

The EU ACQUIS in MATTERS of FAMILY LAW - Key Aspects

A Presentation
by

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background

- Why did the EC start going into Family Law?
- Err well – something to do with the French Revolution actually
- How come?? That was 200 years ago so what possible relevance has it for this day and age?
- Articles 14 and 15 of the Code Civile Francais
- Did what???
- Required French courts to take jurisdiction in any case involving a French citizen

further background

- But... but.... but.....but ! - what has that got to do with Family Law in the EU in 2013 ???
- Well here's what -

Say that a French citizen marries someone from another country and the couple later split up;

The French citizen remains in or goes to France whilst the other is in another country

The French citizen could always go to the French courts for a divorce even if the courts in the other country were competent

The French courts could not decline jurisdiction and France was not in a position to rescind Articles 14/15 for constitutional reasons

yet further background

- So what !!!???
- So there was a big possibility of parallel proceedings and conflicting judgments
- This led to a lot of confusion and needless litigation in cross-border divorce cases
- Especially between France and Germany and also with Italy and Spain
- Can be found also in other MS especially where nationality is a connecting factor
- Family Law - except aliment - was excluded from the scope of the Brussels Convention
- Thus - this was the main reason why the EC began to take steps in Family Law – to avoid needless duplication of proceedings and the possibility of conflicting judgments

what did the EC do?

- At first the EC did nothing before the Maastricht Treaty came into effect as the EC institutions had a limited direct role in such matters
- However in 1992 after Maastricht was in force Germany proposed that there should be a Convention to regulate jurisdiction, recognition and enforcement of divorce etc so as to prevent the possibility of parallel proceedings
- The original proposal contained no provisions about children
- At the same time negotiations were proceeding on what was to become the Hague 1996 Convention and some MS wanted to wait till these were over before deciding whether to do anything in the EC on parent/child relationships
- The ensuing negotiations among the then 15 MS laid the basis for later developments including making some limited provisions as regards parent/child relationships
- In the event the terms of that Convention were taken into account to align the two texts with each other as much as possible

Brussels 2 - the Convention

Was -

- Agreed on 28th May 1998 after six years of work
- On basis of a text suggested by Germany in 1994 for divorce jurisdiction, recognition and enforcement
- based on similar principles to the Brussels Convention namely direct and mutual recognition
- never ratified so never came into force

Included very limited provisions as regards children dealing only with parental responsibility issues raised in divorce where both of the parties were the parents

Had a –

- similar structure to Brussels Convention
- report attached as with all PIL Conventions

Brussels 2 – the Regulation

- Post-Amsterdam Treaty - Tampere – no special mention of the need for a Regulation (Recital no (2) being not quite accurate in this respect) –
- The Commission had already made clear at the time of adoption of the Convention that it would present a proposal for a Regulation based on the Brussels 2 Convention - with the same text
- The Regulation was quickly negotiated, adopted on 29th May 2000 and came into force on 1st March 2001 in 14 of the 15 then MS

....meanwhile....

- A very difficult cross-border parent-child case erupted between France and Germany
- This involved unlawful retention of a child following a contact visit in Germany
- Then a sequence of abductions and re-abductions including the use of force and spectacular car chases across the border
- The child was habitually resident in Avignon, the constituency of the French Justice minister of the day - Mme. Gigou - so
- Both Ministers of Justice became involved

... and then ...

- France made a proposal for a Regulation to deal with parent-child contact
- This was to allow automatic enforcement of such orders across borders
- The French argument was that the Hague 1980 Convention on Child Abduction did not do enough to prevent unlawful removal and retention in particular by parents seeking to protect rights of contact with their children
- So EC action was needed to deal with Child Abduction cases and parent/child contact
- Also Tampere had contained a call to reduce the intermediate measures for recognition and enforcement in contact cases

.... further

- Other MS argued that, given unwillingness of most MS to rely for intra-EC cases on the solutions adopted in the Hague 1996 Convention, it would be better to deal with all parent/child relationships in a new Regulation separate from the Divorce instrument
- The Commission nonetheless pressed ahead with the intention of making a proposal for a Regulation based on Brussels 2 with a greatly expanded scope on parent child relationships and taking on board the proposal by France

.... and so

- The Commission proposal emerged on 3rd May 2002 as a single instrument
- Negotiations proceeded relatively quickly under the influence of several interested MS whose successive Presidencies put a lot of pressure on the MS for agreement
- Some MS argued strongly for disapplication of the Hague 1980 Convention as between the EC MS as it 'encouraged' child abductions
- Others opposed this argument vehemently

.... finally

- Political agreement was reached under the Danish Presidency in the second half of 2002
- The regulation was eventually adopted on 27th November 2003
- Application of the Hague 1980 Convention was retained for EC cases as ‘complemented’ by the Regulation – see Recital (17)
- The French idea of direct enforcement of parent/child contact cases was included

The Brussels 2a Regulation

- entered into force on 1st March 2005
- applied in 24 of the then 25 MS (not Denmark) to all cases instituted after that date as well as to certain proceedings instituted before then
- and in Bulgaria and Romania from 1st January 2007 – Croatia will be bound as from 1st July 2013
- replaced the Brussels II Regulation
- defines the relationship with the Hague Conventions of 1980 and 1996; and
- has been the subject of a no. of FCJ cases

Brussels 2a – Direct applicability

- Under the EU Treaty Regulations become part of the internal law of the MS bound by them
- Unlike Conventions they do not need to be ratified by each MS to have effects
- Unlike Directives they do not need to be transposed into national law
- MS are obliged to make provisions to ensure that Regulations work as intended

Scope of the Regulation

Jurisdiction, recognition and enforcement -

- in divorce – rules taken from Brussels II
- in parental responsibility – both as regards private individuals and also includes public law matters – children in care and so forth

Special rules on child abduction between MS

- Co-operation between courts and central authorities in parental responsibility
- Various exclusions from scope - paternity, maintenance, succession

Next Steps – Applicable Law

- Commission Published in March 2005 a green paper proposing measures to deal with applicable law in Divorce –
- Original idea was to do that along with Matrimonial Property
- Reasoning was that ‘forum shopping’ was common in relation to grounds - and property consequences - of divorce
- Now rarely for divorce itself

ROME III

- Proposal published in July 2006 for a Regulation dealing with applicable law in divorce and amending jurisdiction rules
- Negotiations concluded in June 2008 without agreement
- Enhanced cooperation proposed by a number of Member States
- Regulation adopted eventually in July 2010
- Fourteen MS bound – soon fifteen (Lithuania from 22nd May 2014)
- Of MS here present only Hungary is

Rome III – choice of law

The spouses can agree one of the following to govern the divorce -

- the law of the State where they are HR at the time the agreement is concluded; or
- the law of the State where they were last HR, in so far as one of them still resides there at the time the agreement is concluded; or
- the law of the State of nationality of either spouse at the time the agreement is concluded; or
- the law of the *forum*

Rome III – where there is no choice
The law of the MS -

- A) where the spouses are habitually resident at the time the court is seised; or, failing that
- B) where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seised, in so far as one of the spouses still resides in that State at the time the court is seised; or, failing that
- C) of which both spouses are nationals at the time the court is seised; or, failing that

Maintenance

- Originally included in Brussels Convention and Regulation
- Problem associated with lump sum payments
- Also difficulties with 'clean break' settlements
- Tampere conclusions suggested removal of the intermediate measures for recognition and enforcement
- Hague and NY Conventions subject to renegotiation at The Hague

• In application from 18th June 2011

EU and Hague Conference

- Simultaneous negotiations in Brussels and The Hague to create a harmonious - even if not harmonised - regime for Maintenance in the EU and worldwide
- EU proposal also took on board need to remove the intermediate measures for recognition and enforcement
- Maintenance within scope for the European Enforcement Order

Maintenance- Applicable Law

- Applicable Law proved difficult to negotiate
- At The Hague it was decided to adopt an optional protocol in order not to alienate key potential States parties
- In Brussels most MS willing to sign up to the protocol so the Commission had a mandate to agree that idea at The Hague
- Protocol applied in the EU as an option also

Recognition and Enforcement

- The EU Regulation has two procedures for recognition and enforcement
- For MS which adopt the applicable law protocol the EU exequatur is abolished
- For MS which do not – chiefly the UK – the intermediate measures remain
- These are based on Brussels I so once the Brussels I re-cast is in force it is presumed that the new Br I procedures will apply

the Hague 1996 Convention

- This Convention deals with jurisdiction recognition and enforcement in parent/child relationship matters and also provides rules of applicable law in such cases
- It provides for such matters between EU and third (non-EU) States and is in force – it is, arguably, a part of the EU acquis
- All EU States (except Denmark) were obliged by a decision of the Council to ratify the Convention by not later than July 2010
- Some other notable states party are Croatia, Montenegro, The Russian Federation (as from 1st June 2013) and Ukraine,

EU Member States are parties

- As of 1st April 2013 two EU MS had still to ratify the Convention – Belgium and Italy
- Germany, Ireland, Romania and Spain became parties as from 1st January, France as from 1st February, Finland as from 1st March, Austria as from 1st April and Netherlands as from 1st May 2011 and Portugal and Denmark became parties with effect respectively from 1st August and 1st October 2011, Malta and Greece as from 1st January and 1st June 2012, the UK as from 1st November 2012 and Sweden as from 1st January 2013
- Earlier a number of States had ratified, some – including Bulgaria, Czech Republic, Estonia, Latvia, and Slovakia before they were Member States

Succession Regulation

- Linked to freedom of movement
- Not treated as a Family Law instrument
- Links to matrimonial property regimes
- Rules on Jurisdiction, Recognition, enforcement, applicable law
- Introduces an optional certificate of succession
- Great scope for ante mortem agreements
- Applicable from 17th August 2015

The Future - Matrimonial Property

- Eventually a proposal appeared
- Currently under negotiation
- Will deal with jurisdiction, recognition and enforcement and applicable law
- Limited party autonomy for both jurisdiction and applicable law
- Recognition and enforcement is to follow Brussels I
- Also a proposal for registered partnerships which is being 'slow-tracked'

Review of Brussels II bis

- Commission has let a tender for a study
- Likely policy on further removal of intermediate measures for recognition and enforcement
- Possible further policy on child abduction in the light of case law of the CJEU and of the ECtHR which are tending to move in opposite directions

Brussels II bis - jurisdiction

- The Rome III Regulation as adopted has no jurisdiction provisions - but
- It is likely that the Commission will propose some jurisdiction changes along the lines of those in the original Rome III proposal such as -
- A limited party autonomy provision for the choice of the divorce court by the parties
- Removal of Article 7 on residual jurisdiction

Freedom of movement of Documents

Proposal published 24th April 2013 under Art 21/114 TFEU for - abolition of any formality of legalisation for certain types of document 'having formal evidentiary value' issued by public authorities notably those dealing with -

- birth, parenthood, adoption;
- death, name, marriage and registered partnership;
- residence, citizenship and nationality;
- real estate, legal status and representation of a company or other undertaking;
- intellectual property rights; and
- absence of a criminal record;

Also no need to certify copies of documents

Abolition of legalisation

- Hague 1961 Convention 'Apostille' abolished
- Central authorities have to be designated
- Multilingual forms can be used to simplify formalities for birth, death, marriage, registered partnership and legal status and representation of a company or other undertaking
- Forms are alternative to national forms
- Authenticity checks can be made through Central Authorities or IMIS

Information and support systems

- European Civil Judicial Network
- Web-site -
http://ec.europa.eu/civiljustice//parental_resp/parental_resp_gen_en.htm
- Network of European Family Judges
- Practice guide to the Brussels II bis Regulation – under revision
- Hague Conference web-site
http://www.hcch.net/index_en.php?act=text.display&tid=1-