong to hold that his application to the Spanish court was not to be characterised as relating to maintenance within Regulation 44/2001 Art.5(2); (2) the judge should have stayed the English proceedings as related proceedings under Regulation 44/2001 Art.27 or Art.28 on the basis that H's Spanish proceedings remained on foot; (3) leave should not have been granted under s.13 of the Act.

The Court of Appeal (Thorpe LJ, Lawrence Collins LJ, Munby J) held that:

- Whether an application was to be regarded as a matter relating to maintenance depended not on Spanish law, nor on English law, but on the autonomous concept of Community law derived from the judgments of the European Court of Justice, *De Cavel v De Cavel* (143/78) (1979) ECR 1055, *De Cavel v De Cavel* (120/79) (1980) ECR 731 and *Van den Boogaard v Laumen* (C220/95) (1997) QB 759 applied. On that basis H's application was plainly not related to maintenance, but was an application for the division of the wealth or assets to which the couple had a claim.

The essential object of H's application was to achieve sharing of the property on his terms rather than an order based on financial needs, *Miller v Miller* (2006) UKHL 24, (2006) 2 AC 618 considered. Consequently the application was not a matter relating to maintenance for the purposes of Regulation 44/2001 Art.5(2).

- Since H's application was not a matter relating to maintenance within Regulation 44/2001 Art.5(2), there was no basis for the application of Art.27 or 28 even if those proceedings were still pending, and it was not necessary to decide whether Art.27 applied where the court first seised had declared that it was without jurisdiction but an appeal was pending.
- The judge had been entitled to find that the connection with England was overwhelming for the purposes of s.13 and s.16 of the 1984 Act and that W had established a substantial ground for making her application. There was no error in the judge's approach or conclusion.

*Source: Lawtel.*

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## **The Concept of Enforceability**

Notionally, what is enforceability? When the forum declares a foreign judgement enforceable, what does it mean? Does it mean that the foreign judgement actually enters in the legal system of the forum as such, and remains a foreign judgement? Or does it mean that a judgement of the forum carrying the substance of the foreign judgement is produced, and will be the only one existing in the legal system of the forum?

The distinction can be important for some of the effects of judgements, which could differ in the foreign legal system and in the forum. For instance, judgements could become time barred more quickly in some legal orders. Also, there could be special rules about the interests of judgement debts. The issue can thus arise of whether the foreign rule or the rule of the forum applies.

One example of such rule is article 1153-1 of the French Civil Code, which provides that judgement debts automatically attract a higher interest rate. Is this

provision applicable to foreign judgements? If so, when does the interest start?

On March 6, 2007, the French supreme court for private matters (*Cour de cassation*) held in *Delsey* that the provision applies to foreign judgements declared enforceable in France, and that the interest begins to accrue from the date of the declaration of enforceability (*exequatur*). In an earlier 2004 case on the enforcement of arbitral awards in France, the *Cour de cassation* had already held that the provision applies to the arbitral awards declared enforceable in France “as the law of the enforcement proceedings”.

The *Cour de cassation* did not provide much information on the facts of the *Delsey* case, but it seems that a Saudi agent of the French company *Delsey* had sued its principal in Saudi Arabia and obtained a judgement awarding Euros 807,121 as compensation for the termination of the contract. The agent then sought to enforce the Saudi judgement in France and obtained a declaration of enforceability providing that interests had accrued pursuant to article 1153-1 since when the Saudi judgement was made. *Delsey* appealed before the *Cour de cassation* arguing that the starting point of the interest was the date of the French declaration of enforceability and not the date of the making of the Saudi judgement. The appeal was allowed.


*Delsey* lays down the above mentioned rules, but does not explain them, in accordance with the French judicial practice. The case could be considered as an indication that the *Cour de cassation* subscribes to the theory that it is the declaration of enforceability of the forum which is enforced locally, and that this is the reason why the rules of the forum govern.

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## **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 maintenance obligation 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 States 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 other than 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**.