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.

Diana Wallis on the Need to Find Coherent EU Cross-Border Legislation

Diana Wallis MEP (*Rapporteur for Rome II*) has stated the case for the Europeanization of the conflict of laws, specifically the need for Rome II, in a piece published by The Lawyer.

Rome II, Wallis states, may well be the subject of a conciliation process (as we noted here a while ago), and the Rapporteur seems suprised that it has come to that:

Why should this have been so difficult when there is clearly a perceived need to provide legal certainty? Some member states of the EU have no conflict rules at all, some have only partial rules and, of course, in other cases the rules of individual countries may themselves be in conflict with one another.

So if we are to know where we are with regards the legal diversity of Europe, we at least need an agreed set of coherent rules; a set of rules that we can all apply to determine whose national law is to be used in any given set of tortious facts that the increasingly mobile lives of EU citizens throw up.

Concessions that there were going to be problems "when such a technical field came into co-decision and also a reticence to let the decision-making out of the expert committees in national justice ministries" are rebuffed by the claim that "…however, the European Parliament has taken its time, consulted widely, held hearings and engendered debate." Wallis then goes on to discuss two big sticking points for Rome II: *defamation* and *road traffic accidents*. In terms of the former, she states:

So difficult an issue is this that the European Commission has belatedly attempted to withdraw it entirely from the proposal. That may ultimately be the only answer, although the European Parliament did get a formulation at first reading that was supported widely and which it is currently sticking to. A blank space in the legislation will not provide legal certainty and the issue in a world of growing global and popular media will surely be back to haunt the legislator sooner rather than later.

The arguments for the road traffic accidents, and the damages issue, are rather more fierce:

The problem is that the level of compensation for personal injury varies enormously in member states. Put simply, if a Brit has an accident in Spain the compensation would likely be a third or even a quarter of what might be awarded by an English court. The problem being that it is in the UK that the victim will probably live out their life.

This has led to a huge debate, with suggestions for solutions that certainly offend the private international law purists, even if they do deliver justice. The

debate continues, but the European Parliament will not let go, as it plainly touches on the lives of many whom the European Parliament represents.

You can view the full article by Diana Wallis MEP here. Whatever else, it seems clear that all is not well within the European law-making institutions in their struggle to agree on rules on the law applicable to non-contractual obligations.

Scots Rules of Private International Law Concerning Homosexual Couples

Janeen Carruthers (Glasgow University) has written a piece in the latest issue of the *Electronic Journal of Comparative Law* on "**Scots Rules of Private International Law Concerning Homosexual Couples**" (December 2006). Here's the abstract:

In this report, Dr Carruthers outlines the Scots rules of private international law concerning civil partnership, as contained in the Civil Partnership Act 2004, Parts 3 and 5. The report includes treatment of such topics as: the constitution of civil partnerships (including the question of legal capacity to enter into such a relationship); the dissolution of civil partnerships (including the jurisdiction of the Scottish courts to grant dissolutions, and issues of choice of law); the recognition in Scotland of foreign decrees of civil partnership dissolution, annulment and legal separation; and the property consequences attendant upon registration of a civil partnership. The author also addresses conflict of laws issues pertaining to de facto (as opposed to de iure) cohabitation (including analysis of the relevant provisions of the Family Law (Scotland) Act 2006), and same sex marriage.

You can download the article from here.

Navigating the Common Law Approach to Cross-Border Insolvency

Look Chan Ho (Freshfields Bruckhaus Deringer) has posted "**Navigating the Common Law Approach to Cross-Border Insolvency**" on SSRN. The abstract reads:

> *Just when legislations are being put in place around the world to cope with cross-border insolvency (such as the implementation of the UNCITRAL Model Law on Cross-Border Insolvency), the UK Privy Council in Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors of Navigator Holdings [2006] UKPC 26; [2006] 3 WLR 689 reminds us that the common law remains essential and is capable of development.*
>
> *In summary, the Privy Council held that the Isle of Man court, having recognised a US Chapter 11 proceeding, had a broad discretion to assist in the implementation of that Chapter 11 plan, notwithstanding that this involved the transfer of shares in an Isle of Man company.*
>
> *While the spirit of cooperation demonstrated by the Privy Council is commendable, its approach seems novel and may have significant implications for the management of cross-border insolvencies and for the general law. This commentary reviews the Privy Council's approach and contrasts it to an alternative approach adopted by the Canadian courts, in particular the decision of the Ontario Court of Appeal in Re Cavell Insurance Company (23 May 2006).*

Download the article from here.

Transnational Tort Litigation as a Trade and Investment Issue

Alan O. Sykes (Stanford Law School) has posted "**Transnational Tort Litigation as a Trade and Investment Issue**" on SSRN. Here's the abstract:

Tort plaintiffs regularly bring cases in U.S. courts seeking damages for harms that have occurred abroad, attracted by higher expected returns than are available in the jurisdiction where the harm arose. Such claims are especially likely to be filed by plaintiffs from developing countries, who commonly argue that the remedies available to them in their home jurisdictions are deficient or non-existent. This paper focuses on a potential inefficiency of forum shopping that is of special importance in transnational tort litigation against business defendants – the potential distortion of trade and investment patterns that can result from implicit "discrimination" in the applicability of legal rules to producers or investors of different nationalities. These distortions are akin to those associated with discriminatory tariff or tax policies. They can reduce global economic welfare, and afford a potentially important argument for limiting foreign tort plaintiffs to the law and forum of the jurisdiction in which their harm arose. The problem arises even if the substantive or procedural law of the foreign jurisdiction in question is demonstrably inferior to U.S. law from an economic standpoint. The analysis has implications for a number of areas of legal doctrine, including the construction of the Alien Tort Statute, the rules governing choice of law in transnational tort cases, and the doctrine of forum non conveniens.

You can download the article, for free, from here.

Harding v Wealands – the Final Word on Assessment of Damages under English Law?

Yet another casenote on Harding v Wealands (2006) has been published, this time in the new issue of the *Civil Justice Quarterly*, written by Hakeem Seriki (C.J.Q. 2007, 26(Jan), 28-36). Here's the abstract:

> *Examines English and Australian case law on the classification of issues as either substantive or procedural in the context of a conflict of laws. Comments on the first instance, Court of Appeal, and House of Lords decisions in Harding v Wealands on whether the assessment of damages in respect of a car accident in Australia was a "question of procedure" within the meaning of the Private International Law (Miscellaneous Provisions) Act 1995 s.14(3)(b) so that the law of the forum, rather than the law of New South Wales, applied.*

The *Civil Justice Quarterly*, to my knowledge, isn't accessible online, so you'll have to get your hands on a copy of the Journal itself to read the article.

Mutual Recognition of Personal and Family Status in the EC

An interesting article written in English by *Roberto Baratta* (University of Macerata, Italy) has been published in the latest volume of the German legal journal IPRax (IPRax 2007, 4 et seq.): "**Problematic elements of an implicit rule providing for mutual recognition of personal and familiy status in the EC**".

In this article *Baratta* examines whether certain primary rules of the EC Treaty may serve as a "theoretical gateway" for establishing a private international law

principle of mutual recognition which facilitates the recognition of European Union citizens' personal status and family relationships within the European Union.

As a "theoretical gateway" *Baratta* considers three basic provisions of the EC Treaty.

As a first basis Art. 17 EC which is completed by Art. 18 EC guaranteeing EU citizens "the right to move and reside freely within the territory of the Member States" is contemplated. *Baratta* regards the latter right as including "the right to move with the personal status and family situations legally acquired" in the respective Member State of origin and supports this teleological interpretation of these two provisions of the EC Treaty with the ECJ's ruling in *Dafeki,* where the Court had affirmed, "at least as a matter of principle, the obligation to recognise that a worker (exercising a fundamental freedom) had the same personal status he or she possessed in her national State".

The second argument in favour of a principle of mutual recognition brought forward by *Baratta* is Art. 12 EC. Here, *Baratta* concludes from ECJ case law such as *Konstantinidis* and *Garcia Avello* that "legal values granted to a person by its national State cannot be denied by another Member State, in particular whenever this refusal has a negative effect on the integration of European citizens and, more generally, on their freedom to circulate and enjoy fundamental rights".

The third provision which is referred to is Art. 10 EC according to which Member States are obliged "to take all appropriate measures […] to ensure fulfilment of the obligations arising out of this Treaty […]". *Baratta* regards it as a jeopardy for the exercise of the freedom of movement as well as the attainment of the objectives of the Treaty – which is forbidden by Art. 10 EC – if a Member State refuses *a priori* to recognise a legal status duly acquired by an EU citizen according to its national legal system.

Baratta regards the aforementioned provisions as a theoretical foundation of a private international law principle of mutual recognition and derives from this principle the following three consequences:

First he argues that domestic conflict-of-law rules as well as substantive rules should not be applied if they lead to a non-recognition result.

Second, "the aim of the principle would be to maintain throughout the territory of the EC the personal and family status legally acquired in the Member State of origin" and therefore the Member States would be obliged to recognise legal relationships acquired either ex lege or by an act of public authorities.

And third, the recognising Member State should in principle grant the respective status an effect as similar as possible to the effect of the same situation in the State of origin.

Baratta however supports – due to the different legal traditions in the Member States – a certain limitation of this principle by allowing a – narrowly construed – public policy exception.

Finally *Baratta* concludes that a private international law principle of mutual recognition could simplify the solution of private international law problems with regard to some status matters but was, however, "not capable of replacing the traditional conflict of law rules as a whole". One reason is that the scope of the principle is limited to intra-Community situations. Therefore *Baratta* supports the creation of European private international law rules on the basis of Art. 65 EC which "would be better placed to achieve predictability, continuity of family relationships and consistency with a future, comprehensive and coherent Community system of PIL […]".

Provisional EU Council Agendas on Private International Law Matters

The German Presidency has produced, in accordance with its obligations under Article 2, para. 5, of the Council’s rules of procedure, the indicative provisional agendas for Council meetings prepared by the Permanent Representatives Committee for the period up to 30 June 2007. Scrolling through the agendas, the various proposed Rome Regulations (I, II & III) are all timetabled (along with what they hope to achieve), as well as a few other related matters:

Justice and Home Affairs Council, Brussels, 15/16 February 2007 (p. 24)

- (Possible) Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (**Rome II**) ? *Adoption of the amended common position*
- (Possible) Proposal for a Regulation of the European Parliament and of the Council establishing a **European Small Claims Procedure** ? *Adoption*
- (Possible) Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of **judicial and extrajudicial documents** in civil or commercial matters ? *Adoption of the Common position*

Justice and Home Affairs Council, Luxembourg, 19/20 April 2007 (p.26)

- (Possible) Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (**Rome II**) ? *Adoption of the amended common position*
- Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (**Rome I**) ? *Debate on certain issues*
- Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decision and cooperation in matters relating to maintenance obligations (**Maintenance regulation**) ? *Conclusions on certain issues*
- (Possible) Proposal for a Council Regulation amending Regulation (EC) N° 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (**Rome III**) ? *Debate on certain issues*

Justice and Home Affairs Council, Luxembourg, 12/13 June 2007 (p. 28)

- Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (**Rome I**) ? *Debate on certain issues or general agreement*
- (possible) Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decision and cooperation in matters

relating to **maintenance obligations**. VO Unterhalt ? *Conclusions on certain issues*

- 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**) ? *Debate on certain issues*

You can find the full list of provisional agendas here.

There's No Case Like Rome (III)

Rachael Kelsey and Caroline Murphy have written a fairly scathing piece on Rome III (i.e. the "green paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition") in the latest issue of the *Journal of the Law Society of Scotland*. Here's a taster:

> *Picture the scene. March 2008, and you're in Lochmaddy Sheriff Court for a divorce proof. You've cited your witnesses, booked your shorthand writer, copied your authorities, even lodged all your productions on time… you've read Cunningham, Wallis, even Coyle. How bad can it be?*
>
> *Thankfully not as bad as it looked like it might be a couple of months ago. At that stage the UK had indicated that we wanted to take part in the adoption of what has become known as Rome III – to give it its proper title, "The green paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition", SEC(2006)952, which is due to come into force on 1 March 2008.*
>
> *At the end of October however the government decided that we would exercise our right not to opt in at this stage (we may still in the future). We need to hope and pray that our government doesn't change its mind.*

You can access the full note online for free.

German Courts: Scope of Art. 6 (3) Brussels I Regulation

The scope of Art. 6 (3) Brussels I (counter-claim) has not been clarified by the ECJ so far. Also the German Federal Supreme Court has left this question explicitly open in a judgment of 7 November 2001 (VIII ZR 263/00).

Now, the Local Court Trier adopted with judgment of 11 March 2005 (32 C 641/04) a **restrictive** approach. The Court held that a counter-claim can only be based on Art. 6 (3) Brussels I if the counter-claim arises from the same contract or facts on which the original claim was based; i.e. it has not been regarded as sufficient if the claim and the counter-claim are based on different sales contracts which have been concluded within the context of continuous business relations between the parties. Rather the existence of a framework contract or an apportioned contract is regarded to be necessary.

The Court refers for supporting this restrictive interpretation mainly to the wording of Art. 6 (3) Brussels I which differs from the wording of Art. 28 (3) Brussels I by not regarding a close connection between the actions as sufficient, but rather requiring that the claim and the counter-claim arise from the same contract or facts.

This point of view is in line with the predominant opinion among German legal writers, but has nevertheless been criticised by *Michael Stürner* (IPRax 2007, 21 et seq.) who argues that it should be possible to bring a counter-claim in the court in which the original claim is pending in cases where separate proceedings may lead to irreconcilable judgments in terms of Art. 28 (3) Brussels I. In contrast to the Local Court Trier he regards the matter in dispute of both proceedings – claim and counter-claim – to be decisive, rather than the existence of an apportioned contract.

The full judgment can be found in IPRax 2007 41 et seq.