PRIVATE INTERNATIONAL LAW ASPECTS OF THE MATRIMONIAL MATTERS IN THE EUROPEAN UNION - JURISDICTION, RECOGNITION AND APPLICABLE LAW

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UDK 341.94::347.6(4)EU
Prethodno znanstveno priopćenje
Primljeno: studeni 2006.

*Considering the process of unification and harmonization of family law in the European Union, one can say that a lot of work has been done in the past twenty years. However, all the existing Community legal instruments in the field of family law deal only with the questions of procedure, namely the problems of jurisdiction and recognition. The same statement applies to divorce, legal separation and marriage annulment (matrimonial matters), the family law instruments which are in the focus of this paper. In the introduction of this paper we have an intention to show how the evolution of the integration process in Europe influenced the necessity to regulate family law matters within Community's legal order (Chapter I). After giving an overview of the EU instruments regulating matrimonial matters, we continue by briefly examining current Community provisions on jurisdiction and recognition of divorces, legal separations and marriage annulments in the EU (Chapter II). There are currently no Community provisions on applicable law in matrimonial matters. This paper will mainly focus on the problems caused by this legal gap and the possible ways forward proposed by The Green Paper (Chapters III and IV). The Commission has recently launched a Proposal for a Council Regulation amending Brussels II*bis *Regulation as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters. This Proposal, aimed primarily to harmonize conflict-of-law rules, represents a significant progress for the benefit of the EU citizens as it greatly diminishes problems of legal uncertainty and unpredictability both for the spouses and the legal practitioners (Chapter V). Finally, we finish this paper by giving some concluding remarks and suggesting possible ways forward in the field of family law in the EU (Chapter VI).*

Key words: private international law, matrimonial matters, divorces, jurisdiction, recognition, applicable law

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I. INTRODUCTION

I.1. 1968 Brussels Convention and 1980 Rome Convention

European integration was mainly an economic affair to begin with and for that reason the legal instruments established were tailored to serve an economic purpose.[1] The Brussels Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Convention)[2] was designed to meet the economic needs of the European integration of the sixties.[3] Brussels I was the major achievement in judicial matters and it was concluded on the basis of Article 220 (fourth indent)[4] of the Treaty establishing the European Economic Community. The Brussels Convention applies to civil and commercial matters and is a general convention on jurisdiction, recognition and enforcement. However, matters relating to the status and legal capacity of natural persons are excluded from its scope.[5]

The 1980 Rome Convention on the Law Applicable to Contractual Obligations[6] also does not apply to questions involving the status or legal capacity of natural persons[7].

At least two reasons for such exclusion in both of these instruments can be identified.[8] First, at the time of their creation, the EEC was not a body aimed

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1 Explanatory Report on the Convention, drawn up, on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, prepared by Dr. Alegría Borrás, OJ C221/27, (98/C 221/04), 16 July 1998, p. 28.

2 A consolidated version of the Convention incorporating all the amendments can be found at OJ C 27 of 26 January 1998.

3 Mathilde Sumampouw: Parental Responsibility under Brussels II, Private Law in the International Arena (From National Conflict Rules Towards Harmonization and Unification)- Liber Amicorum Kurt Siehr, J. Basedow et al., eds., 2000, T.M.C. Asser Press, The Hague, The Netherlands, p. 729.

4 "Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals…the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards."

5 The Brussels I Convention, Art. 1.

6 A consolidated version of the Convention can be found at OJ C 27 of 26 January 1998.

7 The Rome Convention, Art. 1(2).

8 Paul Beaumont and Gordon Moir: Brussels Convention II: A New Instrument in Family Matters for the European Union or the European Community?, European Law Review, Vol. 20, no. 3, June 1995, p. 270.

directly at the regulation of family law matters but rather at the securing of economic freedoms, as mentioned supra. Secondly, there were the problems caused by the divergences between the Member States in the regulation of family matters.[9]

I.2. The Maastricht Treaty - The European Union Citizenship

European integration has advanced considerably in the 30 years since the 1968 Brussels Convention was drawn up. The Maastricht Treaty[10] marked the formal beginning of the stage during which the European Community's goals of European integration expanded to an even wider scale.[11] The Maastricht Treaty created the idea of the European Union citizenship[12], and it provided a number of rights upon the citizens of Community, in particular the right to free movement of persons. The Maastricht Treaty's concept of citizenship, however, has ultimately disappointed many citizens of the Union because, alone, it did not confer effective rights.[13] Citizens of the EU found themselves able to exercise their substantive rights, but unable to find the means of obtaining certainty of enforcement of judgments resulting from the exercise of such rights.[14] Especially, problems caused by divorces rendered by one Member State but not recognized by another Member State, created severe conflicts for citizens of the European Union exercising their right to free movement. Recognition of the dissolution of marriage affects the validity of subsequent marriages, the legitimacy of children from a later marriage, and property rights, all of which depend on whether one Member State recognizes a divorce judgment rendered by another Member State.[15] Even though the question of recognition of foreign divorces had already

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9 *See* Jenard Report (Explanatory Report on the original version of The 1968 Brussels Convention), OJ C 59 5 March 1979 at p. 10.

10 The Treaty on European Union, Feb 7, 1992, OJ (C 191), 1.

11 Sara L. Uberman: The Brussels II Convention: A tool necessary to enforce individual rights relating to matrimonial matters within the European Union, Suffolk Transnational Law Review, Vol. 23/1, p. 164.

12 The Maastricht Treaty, Art. 8.

13 Commission Report on the operation of the Treaty on European Union, PARL. EUR. DOC. SEC (95) 731 final, May 10, 1995, at para. 10.

14 Uberman, *supra* note 11, p. 188.

15 A.E. Anton: The Recognition of Divorces and Legal Separations, International and Comparative Law Quarterly, Vol. 18, July 1969, p. 622.

been regulated on international level by the 1970 Hague Convention on the Recognition of Divorces and Legal Separations[16], it was ratified by only 8 of the 15 Member States.[17] The creation of an agreement among Member States became particularly important because of the probability that Member States not signatories would never sign that Convention.[18] Furthermore, the 1970 Hague Convention only partly solves problems which arise, as it does not lay down direct jurisdiction provisions and does not sufficiently avoid the problem of irreconcilable judgments.[19]

II. RULES ON JURISDICTION AND RECOGNITION

II.1. Brussels II Convention

At the meeting in Brussels on 10 and 11 December 1993 the European Council considered that entry into force of the Maastricht Treaty[20] opened up new prospects for the European citizen, but that still was the requirement for additional work to be carried out in respect of certain aspects of the European citizen's family life. A working party was set up in 1993. To that end, the Council considered the possibilities of extending the scope of the 1968 Brussels Convention to matters of family law.[21] Soon the project was directed towards the drafting of an independent Convention dealing with matrimonial matters, but modeled on the 1968 Brussels Convention. In 1995, after French and Spanish initiatives, it was decided that the future Convention should also cover

16 Convention on the recognition of divorces and legal separations (concluded 1 June 1970), www.hcch.net/e/conventions/text18e.html.

17 Particularly, numerous jurisdictional conflicts frequently occurred upon the break-up of Franco German marriages and neither France nor Germany has ratified this Convention. See Peter McEleavy: The Brussels II Regulation: How The European Community Has Moved Into Family Law, ICLQ, vol. 51, October 2002, p. 889.

18 Beaumont and Moir, *supra* note 8, pp. 29-30.

19 European Parliament Report on the proposal for Council Regulation on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children (Rapporteur: Evelyne Gebhardt), 10 November 1999, (COM(1999) 220- C5-0045/1999- 1999/01 10(CSN)), final A5-0057/1999, p. 18.

20 The Maastricht Treaty entered into force on 2 November 1993.

21 Borrás Report, *supra* note 1, p. 31.

parental responsibility in cases when such an issue arises during matrimonial proceedings between the child's parents. The legal basis for the Convention was found in Article K.3[22] of the Maastricht Treaty.[23] After a few years of negotiations, a Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (Brussels II Convention) was agreed[24]. On 28 May 1998 the Council approved the Convention and on the same date the representatives of all the Member States signed it. The signing of the Brussels II Convention was described as a "breakthrough- probably the most important advance since the entry into force of the Maastricht Treaty- in the creation of a European legal area for the tangible benefit of the people of Europe."[25]

II.2. The Amsterdam Treaty - From Conventions to Regulations

Nonetheless, the Brussels II Convention remained in the form of a convention between the Member States, rather than a form of Community law.[26] This position has changed, however, with the entry into force of the 1997 Treaty of Amsterdam[27] and its further expansion of competence relating to judicial co-operation. The Treaty of Amsterdam has declared the progressive

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22 "Without prejudice to Article 220 of the Treaty establishing the European Community, it is open to the Council, on the recommendation of any Member States or the Commission, to draw up conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional reqirements."

23 Art. K.3 is to be seen in conjunction with Art. K.1. Point 6 of Art. K.1 of the Treaty establishes judicial co-operation in civil matters as one of the matters of common interest for the purposes of achieving the objectives of the Union, in particular the free movement of persons. *See more about legal basis in* Beaumont and Moir, *supra* note 8, pp. 275-278.

24 Council Act of 28 May 1998, drawing up, on the basis of Article K.3 of the Treaty on European Union, the Protocol on the interpretation by the Court of Justice of the European Communities of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, OJ C 221/19, (98/C 221/03), 16 July 1998.

25 Council of the European Union, General Secretariat, Press Release, 8853/98 (Presse 167) of Justice and Home Affairs Council Meeting of 28 May 1998.

26 Clare McGlynn: The Europeanisation of family law, Child and Family Law Quarterly, Vol. 13, no. 1, 2001, p. 39.

27 The Amsterdam Treaty entered into force on 1 May 1999.

establishment of an area of freedom, security and justice to be a target of the Community, as stated in Art. 61. In pursuance of that target, a new title IV on "Visas/asylum, immigration and other policies related to free movement of persons" comprising Art. 61-69 has been inserted into the EC Treaty. These provisions have transferred the judicial co-operation in civil matters, more specifically private international law and procedural law[28], from the Third Pillar (which has not allowed for much progress in this field[29], mainly because of the difficulties involved in ratification of related conventions) to the First Pillar, i. e. into the competence of the European Community.[30]

Another question is whether the European Union has competence to unify or harmonize substantive family law. It is still generally accepted that the answer

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[28] Katharina Boele-Woelki: Unification and Harmonization of Private International Law in Europe, Private Law in the International Arena (From National Conflict Rules Towards Harmonization and Unification)- Liber Amicorum Kurt Siehr, J. Basedow et al., eds., 2000, T.M.C. Asser Press, The Hague, The Netherlands, p. 62.

[29] Jürgen Basedow: EC Regulations in European Private Law, Private Law in the International Arena (From National Conflict Rules Towards Harmonization and Unification)- Liber Amicorum Kurt Siehr, J. Basedow et al., eds., 2000, T.M.C. Asser Press, The Hague, The Netherlands, p. 20.

[30] Art. 61 of the EC Treaty gives a list of areas in which measures shall be adopted by the Council, and under c) it mentions "measures in the field of judicial cooperation in civil matters as provided for in Art. 65". It states:

"Measures in the field of judicial cooperation in civil matters having cross border implications, to be taken in accordance with article 67 and insofar as necessary for the proper function of the internal market shall include:

a) improving and simplifying:
   - the system for cross border service of judicial and extrajudicial documents;
   - cooperation in the taking of evidence;
   - the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;
b) promoting the compatibility of the rules applicable in the Member States concerning the conflict-of-laws and of jurisdiction;
c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States."

It is made clear ("shall include") that this list is not exhaustive and the Community may choose other subjects of legislation in the field of judicial co-operation in civil matters as long as they have cross-border implications and in so far as they are necessary for the proper functioning of the internal market. The term "measures" includes both binding (regulation, directive) and non-binding (resolution, recommendation) instruments.

to that question is negative.[31] It is true that Article 65 of the EC Treaty speaks of measures in the field of judicial cooperation in civil matters only if they have cross-border implications. However, due to the fact that no time indication is provided regarding the required cross-border implications, theoretically each internal relationship which is only connected to one national jurisdiction can become a cross-border relationship. In order to guarantee the free movement of persons in Europe, the EU Commission should take appropriate steps to avoid a loss of legal position which can occur with a change of residence if e.g. applicable law is based on the habitual residence in question. This means that, if we broadly interpret Article 65 EC Treaty, the European Union could even take measures in order to harmonize or unify substantive family law in Europe.[32]

In the meantime, the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam was adopted on 3 December 1998 by the Council.[33] This is a concrete plan by which to implement, in a workable system, the changes brought about by the Treaty of Amsterdam in the areas covered by the First Pillar and also by which to be able to designate the necessary priorities.[34] At the European Council of Tampere on 15 and 16 October 1999[35], mutual recognition has been recognized as one of the three main priorities for action[36] and the "corner-stone of judicial co--operation in both civil and criminal matters within the Union", which "should

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[31] *See* Walter Pintens: Europeanization of Family Law, in Perspectives for the Unification and Harmonisation of Family Law in Europe, edited by K. Boele-Woelki, Intersentia, 2003, p. 22. and Jänterä-Jareborg: Unification of international family law in Europe - a critical perspective, in Perspectives for the Unification and Harmonisation of Family Law in Europe, edited by K. Boele-Woelki, Intersentia, 2003, p. 195.

[32] Katharina Boele-Woelki: The principles of European family law - its aims and perspectives, Utrecht Law Review, Vol. 1, Issue 2, Dec 2005, p. 161.

[33] Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam establishing an area of freedom, security and justice, Brussels, 4 December 1998, 13844/98, JAI 41, OJ (EC) 1999, C 19/1.

[34] Boele-Woelki, *supra* note 28, p. 66.

[35] Tampere European Council 15 and 16 October 1999- Presidency Conclusions, http://ue.eu.int/Newsroom/LoadDoc.asp?BID=76&DID=59122&from=&LANG=1.

[36] Along with better access to justice and increased convergence in procedural law, cf. paras 28-29 of the Tampere Presidency Conclusions (*supra* note 35).

apply both to judgments and other decisions of judicial authorities"[37] in order to facilitate the creation of an "area of freedom, security and justice" where people should be able to approach courts and authorities in any Member State as easily as in their own and where decisions should be respected throughout the Union[38].

II.3. The Brussels II Regulation

New legislative instruments followed the Tampere Council session. The Regulation 1347/2000[39] (Brussels II Regulation) was the first Community instrument to be adopted in the area of judicial cooperation in civil matters (under the Title IV of the Amsterdam Treaty). The content of this Regulation was substantially taken over from The 1998 European Union Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters (Brussels II Convention). Because the Convention was not ratified before the Treaty of Amsterdam entered into force, its rules have not taken effect.[40] The Regulation also contained a number of new provisions not in the Convention in order to secure consistency with certain provisions of the Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation).[41] In particular, there is regulation of the time at which a court becomes seized of proceedings and a

37 Tampere Presidency Conclusions (*supra* note 35), para. 33.

38 Tampere Presidency Conclusions (*supra* note 35), para. 5.

39 Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L 160/19, 30 June 2000.

40 European Parliament Report on the proposal for Council Regulation on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children (Rapporteur: Evelyne Gebhardt), 10 November 1999, (COM(1999) 220- C5-0045/1999- 1999/01 10(CSN)), final A5-0057/1999, p. 22.

41 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12/1, 16.1.2001. The Regulation entered into force on 1 March 2002.

simplification of the application for an enforcement order has been introduced.[42] The Regulation, which came into force on 1 March 2001, introduced uniform standards for jurisdiction on divorce, legal separation and marriage annulment and aimed to facilitate rapid and automatic recognition among Member States of judgments on these issues. It also provided for uniform rules of jurisdiction regarding parental responsibility of children of both spouses[43], and the recognition and enforcement[44] of judgments relating thereto. It should be, however, noted that the Regulation applied to decisions relating to parental responsibility only when they are given on the occasion of the matrimonial proceedings.[45] This instrument, being a Community regulation, was binding in its entirety on Member States and was under the jurisdiction of the Court of Justice. Its rules were directly applicable in the Member States, without the need to ratify them according to national constitutional law (as in the case of a convention) or of transposing them into national law (as in case of a directive).[46] Having all this in mind, in order to attain the objective of free movement of judgments in matrimonial matters and in matters of parental responsibility within the Community, it was more appropriate to regulate cross-border recognition of jurisdiction and judgments in this field by a mandatory and directly applicable

[42] Wendy Kennett: Current Developments: Private International Law, International & Comparative Law Quarterly, Vol. 50, Part 1, January 2001, p. 189.

[43] It does not cover children of unmarried parents, although they now represent 26% of all children born in the EU. *See* Sheila Barker: Brussels II, 13 Sept. 2002, www.morton-fraser.com/knowledge.php?k_id=43.

[44] While, for matrimonial matters, recognition procedures are sufficient, in view of the limited scope of the Regulation and the fact that recognition includes amendment of civil-status records, rules for enforcement are still necessary in relation to the exercise of parental responsibility. France presented on 3 July 2000 an initiative aimed at abolishing exequatur for the part of the decision on parental responsibility that concerns rights of access. See Initiative of the French Republic with a view to adopting a Council Regulation on the mutual enforcement of judgments on rights of access to children, OJ C 234/7, (2000/C 234/08), 15 Aug. 2000, p. 7.

[45] The Brussels II Regulation, Art. 1 (1b).

[46] *See* more about consequences of transposing convention into regulation in Hélène Gaudemet-Tallon: Le Règlement nº 1347/2000 du Conseil du 29 mai 2000 - Compétence, reconnaissance et exécution des décisions en matière matrimoniale et en matière de responsabilité parentale des enfants communs, 128 J.D.I. (2001) 2, p. 426 *et seq*.

Community legal instrument.[47] The Regulation applied to all the Member States (including the United Kingdom and Ireland)[48] except Denmark.[49,50]

II.4. The Brussels II*bis* Regulation

After The Brussels II Regulation entered into force there were already two proposals connected to its scope, but both of them were concerned only with the part of the Regulation that deals with parental responsibility.[51]

On 3 May 2002, the Commission presented a new Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No 1347/2000 and amending Regulation (EC) No

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47 Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L 160/19, 30.6.2000., p. 19, para. 7.

48 The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation. *See* Protocol annexed to the Treaty on European Union and to the Treaty establishing the European Community on the position of the United Kingdom and Ireland, http://europa.eu.int/eur-lex/en/treaties/selected/livre316.html.

49 Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application. *See* Protocol annexed to the Treaty on European Union and to the Treaty establishing the European Community on the position of Denmark, http://europa.eu.int/eur-lex/en/treaties/selected/livre317.html.

50 Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L 160/19, 30 June 2000, pp. 20-21, paras. 24 and 25.

51 Initiative of the French Republic with a view to adopting a Council Regulation on the mutual enforcement of judgments on rights of access to children, OJ C 234/7, (2000/C 234/08), 15 August 2000, p. 7 *and* Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility, OJ C 332 E/269, (2001/C 332 E/11), COM (2001) 505 final- 2001/0204(CNS), (Submitted by the Commission on 6 September 2001), 27 November 2001.

44/2001 in matters relating to maintenance. A new proposal brought together Brussels II Regulation, the Commission proposal on parental responsibility and the French initiative on rights of access. The Proposal had two elements. First, it took over the provisions on matrimonial matters of Brussels II Regulation as they were. Second, it integrated into a complete system of rules on parental responsibility the provisions on parental responsibility of Brussels II Regulation, the Commission proposal on parental responsibility and the French initiative on rights of access.

The new Regulation 2201/2003 (Brussels II*bis*)[52] entered into force on 1 August 2004. and applies from 1 March 2005.[53] The Brussels II*bis* also, as Brussels II Regulation used to, applies to all Member States, except Denmark. It should be however noted that provisions of the Brussels II*bis* Regulation concerning matrimonial matters have been adopted from the Brussels II Regulation practically unchanged.

As regards judgments on divorce, legal separation or marriage annulment, this Regulation applies only to the dissolution of matrimonial ties and does not deal with issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures. Maintenance obligations are excluded from its scope as they are already covered by Council Regulation 44/2001 (Brussels I Regulation).

II.4.1. Jurisdiction - matrimonial matters

II.4.1.1. Jurisdictional grounds

While the Brussels I Regulation, the general regulation on recognition and enforcement, in its Article 2 in principle proceeds from general jurisdiction in the respondent's place of residence and in Articles 5 and 6 contrasts this general jurisdiction to special jurisdictions by way of exception, the Brussels II*bis* Regulation declines to establish a general jurisdiction of a particular forum

[52] Council Regulation (EC) No 2201/2003 of 27 November 2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) 1347/2000, OJ L 338/1, 23 December 2003.

[53] The Brussels II*bis* Regulation, Art. 72.

in matrimonial matters (civil proceedings relating to divorce, legal separation and marriage annulment). Instead, there is a multiple choice of jurisdictional connecting factors. These jurisdictional grounds are alternative, implying that there is no hierarchy between them. There are seven alternative grounds of jurisdiction and, since they do not take precedence over each other, the spouse/spouses may file a petition with the courts of the Member State of:[54]

a. their habitual residence or
b. their last habitual residence if one of them still resides there or
c. the habitual residence of either spouse in case of joint application or
d. the habitual residence of the respondent or
e. the habitual residence of the applicant provided that he or she has resided there for at least one year before making the application or
f. the habitual residence of the applicant provided that he or she has resided there for at least six months before making the application and he or she is a national of that Member State or
g. their common nationality (common domicile in the case of the U.K. and Ireland).

Consequently, jurisdiction lies with the courts of the Member State based on habitual residence, nationality or domicile of the spouse/spouses.[55] What is required, therefore, is a real link between the parties and the Member State the courts of which are seized of the proceedings.

Accordingly, the Regulation contains only jurisdiction criteria which can be determined objectively. By contrast, the spouses' intentions are in principle of no significance. Consequently, there is no possibility for the spouses to choose which Member States' courts will have jurisdiction (prorogation of jurisdiction).

The Regulation is silent on the consequences of dual nationality. Therefore, the judicial bodies of each Member State will apply their national rules within the framework of general Community rules on the matter.[56]

The jurisdictional grounds are exclusive in the sense that a spouse who is habitually resident in a Member State or who is a national of a Member State

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[54] The Brussels II*bis* Regulation, Art. 3.

[55] The courts having jurisdiction under this Regulation will generally have jurisdiction to rule on maintenance obligations by application of Article 5(2) of Council Regulation 44/2001.

[56] Borras Report, *supra* note 1, p. 39.

(or who has his or her domicile in the U.K. or Ireland) may only be sued in another Member State on the basis of the Regulation.[57] While the Brussels I Regulation, particularly in its provisions on special jurisdictions (Articles 5 and 6) establishes local jurisdiction at the same time that it establishes international jurisdiction, the Brussels II*bis* Regulation basically limits itself to establishing international jurisdiction. This means that the Brussels II*bis* Regulation determines merely the Member State whose courts have jurisdiction, but not the court which is competent within that Member State. This question is left to domestic procedural law.

There is a special rule on the so-called residual jurisdiction contained in Article 7. If no court of a Member State is competent under the Regulation, jurisdiction shall be determined, in each Member State, by the laws of that State. As against a respondent who is not habitually resident and is not either a national of a Member State, or, in the case of the United Kingdom and Ireland, does not have his domicile within the territory of one of the latter Member States, any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State. These current rules on residual jurisdiction can seriously hamper the right to access to the courts, since they can lead to the situation where no court in the EU or indeed anywhere has jurisdiction to deal with a divorce application.[58]

The court which has jurisdiction to hear the case also has jurisdiction to examine a counterclaim, insofar as it comes within the scope of the Regulation.[59]

The conversion of legal separation into divorce is fairly frequent in some legal systems, while that distinction is unknown in other legal systems. In some Member States separation is an obligatory step prior to divorce and a stated period of time must usually elapse between the separation and divorce. That is why the Regulation provides that a court of a Member State that has given a judgment on a legal separation shall also have jurisdiction for converting that judgment into a divorce, if the law of that Member State so provides.[60] This means that the spouses can obtain the divorce either before that court

[57] The Brussels II*bis* Regulation, Art. 6.

[58] *See* more under section III.2.4.

[59] The Brussels II*bis* Regulation, Art. 4.

[60] The Brussels II*bis* Regulation, Art. 5.

or before the courts of the Member State which have jurisdiction under the Article 3 of the Regulation.

II.4.1.2. Seizing of the court

Where a court of a Member State is seized of a case over which it has no jurisdiction under the Regulation and over which a court of another Member State has jurisdiction according to the Regulation, it shall declare of its own motion that it has no jurisdiction.[61]

Jurisdiction is taken on a first come, first served basis with no *forum conveniens* rule in matrimonial maters. This means that the court first seized which has jurisdiction, even though it holds that some other court that also has jurisdiction would be in better position to hear the case, cannot decline its jurisdiction in favor of that second court. The possibility to transfer the case exists, according to Art. 15, only for the matters relating to parental responsibility.

Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.[62] Where the jurisdiction of the court first seized is established, the court second seized shall decline jurisdiction in favor of that court and in that case, the party who brought the relevant action before the court second seized may bring that action before the court first seized.[63] The court first seized thus has exclusive jurisdiction. This *lis pendens* rule, that is to say *prior temporis* rule, is designed to ensure legal certainty, avoid parallel actions and consequently the possible irreconcilable judgments.

II.4.2. Recognition - matrimonial matters

Any judgment concerning divorce, legal separation or marriage annulment given by the court of any Member State (or any other authority with the same

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61 The Brussels II*bis* Regulation, Art. 17.

62 The Brussels II*bis* Regulation, Art. 19 (1).

63 The Brussels II*bis* Regulation, Art 19 (3).

jurisdiction in the Member State in question), and against which no further appeal lies under the law of that Member State[64], is to be recognized without any special procedure being required throughout the European Union.[65] In other words, recognition is automatic by operation of law. Moreover, the courts in which the recognition is sought are forbidden to review the jurisdiction of the court of origin[66] and to refuse recognition because of a difference in applicable law[67] (the recognition of a judgment may not be refused because the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts). This provision has been inserted into the Regulation because Member States in which dissolution of the marriage bond is easier feared that that their judgments would not have been recognized in Member States with more stringent rules. On the other hand, to provide some guarantees for the latter Member States, the public policy rule has been inserted into the Regulation, as a ground for recognition refusal.

Importantly, under no circumstances may a judgment be reviewed as to its substance[68]. This means that the court in the Member State in which recognition is sought is not allowed to rule again on the ruling made by the court in the Member State of origin.[69]

Since the recognition of judgments given in a Member State is based on the principle of mutual trust, the grounds for non-recognition are kept to the minimum required.

A small number of narrow grounds of non-recognition of a judgment are set out in the Regulation[70]. Non-recognition is mandatory:

- if recognition would be manifestly contrary to public policy of the Member State in which recognition is sought;
- if the judgment is given in default of appearance by the respondent;
- if it is irreconcilable with an earlier judgment between the same parties in the Member State in which the recognition is sought; or
- if it is irreconcilable with an earlier judgment given in another Member State or in a non - Member State between the same parties, provided that

64 The Brussels II*bis* Regulation, Art. 21(2).

65 The Brussels II*bis* Regulation, Art 21 (1).

66 The Brussels II*bis* Regulation, Art. 24.

67 The Brussels II*bis* Regulation, Art. 25.

68 The Brussels II*bis* Regulation, Art. 26.

69 Borras Report, *supra* note 1, p. 53.

70 The Brussels II*bis* Regulation, Art. 22.

the earlier judgment fulfills the conditions necessary for its recognition in the Member State in which the recognition is sought.

Nevertheless, any interested party may apply "for a decision that the judgment be or not to be recognized".[71]

For all the matrimonial proceedings covered by the scope of this Regulation, recognition is sufficient and there is no need for enforcement procedure. Particularly, recognition includes amendment of civil-status records[72]. The recognition involved is therefore not judicial but is equivalent to recognition for the purposes of civil-status records.[73]

III. RULES ON APPLICABLE LAW

There are currently no Community provisions on applicable law in divorce. The seven jurisdictional grounds contained in The Brussels II*bis* Regulation seek to achieve, as previously mentioned, a balance between principles of fairness, appropriateness, flexibility and tradition. However, their construction is such that they can prevent proceedings from being brought in the forum with which the spouses have their closest connection and at the same time they may expose spouses to litigation in a State with which they have no current connection.[74] The aim was to produce legal certainty and predictability, but the result is that the spouses have difficulties of not knowing which law will be applied to their divorce proceedings. Furthermore, these alternative grounds on jurisdiction in matrimonial matters, contained in Brussels II*bis,* are feared to encourage the spouses to both forum shopping and forum racing, apart from the lack of legal certainty and flexibility. This means choosing forum on the basis of what best suits the plaintiff's interests, in which respect the law applied to divorce in the alternative States of forum may be of great importance. Under the Brussels II*bis* the competent court first seized will have exclusive competence. As a result, both spouses may find it necessary to "race to court" in order to be the

71 The Brussels II*bis* Regulation, Art. 21 (3).

72 The Brussels II*bis* Regulation, Art. 21 (2).

73 Borras Report, *supra* note 1, p. 49.

74 Peter McEleavy: Green Paper on Applicable Law and Jurisdiction in Divorce - Desirability of Community Action, p. 1., http://europa.eu.int/comm/justice_home/news/consulting_public/divorce_matters/contributions/contribution_mceleavy_1_en.pdf (3 April 2006).

first one to initiate proceedings. This gives an advantage to the economically stronger party, who is more easily able to afford in-depth legal advice regarding the conflict-of-law rules and the substantive laws of the available fora, as well as the additional costs of a legal dispute in another country.[75]

It is also stated that this lis pendens rule contained in Brussels II*bis* has greatly discouraged conciliation between couples, both in relation to resolving their matrimonial difficulties and repairing their marriage but also with regard to mediation or other non-litigious forms of dispute resolution once the couple has accepted that the marriage has broke down.[76] It can also be said that this rush to court encouraged by the mentioned lis pendens rule flies in the face of other proposals from the EU such as the Proposal for a Directive of the European Parliament and the Council on certain aspects of mediation in civil and commercial matters of 22 October 2004.[77] On the other hand, it is feared that a reduction of concurrent international jurisdictions could not alleviate this problem without severely limiting access to the courts.[78]

Calculations on where to start divorce proceedings would be useless if the courts of all the Member States were to apply the same law to the marriage dissolution. Irrespective of in which Member State the proceedings are initiated, the same law would be applied to the spouses when decided upon matrimonial proceedings, which would prevent above mentioned problems of forum shopping, racing to the courts and lack of legal certainty and predictability.

IV. THE GREEN PAPER

To prevent these problems arising, in November 2004, the European Council invited the Commission to present a Green Paper on the conflict-of-law rules in

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75 Nina Dethloff: Arguments for the Unification and Harmonisation of Family Law in Europe, in Perspectives for the Unification and Harmonisation of Family Law in Europe, edited by K. Boele-Woelki, Intersentia, 2003, p. 51.

76 *See* Response of Resolution to the EU Green Paper on Applicable Law and Jurisdiction in Divorce Matters (Rome III), p. 5., http://europa.eu.int/comm/justice_home/news/consulting_public/divorce_matters/contributions/contribution_kingsley_napley_en.pdf (27 March.2006).

77 http://europa.eu.int/eur-lex/en/com/pdf/2004/com2004_0718en01.pdf (20 March 2006).

78 Dethloff, *supra* note 75, p. 51.

matters relating to divorce (Rome III) in 2005. Consequently, The Green Paper on Applicable Law and Jurisdiction in Divorce Matters was presented by the Commission on 14 of June 2005.[79] Why was jurisdiction included as an option in this Green Paper? The Commission had to be pragmatic - some Member States were totally opposed to harmonization, or imposition, of conflict-of-laws. That is why the Commission had to look at other options and other methods like the possibility to revise the current provisions on jurisdiction contained in the Brussels II*bis* Regulation. The Commission invited all the interested parties to submit comments before 30 of September 2005.

Rome III Green Paper identifies all mentioned shortcomings of the current situation and introduces the possible ways forward.

IV.1. Harmonizing the conflict-of-law rules

There are significant differences between the Member States' conflict-of-law rules concerning divorce. According to the nature of their conflict-of-law rules, we can divide them into two categories.

In the first category (sixteen Member States),[80] the States determine the applicable law on the basis of a scale of connecting factors that seek to ensure that the divorce is governed by the legal order with which it has the closest connection. The connecting factors vary, but include in most cases criteria based on the nationality or habitual residence of the spouse.

In the second category (seven Member States),[81] the States apply exclusively their domestic laws (*lex fori*) to divorce proceedings.

France does not belong to any of the above mentioned categories, since it applies unilateral conflict-of-law rules which only specify in which conditions French law applies.[82]

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79 http://europa.eu.int/comm/justice_home/doc_centre/civil/doc/com_2005_082_en.pdf (3 April 2006).

80 Austria, Belgium, Estonia, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, the Netherlands, Spain, the Czech Republic, Poland, Portugal, Slovakia, Slovenia.

81 Cyprus, Denmark, Finland, Ireland, Latvia, Sweden (with a possibility to take account of foreign law in certain cases) and the United Kingdom (in Scotland with a possibility to take account of foreign law in certain cases).

82 Unilateral conflict-of-law rules determine only the circumstances in which domestic law applies. Bilateral conflict-of-law rules, on the other hand, being nowadays a general rule, designate either a foreign or a domestic law.

Having these differences in mind, one way to move forward, according to The Green Paper, would be to introduce harmonized conflict-of-law rules based on a set of uniform connecting factors. The connecting factors would need to be carefully considered in order to ensure legal certainty and predictability and at the same time allow for some flexibility. The objective would be to ensure that a divorce is governed according to the legal order with which it has the closest connection. As mentioned before, introduction of harmonized conflict-of-law rules would also reduce the need to rush to courts, since any court seized would apply the divorce law designated on the basis of common rules. However, as previously noted, seven Member States do not have choice of law rules in respect of divorce. Instead, their courts apply simply the lex fori. The proposed reform of introducing harmonized conflict-of-law rules would increase enormous problems in those states, bringing increased complication, cost and delay. The lack of legal certainty and predictability in international divorces does not only arise out of the differences between and the complexity of the national conflict-of-law rules in divorce matters, but also from the necessity to determine and apply foreign substantive law. This entails considerable effort and enormous costs not only for the parties and their lawyers but also for the courts. When the courts are in the position where they have to apply foreign law, they often face a problem since up to date legal texts are not always available, particularly not in the local language. The foreign legal system may be so different in its concepts and procedures from the local system that, even if a translation of statutes is available, practitioners and judges are unable to understand the meaning or may apply it entirely differently to the courts of the state whose law they apply. We also have to have in mind that e.g. under English law, questions of foreign law are questions of fact about which the court hears experts from both sides and then makes a decision as to which is more convincing, the system which completely differs from the states whose legal orders are based on Roman law.[83] It is completely obvious from the comments submitted by the interested parties from common law states that they are both unwilling and unprepared to support an idea of introducing harmonized conflict-of-law rules on the Community level. According to their observations, they support applying only lex fori when deciding upon divorce since, according to their experience, it provides certainty and clarity for citizens and ensures that

[83] In continental legal systems, questions of foreign law are considered as questions of law.

judges make their decisions on the basis of their own substantive domestic law, in which they have been trained, rather than unfamiliar foreign law.[84] On the other hand, the continental law practitioners argue that, although the choice of the lex fori should be possible due to a limited party autonomy, the general application of the lex fori would lead to an increase of forum shopping and is thus not an option.[85]

IV. 2. Providing the possibility for the spouses to choose the applicable law

Another possibility to move forward, according to The Rome III Green Paper, would be to introduce a limited possibility for the spouses to choose the applicable law in divorce proceedings.[86] To leave the parties an unlimited choice could result in the application of exotic laws with which the parties have little or no connection. It would therefore seem preferable to restrict the choice to certain laws with which the spouses are closely connected.

Certain Member States allow the spouses to choose applicable law in certain circumstances. This possibility exists in Germany, the Netherlands, Spain and Belgium.

German law limits this choice to cases where the spouses do not have a common nationality and where no spouse is a national of the State of habitual residence of the parties or the spouses are resident in different States.[87]

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[84] *See* Response of Resolution to the EU Green Paper on Applicable Law and Jurisdiction in Divorce Matters (Rome III), *supra* note 76, p. 11.

[85] *See* Nina Dethloff: Green Paper on applicable law and jurisdiction in divorce matters - comments on questions 19 and 20, p.2., http://europa.eu.int/comm/justice_home/news/consulting_public/divorce_matters/contributions/contribution_university_bonn_en.pdf (3 April 2006).

[86] *Lex autonomiae*, as a connecting factor, becomes more and more present in modern European private international law instruments. *See e.g.* Art. 3 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, OJ L 266, 9 October 1980, pp. 0001-0019. and Art. 10 of the Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II"), COM (2003) 427 final, Brussels, 22 July 2003.

[87] Art. 14 of "EGBGB" (Einführungsgesetz zum Bürgerlichen Gesetzbuche), 25 July 1986.

"(1) Die allgemeinen Wirkungen der Ehe unterliegen

Under Dutch law, applicable law to divorce, when the parties have a common nationality, is the law of that State. If the parties do not have common natio-

1. dem Recht des Staates, dem beide Ehegatten angehören oder während der Ehe zuletzt angehörten, wenn einer von ihnen diesem Staat noch angehört, sonst
2. dem Recht des Staates, in dem beide Ehegatten ihren gewöhnlichen Aufenthalt haben oder während der Ehe zuletzt hatten, wenn einer von ihnen dort noch seinen gewöhnlichen Aufenthalt hat, hilfsweise
3. dem Recht des Staates, mit dem die Ehegatten auf andere Weise gemeinsam am engsten verbunden sind.

(2) Gehört ein Ehegatte mehreren Staaten an, so können die Ehegatten ungeachtet des Artikels 5 Abs. l das Recht eines dieser Staaten wählen, falls ihm auch der andere Ehegatte angehört.

(3) Ehegatten können das Recht des Staates wählen, dem ein Ehegatte angehört, wenn die Voraussetzungen des Absatzes 1 Nr. 1 nicht vorliegen und
1. kein Ehegatte dem Staat angehört, in dem beide Ehegatten ihren gewöhnlichen Aufenthalt haben, oder
2. die Ehegatten ihren gewöhnlichen Aufenthalt nicht in demselben Staat haben.

Die Wirkungen der Rechtswahl enden, wenn die Ehegatten eine gemeinsame Staatsangehörigkeit erlangen.

(4) Die Rechtswahl muß notariell beurkundet werden. Wird sie nicht im Inland vorgenommen, so genügt es, wenn sie den Formerfordernissen für einen Ehevertrag nach dem gewählten Recht oder am Ort der Rechtswahl entspricht."

"Article 14. General effects of marriage.

(1) The general effects of marriage are subject to:
1. the law of the state, to which both spouses belong or did belong during the marriage, if one of them still belongs to that state, otherwise
2. the law of the state, in which both spouses have their habitual residence or last had their habitual residence during the marriage, if one of them has there still his/her habitual residence, otherwise
3. the law of the state, with which the spouses are together most closely connected in other way.

(2) If a spouse belongs to several states, then the spouses can choose the law of one of these states regardless of Art. 5 (1), if also the other spouse belongs to that state.

(3) Spouses can choose the law of the state, to which a spouse belongs, if the requirements of par. 1 (1) are not met and
1. no spouse belongs to the state, in which both spouses have their habitual residence, or
2. the spouses do not have their habitual residence in the same state.

The effects of the right to choice end if the spouses attain a common nationality.

(4) The choice must be notarially recorded. If it is not made inland, then it is sufficient that it corresponds to the requirements for the form of a marriage contract according to the chosen law or the law of the place where the choice has been made."

nality, divorce is governed according to the law of the State of their habitual residence. If the parties have neither common nationality nor common habitual residence, Dutch law applies. Notwithstanding these provisions, Dutch law shall also be applied if the parties jointly choose Dutch law, or if such a choice made by one of the parties remains uncontested.[88]

Spanish law allows foreign spouses to opt for the application of Spanish law (*lex fori*) if one of the spouses is of Spanish nationality or is habitually resident in Spain by petitioning for divorce before Spanish courts. The divorce would be governed according to the Spanish law if the law that would otherwise be applicable to divorce does not allow divorce or separation, or if it allows them in a way which is discriminatory or contrary to the public policy.[89]

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[88] Art. 1. of the Act of 25 March 1981., Staatsblad (Bulletin of Acts and Decrees) 1981., no. 186.

"1. Whether dissolution of a marriage or judicial separation may be petitioned or demanded, and if so on what grounds, is determined:
   a) when the parties have a common national law, by that state;
   b) when there is no common national law, by the law of the country in which the parties have their habitual residence;
   c) when the parties have no common national law, and no habitual residence in the same country, by Dutch law.
2. For the purposes of the preceding paragraph, the parties shall be considered to have no common national law, if one of them manifestly lacks a real societal connection with the country of the common nationality. In that case the common national law shall nevertheless be applied if a choice for that law was made jointly by the parties or such a choice remains uncontested by one of the parties.
3. If a party possesses the nationality of more than one country, his or her national law shall be understood to be the law of that country of which he or she possesses the nationality and with which, taking into account all the circumstances, he or she has the closest connections.
4. Notwithstanding the preceding paragraph, Dutch law shall be applied if the parties jointly choose such a law or such a choice by one of the parties remains uncontested." (Translation according to Sumner and Warendorf: Family Law Legislation of the Netherlands, Intersentia, 2003, p. 232.).

[89] Art. 4. (4) of Law 11/2003 of 29 September 2003., Boletín Oficial del Estado, no. 234, 30 September 2003, pp. 35399-35400).

"Con el objetivo de mejorar la integración social de los inmigrantes en España y de garantizar que disfrutan de semejantes derechos a los nacionales, se aborda una reforma de Código Civil en materia de separación y divorcio para garantizar la protección de la mujer frente a nuevas realidades sociales que aparecen con el fenómeno de la inmigración. En concreto, se modifica, siguiendo los trabajos realizados por la Comisión General de

Belgian law provides a limited party autonomy by allowing the spouses to choose between the law of the common nationality or Belgian law (*lex fori*).[90]

Codificación, el Articulo 107 del Código Civil para solventar los problemas que encuentran ciertas mujeres extranjeras, fundamentalmente de origen musulmán, que solicitan la separación o el divorcio.

El interés de una persona de lograr la separación o el divorcio, por ser expresión de su autonomía personal, debe primar sobre el criterio que supone la aplicación de la ley nacional. Y sucede que en estos casos, la aplicación de la ley nacional común de los cónyuges dificulta el acceso a la separación y al divorcio de determinadas personas residentes en España. Para ello, se reforma el artículo 107 del Código Civil estableciendo que se aplicará la ley española quando uno de los cónyuges sea español o residente en España, con preferencia a la ley que fuera aplicable si esta última no reconociera la separación o el divorcio, o lo hiciera de forma discriminatoria o contraria al orden público."

"With the objective to improve the social integration of the immigrants in Spain and to guarantee that they enjoy the same rights as the nationals, a reform of Civil Code in the matter of separation and divorce is approached to guarantee the protection of women who face new social realities that appear with the phenomenon of immigration. In particular, following the work made by the General Commission of Codification, Art. 107 of the Civil Code is modified to resolve the problems that certain foreign women encounter, especially of Muslim origin, when they seek separation or divorce. The interest of a person to apply for separation or divorce, as an expression of his/her personal autonomy, must primarily be based on the criteria that suppose the application of the national law. And it happens that in these cases, the application of the common national law of the spouses makes the access to separation and divorce difficult for certain people who reside in Spain. Because of that, reformed Article 107 of the Civil Code establishes that the Spanish law will be applied when one of the spouses is Spanish or resident in Spain, with preference to the law that would otherwise be applicable, if that latter law does not recognize separation or divorce, or if does recognize separation or divorce in a form which is discriminatory or contrary to the public policy.".

[90] Art. 55 of "Loi portant le Code de droit international privé" of 16 July 2004.

"§ 1er. Le divorce et la séparation de corps sont régis:

1° par le droit de l'Etat sur le territoire duquel l'un et l'autre époux ont leur résidence habituelle lors de l'introduction de la demande;

2° ŕ défaut de résidence habituelle sur le territoire d'un même Etat, par le droit de l'Etat sur le territoire duquel se situait la dernière résidence habituelle commune des époux, lorsque l'un d'eux a sa résidence habituelle sur le territoire de cet Etat lors de l'introduction de la demande;

3° ŕ défaut de résidence habituelle de l'un des époux sur le territoire de l'Etat oů se situait la dernière résidence habituelle commune, par le droit de l'Etat dont l'un et l'autre époux ont la nationalité lors de l'introduction de la demande;

4° dans les autres cas, par le droit belge.

However, all the above mentioned problems which would result from the harmonization of the choice of law rules would be the same if the parties would have a possibility to choose the applicable law in divorce matters. In order to avoid those problems (of determining and applying foreign substantive law), common law practitioners propose that the parties should be left only with an option to choose the substantive domestic law of the jurisdiction they choose, provided the revision of the provisions relating jurisdiction in the Brussels II*bis* Regulation.

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§ 2. Toutefois, les époux peuvent choisir le droit applicable au divorce ou ŕ la séparation de corps.

Ils ne peuvent désigner que l'un des droits suivants:

1° le droit de l'Etat dont l'un et l'autre ont la nationalité lors de l'introduction de la demande;

2° le droit belge.

Ce choix doit être exprimé lors de la première comparution.

§ 3. L'application du droit désigné au § 1er est écartée dans la mesure oů ce droit ignore l'institution du divorce.

Dans ce cas, il est fait application du droit désigné en fonction du critère établi de manière subsidiaire par le § 1er."

"§ 1. Divorce and separation are governed:

1º by the law of the State where both spouses have their habitual residence at the time of petition;

2º when they do not have their habitual residence in the same State, by the law of the State where the spouse had their last common habitual residence, if one of them has her/his habitual residence in that State at the time of petition;

3º if one of the spouse does not have her/his habitual residence in the State where the spouse had their last common habitual residence, by the law of the State which nationality both spouses have at the time of petition;

4º in other cases, by Belgian law.

§ 2. In any case, the spouses can choose law applicable to divorce or separation.

They can choose one of the following laws:

1º the law of the State which nationality both spouses have at the time of petition;

2º Belgian law.

This choice has to be expressed at the time of the first appearance.

§ 3. The chosen law will not be applied if it does not recognize the institution of divorce.

In that case, the applicable law will be subsidiarily established by using criteria in § 1."

IV. 3. Revising the grounds of jurisdiction

The possibility of the revision of the provisions on jurisdiction contained in the Brussels II*bis* Regulation is also introduced by The Rome III Green Paper as another way to overcome the current situation. Introducing a hierarchy of grounds of jurisdiction would prevent the rush to court and, to some extent, it would avoid the possible application of the law with which the spouses are not necessarily the most closely connected. On the other hand, restriction of the grounds of jurisdiction, even by the way of introducing a hierarchy between them, could have serious consequences in terms of flexibility and access to courts, unless the parties are given the opportunity to choose the competent court. This prorogation of jurisdiction rule would allow parties to agree that the courts of a certain Member State would have jurisdiction in divorce proceedings between them.[91]

IV. 4. Revising the rule on residual jurisdiction

Article 7 of the Brussels II*bis* Regulation may give difficulties to Community citizens who live in a third State. If none of the grounds of jurisdiction contained in the Regulation is applicable, the courts of the Member States may under such circumstances avail themselves of the national rules on international jurisdiction. However, the fact that these rules are not harmonized may lead to situations where no court within the European Union or elsewhere is competent to divorce a couple of EU citizens of different nationalities who live in a third State. Even if the divorce would be pronounced in a third State, the spouses would probably have difficulties in order to have the divorce recognized in the relevant Member State, since a decision issued in a third State is not recognized in the EU Member States according to the Brussels II*bis* Regulation, but only pursuant to national rules or applicable international treaties. The consequences of this current rule seriously hamper the right to access to the courts.

[91] That possibility exists in several Community instruments. Prorogation is possible pursuant to Article 23 of Council Regulation (EC) 44/2001. Similarly, Article 12 of the Brussels II*bis* Regulation foresees a limited possibility to choose competent court in matters of parental possibility.

IV. 5. Providing the possibility for the spouses to choose the competent court

Introducing a possibility for the parties to choose jurisdiction could enhance legal certainty and flexibility. However, prorogation in divorces should be limited to courts of Member States with which the spouses have a close connection. The agreement on court jurisdiction should require consensual expression of will by the spouses at the time of filling the divorce petition or during the proceedings. The problem which obviously occurs is that it would be hard to expect any cooperation between the spouses who do not live together any longer and who do not display a forthcoming attitude during divorce proceedings, including reaching agreement on court jurisdiction.

IV. 6. Introducing the possibility to transfer a case

If it is decided to revise current provisions on jurisdiction provided by Brussels II*bis*, another option to overcome the problem of rushing to courts would be to introduce the possibility to transfer a divorce case, in exceptional circumstances, to a court of another Member State.[92] This provision could be introduced especially to overcome the problems that may arise when one spouse has unilaterally applied for divorce against the will of the other spouse. In the situation like this, the latter spouse would have possibility to request the transfer of the case to a court of another Member State on the basis that the marriage was principally based in that State.

V. PROPOSAL FOR A COUNCIL REGULATION AMENDING BRUSSELS II*BIS* REGULATION AS REGARDS JURISDICTION AND INTRODUCING RULES CONCERNING APPLICABLE LAW IN MATRIMONIAL MATTERS

On July 17th the Commission presented a Proposal for a Council Regulation amending the Brussels II*bis* Regulation as regards jurisdiction and introducing

[92] As previously noted (*see* II.4.1.2.), Article 15 of the Brussels II*bis* Regulation provides for such possibility in matters relating to parental responsibility.

rules concerning applicable law in matrimonial matters.[93] Since the Commission presented a Green Paper on applicable law and jurisdiction in divorce matters, it received approximately 65 submissions (from the civil society, non-governmental organizations, national governments and parliaments of the Member States, regional and local authorities) in response to the addressed shortcomings.[94]

The majority of the responses acknowledged the need to enhance legal certainty and predictability (both for the spouses and legal practitioners), to introduce a limited party autonomy relating to the possibility to choose jurisdiction and applicable law, and to prevent racing to the courts. All the responses to the Green Paper where taken into account in the preparation of this Proposal.

V. 1. Jurisdiction

The proposed Regulation introduces limited party autonomy for the spouses to designate the competent court in a proceeding relating to divorce and legal separation. The main object of this provision is the improvement of legal certainty and predictability for the spouses. The spouses can choose only the court of a certain Member State provided that divorce or legal separation has a substantial connection with that Member State. The new Regulation assumes that divorce and legal separation have a substantial connection with the courts of the Member States that have jurisdiction according to the provisions on general jurisdiction contained in the Brussels II*bis* Regulation, with the courts of the Member State in whose territory the spouses had last common habitual residence for a minimum period of three years or whose nationality holds at least one of the spouses (in the case of the United Kingdom and Ireland the relevant connecting factor is domicile).[95] This new rule would provide the spouses with a possibility to apply for divorce or legal separation in a Member State of which only one is a national even in the absence of another connecting factor. The agreement conferring jurisdiction has to be expressed in writing and signed by both parties at the latest at the time the court is seized.[96]

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93 Done at Brussels, 17 July 2006, COM(2006) 399 final, 2006/0135 (CNS).

94 The responses are published at the following address: http://ec.europa.eu/justice_home/news/consulting_public/divorce_matters/news_contributions_divorce_matters_en.htm.

95 The Proposal, Art. 3a (1).

96 The Proposal, Art. 3a (2).

The possibility to choose the competent court should not extend to marriage annulment, which is closely linked to the conditions for the validity of the marriage, and for which parties' autonomy is inappropriate.[97]

The problem of residual jurisdiction is also addressed in the proposed Regulation, as it introduces a uniform and exhaustive rule on residual jurisdiction which replaces the national rules on residual jurisdiction. The new Regulation ensures access to the court of a Member State for the spouses of different nationalities who live in a third State but retain strong links with a certain Member State. If none of the spouses is habitually resident in the territory of a Member State and do not have common nationality of a Member State (common domicile in the case of the United Kingdom and Ireland), the courts of a Member State are competent by virtue of the fact that the spouses had their common previous habitual residence in the territory of that Member State for at least three years or one of the spouses has the nationality of that Member State (common domicile in the case of the United Kingdom and Ireland).[98]

V. 2. Applicable law

According to the Proposal, a new Chapter IIa on applicable law in matters of divorce and legal separations would be inserted into the Brussels II*bis* Regulation. The Commission proposes to introduce harmonized conflict-of-laws rules in matters of divorce and legal separations based in the first place on the choice of the spouses. This choice would be limited to the law of the State of the last common habitual residence of the spouses insofar as one of them still resides there, to the law of the State of the nationality of either spouse (common domicile in the case of the United Kingdom and Ireland), to the law of the State where the spouses have resided for at least five years, and to the law of forum (*lex fori*).[99]

Again, the possibility to choose applicable law does not extend to marriage annulment, since it is closely linked to the validity of marriage and generally governed by the law of the State where the marriage was celebrated (*lex loci celebrationis*) or the law of the nationality of the spouses (*lex patriae*).

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97 Preface of the proposed Regulation, point 6.

98 The Proposal, Art. 7.

99 The Proposal, Art. 20a (1).

The proposed Regulation seeks to enhance the flexibility for the spouses as it allows them to choose the law applicable to divorce and legal separation, limiting their choice to the laws with which the spouses have a close connection.

The agreement conferring designating applicable law, as the agreement conferring jurisdiction, has to be expressed in writing and signed by both parties at the latest at the time the court is seized.[100]

Although not explicitly stated in the Proposal, the proposed Regulation is meant to have universal application, meaning that the conflict-of-laws rule can designate the law of a Member State of the EU or the law of a third State.[101]

In the absence of the spouses' choice, the applicable law would be determined on the basis of a scale of connecting factors, based in the first place on the habitual residence of the spouses. This uniform rule should ensure legal certainty and predictability and reduce the risk of rushing to the courts since any court seized within the EU would apply the law designated on the basis of common rules.

In the absence of the choice of applicable law, divorce and legal separation will be subject to the law of the State where the spouses have their common habitual residence, or failing that, where the spouses had their last common habitual residence insofar as one of them still resides there, or failing that, to the law of the State of which both spouses are nationals (both have their domicile in the case of the United Kingdom and Ireland), or failing that, to the law of the State where application is lodged (*lex fori*).[102] Unlike with general jurisdictional connecting factors contained in the Brussels II*bis* Regulation, there is hierarchy between these connecting factors, meaning that the latter can be applied only in the absence of the prior.

V. 3. Other provisions

The proposed Regulation contains a public policy rule which stipulates that the application of the law designated according to its rules can only be refused if such application is manifestly incompatible with the public policy of

[100] The Proposal, Art. 20a (2).

[101] Explanatory Memorandum of the Proposal, p.10.

[102] The Proposal, Art. 20b.

the forum.[103] The word "manifestly incompatible" means that the use of the public policy exception must be exceptional.[104]

In order to accomplish the objective of the new Regulation, namely legal certainty and predictability, the application of *renvoi* is excluded.[105]

VI. CONCLUSION

The intention of this paper is to show the importance of regulating matrimonial matters on the EU level. All the work in this field, until now, has dealt only with procedural legislation, namely the problems of jurisdiction and recognition (Brussels II*bis* Regulation).

The harmonization of conflict-of-law rules facilitates the mutual recognition of judgments. The fact that courts of the Member States apply the same conflict-of-law rules to determine the law applicable to a given situation reinforces the mutual trust in judicial decisions given in other Member States.[106]

However, current EU legislation does not include rules on applicable law to matrimonial matters and this legal gap raises a number of problems in the international cases. The Brussels II*bis* Regulation allows spouses to choose between several alternative grounds of jurisdiction. Once a matrimonial proceeding is brought before the courts of a Member State, the applicable law is determined on the basis of the national conflict-of-law rules of that State, which are based on very different criteria. The fact that national laws are very different both with regard to the substantive law and the conflict-of-law rules leads to legal uncertainty. The great differences between and complexity of the national conflict-of-law rules make it very difficult for international couples to predict which law will apply to their matrimonial matters. In addition, the current rules may induce spouses to rush to court, i.e. to seize a court before the other spouse has done so to ensure that the proceeding is governed by a particular law in order to safeguard his or her interest.

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[103] The Proposal, Art. 20e.

[104] Explanatory Memorandum of the Proposal, p.10.

[105] The Proposal, Art. 20d

[106] The Programme of measures to implement the principle of mutual recognition of decisions in civil and commercial matters, adopted on 30 November 2000, OJ C 12, 15 January 2000, p.1.

The introduction of harmonized conflict-of law rules would help in order to, at least to a certain extent, overcome the mentioned problems that occur in international divorces. Having that in mind, we strongly support the Proposal for a new Regulation presented recently by the Commission.

However, relating to the proposed Regulation, we would like to point out two things. Firstly, even that the large number of responses to the Green Paper (mainly from Common Law Systems) were in favor of inserting the possibility to transfer a case in matrimonial matters[107], the proposed Regulation does not include that possibility. It has to be noted, however, that all of these responses which are in favor of introducing the possibility for the courts to transfer the case under some circumstances, at the same time, are not in favor of introducing the possibility for the spouses to choose applicable law and/or jurisdiction in matrimonial matters. We consider that harmonization of conflict-of-law rules removes the current substantive need for the provisions on the transfer of cases, and for that reason we agree with the Commission's standpoint. Secondly, as previously noted, it is obvious from the comments submitted by the interested parties from Common Law Member States that they are both unwilling and unprepared to support the idea of introducing harmonized conflict-of-law rules on the Community level. According to the Protocol annexed to the Treaty on European Union and to the Treaty establishing the European Community on the position of the United Kingdom and Ireland[108], both of these Member States have the opportunity to opt out from the application of this proposed Regulation on their territory, and, if these Member States stick to their responses, it is likely to happen.

The question that therefore arises is whether there is will to attain the objectives set by the Vienna European Council in 1998 of setting up a quick and effective system to make the EU citizens' life easier.

However, even if the Member States agree on the proposed Regulation, the problems associated with the variety of substantive laws will remain, as will remain the uncertainty in determining the content of the foreign law and its application along with the effort required to do so.

The obvious answer to these problems would be harmonization of substantive family law in Europe. In cross-border relationships the enormous difficulties and

[107] E.g. responses from The Law Society of England and Wales, Family Lawyers Association and Ireland.

[108] *See* supra note 48.

costs involved in the application of foreign law would cease. Free movement in Europe would no longer be hampered through the substantial differences in the substantive laws.

According to some views, unification and even harmonization of substantive family law have to be rejected for they would lead to a loss of an important aspect of one's culture.[109] Family law is, even today, characterized by its diversity, deeply rooted in peoples' history, culture, mentalities and values. Despite converging trends towards more equality and more freedom, national differences in the field of family law create clear dividing line, not only between Common Law and Civil Law countries, Northern and Latin countries, but also between countries so close to one another as France, Germany and the Netherlands and even between Nordic countries.[110] Because of these differences it would be so difficult to extract from them a "common core" that might serve as a basis for eventual future unification.[111]

However, when talking about harmonization or unification of family law in Europe, one should have in mind that what is at stake here are the rights of spouses and children, the European citizens who seek European solutions. Diversity of culture and moral views should not hamper the search for solutions that would make their everyday life much easier.

The other question is how we can expect political will for the harmonization of substantial family law, when there is no will, according to some responses to the Green Paper, to introduce and accept, at least, uniform conflict-of-law rules in matrimonial matters.[112]

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[109] Catala: La communauté induite aux acquêts?, Les petites affiches 1992, Nr. 58, 84. Citation according to Walter Pintens: Europeanization of Family Law, in Perspectives for the Unification and Harmonisation of Family Law in Europe, edited by K. Boele-Woelki, Intersentia, 2003, p. 7.

[110] Marie-Thérèse Meulders-Klein: Towards a European Civil Code on Family Law?, in Perspectives for the Unification and Harmonisation of Family Law in Europe, edited by K. Boele-Woelki, Intersentia, 2003, p. 109.

[111] Masha Antokolskaia: The better law approach and the harmonization of family law, in Perspectives for the Unification and Harmonisation of Family Law in Europe, edited by K. Boele-Woelki, Intersentia, 2003, p. 160.

[112] *See* e.g. response from Ireland to Rome III Green Paper, http://europa.eu.int/comm/justice_home/news/consulting_public/divorce_matters/contributions/contribution_ireland_en.pdf (20 April 2006).

Sažetak

Iva Perin Tomičić *

KOLIZIJSKOPRAVNI ASPEKTI BRAČNIH STVARI U EUROPSKOJ UNIJI - NADLEŽNOST, PRIZNANJE I MJERODAVNO PRAVO

Autorica daje pregled propisa Europske unije kojima se regulira međunarodnoprivatnopravna problematika bračnih predmeta u EU. Pri tome pokazuje kako se dosadašnja regulacija tih pitanja odnosila tek na pravila o određivanju nadležnosti i priznanja. Osobito se razlaže problematika nepostojanja harmonizacije pravila o određivanju mjerodavnog prava za razvod braka na razini Unije. Naime, postojeće odredbe o nadležnosti za razvod braka negativno djeluju na pravnu sigurnost, predvidljivost rezultata te istodobno stimuliraju forum shopping i forum racing. Autorica ukazuje na brojne prednosti harmonizacije pravila o određivanju mjerodavnog prava na razini Unije u smislu prevladavanja navedenih problema. Pri tome se osobito vodi računa o rješenjima predviđenim Zelenom knjigom o mjerodavnom pravu za razvod braka i nadležnosti (14.6.2005.) te Prijedlogu uredbe kojom se mijenjaju odredbe uredbe Brussel IIbis glede nadležnosti i kojom se uvode odredbe o mjerodavnom pravu za bračne predmete (17.7.2006.).

Ključne riječi: međunarodno privatno pravo, bračni predmeti, razvodi braka, nadležnost, priznanje, mjerodavno pravo

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Zusammenfassung

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KOLLISIONSRECHTLICHE ASPEKTE VON EHESACHEN IN DER EUROPÄISCHEN UNION - ZUSTÄNDIGKEIT, ANERKENNUNG UND ANZUWENDENDES RECHT

*Der Autor gibt einen Überblick über die EU-Vorschriften, in denen die internationalprivatrechtliche Problematik von Ehesachen in der EU geregelt ist. Dabei kann er aufzeigen, dass sich die bisherige Regelung dieser Fragen ausschließlich auf Regeln zur Bestimmung der Zuständigkeit und der Anerkennung bezieht. Insbesondere wird die Sachlage im Zusammenhang mit dem Mangel an harmonisierten Regeln zur Bestimmung des anzuwendenden Rechts bei der Ehescheidung auf Ebene der EU erörtert. Die bestehenden Vorschriften zur Zuständigkeit bei der Ehescheidung wirken sich nämlich negativ auf Rechtssicherheit und Vorhersehbarkeit des Verfahrensausgangs aus und fördern zugleich die Tendenz des Forum shopping und Forum racing. Der Autor weist auf zahlreiche Vorteile einer Harmonisierung der Bestimmungen zum anzuwendenden Recht auf EU-Ebene hin, mit der die genannten Probleme überwunden werden könnten. Dabei gilt den im Grünbuch über das anzuwendende Recht und die gerichtliche Zuständigkeit in Scheidungssachen (14. 06. 2005) vorgesehenen Lösungen und dem Vorschlag einer neuen Verordnung (17.07.2006), die die Brüsseler II*bis *Verordnung zur Zuständigkeit ersetzen und Bestimmungen zum anzuwendenden Recht in Ehesachen einführen soll, besondere Aufmerksamkeit.*

Schlüsselwörter: *Internationales Privatrecht, Ehesachen, Scheidung, Zuständigkeit, Anerkennung, anzuwendendes Recht*

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