CONGRESS REPORT

ERA Annual Conference on European Family Law 2014

1. EU international family law: a work in progress

On the 25th and 26th September 2014, the Academy of European Law hosted its annual conference on European family law in Trier. An audience of lawyers, judges, notaries, academics and ministry officials convened to exchange information and debate the latest issues occurring in a wide variety of international family law fields.

EU private international law on family matters is, at this moment, very much a work in progress. As evidenced by the theme of this Special Edition of *NIPR*, we are currently anticipating a recast of the Brussels IIbis Regulation.[1] This long-awaited revision was, perhaps unsurprisingly, a dominant focus point during the conference. However, attention was also paid to other emerging developments in the Europeanisation of the private international law on family matters, particularly the progress of the upcoming EU instruments on the property relations of spouses[2] and registered partners,[3] and the first case law on the interpretation of the Rome III Regulation.[4] This report will detail the discussions that took place surrounding these developments, and attempt to map out the direction of future progress.

2. The Brussels IIbis recast: great expectations

The impending recast of the Brussels IIbis Regulation loomed large during the conference discussions. It has been over eleven years since the present instrument first emerged, and a revision of its provisions has been anticipated for some time. In April of 2014 the cogs finally began to turn, and the European Commission released a report[5] setting out a preliminary assessment on the functioning of the current regulation. Although this document contained some provisional conclusions regarding the perceived successes and problem areas of the present instrument, the Commission indicated that a public consultation would be launched to obtain further information.

Joanna Serdynska, from the European Commission's DG Justice, shared the first results from this public consultation on Brussels IIbis with the conference participants. Running from 15 April – 18 July this year, this survey sought to take into account the views of a wide range of stakeholders. In total, almost 200 contributions were received from interested individuals, legal practitioners, organizations, courts, national authorities across the Union, as well as the member states themselves.

The consultation revealed significant divisions with regard to the parties' experiences with the regulation. For instance, whilst more than half of contributors from Spain stated that they did not find the regulation helpful in cross-border matrimonial matters (13/24), support for this instrument was seen to be much stronger in member states such as France (4/20), Italy (3/19) and the UK (2/17).

However, it was the responses to the specific questions posed that proved to be the most revealing. The bulk of those surveyed (69%) thought that the risk of a 'rush to court' might be reduced by establishing a hierarchy of jurisdictional grounds (in place of the list of alternatives that currently exists), whilst an overwhelming majority (85%) stated that the opportunity to make an advance agreement on which member state court will deal with the divorce would be a valuable inclusion in the renewed instrument. On a less positive note, a somewhat concerning 78% of the stakeholders believed that the regulation did not ensure the return of a child (although, it has to be said, only 49% of legal practitioners held this view).

The first results to emerge from the consultation provide much food for thought. As pointed out by Nigel Lowe and Katharina Boele-Woelki during the panel discussion, the collection of statistical data such as this is the key to addressing the needs of those who make use of the regulations (Lowe: 'you cannot reform things if you do not know how they work in practice'). However, the survey could be criticised in terms of its representativeness. If one takes into account that there are 503 million people living in the European Union (13% of whom are said to be in a cross-border marriage),[6] 200 replies is remarkably meagre. Thus, in addition to expanding the scope of statistical data on international families in terms of the subject areas that are covered, we also have to consider increasing the number of stakeholders who are asked to contribute.

The Commission's report and the majority of those surveyed in the public consultation both expressed support for the introduction of a choice of court in cross-border divorce. In this regard, the report particularly drew on the fact that a choice of divorce law already exists in the parallel Rome III Regulation.[7] During her presentation, Katharina Boele-Woelki also endorsed the introduction of party autonomy in a revised version of Brussels IIbis, subject to appropriate safeguards. She put forward Article 10:56(3) of the Dutch Civil Code as a potential template for the formal requirements to be imposed for such agreements: 'A choice … must be made explicitly or appear otherwise sufficiently clear from the wording of the application (request) or counter-plea.'

The separate issue concerning the return of children under Article 11 of Brussels IIbis also drew speculation during the conference discussions. Nigel Lowe and Jörg Pirrung both expressed their dissatisfaction with the fact that the current provision is out of line with its counterpart contained in Article 13 of the 1980 Hague Child Abduction Convention. However, given that the innovations brought about by Article 11 may well be viewed as progressive in the context of cross-border

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

2 Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011) 126 final.

3 Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM(2011) 127 final.

4 Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, *OJ* 2010, L 343/10.

5 Report from the Commission to the European Parliament, the Council and the European Social and Economic Committee on the application of Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, COM(2014) 225 final.

6 Communication from the European Commission, 'Bringing legal clarity to property rights for international couples', COM(2011) 125/3, p. 2.

7 Report, *supra* note 5, p. 5, para. 1.1.

child abduction, it remains to be seen whether consistency between the respective instruments will be considered necessary by the drafters of a future recast.
Exciting times evidently lie ahead for those with an interest in cross-border divorce and parental responsibility. One can only hope that the next stages of evaluation and amendment do not take too long. With some luck, we will be discussing a proposal for a Brussels IIbis recast in Trier next year.

3. Rome IV: the waiting game

In 2011, the European Commission released two joint proposals addressing the property relations of married couples and registered partners respectively. These proposed regulations heralded the next stage in the Europeanisation of the private international law on family relations, seeking to streamline the rules on the jurisdiction, applicable law and the recognition and enforcement of decisions concerning the property relations of spouses and registered partners, and to introduce party autonomy for cross-border matrimonial property matters on an EU level. However, whilst the proposals have since given rise to considerable academic debate over these years,[8] all has fallen silent on the legislative front.
Alexandra Thein MEP, who has been involved in the ongoing negotiations concerning these joint instruments in the European Parliament, delivered an update on the legislative progress of the proposed regulations (or lack thereof). Unfortunately, finalisation of the regulations on property relations appears to have been placed on the back burner by successive Council presidencies. Since the proposals were introduced back in 2011, they have been discussed in just two Council meetings. Thein suggested that the pace of negotiation is only likely to pick up in 2015, when the Netherlands takes over the Council Presidency (since this member state is fairly enthusiastic about the property relations initiative).
A more specific reason for the lack of progress relates to the proposed regulation on property relations between registered partners, which has proven to be highly divisive amongst the member states. This proposal is unpopular with those states that do not recognise the institution of registered partnership, and which fear that they may be obliged by the regulation to give effect to the property consequences of such relationships. Although one could envision that an exception similar to that found in Article 13 of Rome III[9] could be used to bypass such concerns, the eking out of a compromise solution is a major source of delay in the legislative process. On the other hand, there are also those who believe that the proposed regulation discriminates against registered partnership, since, in contrast to the parallel matrimonial property instrument, it does not allow for party autonomy.[10]
One of the conference participants raised the question of whether the two proposals could be split from one another in order to allow the instrument concerning married couples to move forward. In response to this, Thein emphasised that a number of member states (e.g. Germany and France) are greatly opposed to making this division. Although the exact reasons for such resistance were not elaborated upon by the speaker, one can speculate that this relates to a desire to maintain equality between the respective types of relationships, as well as concerns that, in the absence of support from its more popular counterpart, the instrument on registered partnership will have to be brought forth through enhanced cooperation (or, worse still, dissolve entirely).

4. Rome III: the first steps in interpretation

Despite the overall state of flux that EU international family law finds itself in, a degree of clarification was nevertheless provided by Ilaria Viarengo (University of Milan), who delivered an account of the first case law to emerge on the 'Rome III' Regulation on the law applicable to divorce and legal separation. Even though this instrument only came into force in 2012, there has already been a fair amount of national jurisprudence on its interpretation. However, as the speaker herself pointed out, national judicial databases were by no means equally accessible; given this, she only presented jurisprudence from Germany, Spain and Italy.
The question of whether Rome III can lead to the application of third country law has been brought before courts in all three of these jurisdictions.[11] In every instance, the resounding answer has been in the affirmative – either as a result of a choice of law, or on the basis of objective criteria – the law of a non-EU state can govern the dissolution of a marriage under this instrument. One has, however, to wonder why this was an issue before the courts at all, since Recital 12 of the regulation clearly establishes its universal applicability.
Viarengo also highlighted instances in which the court contemplated the use of the public policy exception to exclude an applicable law. The cases, which centered on concerns regarding the application of a law that did not appear to permit equal access to court for both women and men, revealed a divergence in approach between the jurisdictions. For instance, whilst a Spanish judge excluded the application of Moroccan divorce law on the grounds that it severely restricted a woman's ability to obtain a divorce, an Italian court found that the application of this same law was not contrary to its own public policy.[12] Such differing outcomes are perhaps unsurprising, given that public policy is dependent on domestic ascertainment and national values (e.g. the Italian legal perception of divorce is considerably more conservative than the Spanish).
The persistent issue regarding the definition of habitual residence in matrimonial matters also reared its head in the case law. At present, national judges depend on a combination of domestic jurisprudence[13] and EU opinions concerning other

8 E.g. I. Viarengo, 'The EU Proposal on Matrimonial Property Regimes: some general remarks', *Yearbook of Private International Law* 2011, p. 199-215; C. González Beilfuss, 'The Proposal for a Council Regulation on the Property Consequences of Registered Partnerships', *Yearbook of Private International Law* 2011, p. 183-198; C.V.M. Clarkson, 'Matrimonial property: the proposed EU Regulation', *Trusts & Trustees* 2011, p. 847-848; A. Rodríguez Benot, 'La armonización del régimen económico matrimonial en la UE: La propuesta de Reglamento de 2011', in: C. Esplugues Mota and G. Palao Moreno (eds.), *Nuevas fronteras del derecho de la Unión Europea. Liber amicorum José Luis Iglesias Buhigues*, Valencia: Tirant Lo Blanch 2012, p. 555-572.

9 'Nothing in this Regulation shall oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation.'

10 Although, it should be noted that party autonomy has been included in subsequent revised inter-institutional texts of the Proposal. In this regard, see: Arts. 5-0 and 15-03, Council of the European Union, Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships of the 28 June 2013 (sixth revised text), 11701/13 JUSTCIV 155.

11 *OLG Hamm*, 7.5.2013; *Tribunale Milano*, 10.2.2014; *Tribunale Firenze*, 9.5.2014; *Audiencia Provincial Logrono*, 108/2014.

12 *Audiencia Provincial Logrono*, 108/2014 and *Tribunale Firenze*, 9.5.2014.

13 See, for example, the Spanish case cited by Viarengo: *Audiencia Provincial Valladolid*, 95/2013, the English High Court decision: *Marinos* v. *Marinos*

subject areas (e.g. social security).[14] However, given that habitual residence ought to be construed autonomously on an EU level, as well as in the context of the particular field, there is a pressing need for the Court of Justice to give an opinion on its interpretation. Although it could be said that the inherently flexible nature of the concept does not lend itself towards the establishment of a concrete set of criteria, a ruling by the CJEU outlining a general set of guidelines would nevertheless be exceedingly useful for domestic courts.

5. Good things come to those who wait?

For many with an interest in EU private international law relating to family matters, 2014 has been a year of tentatively watching and waiting. The proposed recast of Brussels IIbis and the finalisation of the regulations on the property relations of married couples and registered partners have now been pending for some time. This year's contributions to the ERA's Annual Conference reflected the sense of anticipation and, at times, frustration, regarding these expected developments. Whilst a degree of clarity was seen to emerge from the first cases on the interpretation of the Rome III Regulation, it is the upcoming years that will prove decisive in shaping the future of international family law in Europe.

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[2007] EWHC 2047 (Fam), and the French *Cour de Cassation* decision: *Moore* v. *McLean* [2005] [Appeal No. H 05-10.951].

14 See, for example, the EU Court of Justice judgment in Case C-90/97 *Robin Swaddling* v. *Adjudication Officer* [1999] ECR I-01075, which concerned entitlement to income support, but was, nevertheless, later relied upon in the above-cited English case of *Marinos* v. *Marinos* with regard to divorce jurisdiction.