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Comments on GREENBOOK ON APPLICABLE LAW AND JUDICIAL COMPETENCE IN DIVORCE CASES

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this paper was presented but not discussed in the GEDIP meeting

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Intro

- The Greenbook has been drafted after wide consultation of persons interested. Its objective is to provide a sketch of problems that may arise in the present situation and of possible solutions. Comments had to be submitted before September 30, 2005.
- GEDIP: meeting Vienna 19-21 september 2003, compte rendu, para. 1, see website GEDIP.
- Present situation: Regulation nr 1347/2000 (BRX II) replaced as of March 1, 2005 by Reg. nr 2201/2003 (BRX II bis). As far as divorce is concerned, no new provisions.

Critical publications on the former keep their pertinence 1.

The greenbook operation could amount to a new regulation containing choice of law rules and, possibly, amended rules on jurisdiction.

Preliminary questions

- The EC legislative power has its basis in Articles 61/65 EC, but is there any room left besides BRX IIbis, if the subsidiarity principle is to be taken seriously?

- EC legislation on divorce is focusing on pathology. Does the divorce project fit in an overall EC policy aiming at the protection of marriage as the institutional cradle for the new generations? Developing an EC legislative regime for PIL divorce cases reaches beyond the technicalities of PIL craftsmanship!

Legislative concerns about marriage have, or should have, a wider scope than assuring a balanced relationship between the spouses. Marriage is a very special contract. Rights, even human rigths, of the spouses with regard to one another are involved, but not exclusively. Society has definitely its own interests in the shaping of the institution. Rules on capacity to enter into marriage, on consent, on formalities, on celebration either in the presence of or by a public authority show more complexity than the rules of entering into a commercial or household contract, and for good reason! So dissolution of marriage is a delicate topic. Constraints and restrictions on divorce are not necessarily suspect as possible violations of human rights. Freedom, ‘autonomy’, is not without limits. Desires of individual spouses to break up marriage do not necessarily amount to ‘legitimate expectations’.

- Legislators and courts of the Member States (MS) do not necessarily agree. The cultural identity, in a large sense, of the MS is at stake. It is not self-evident that a catching idea of a free market of divorce judgments, or an EC wide area of freedom, justice and security, should prevail over the preservation of the national identity of the MS with regard to marriage. This identity may either have a very liberal colour (Netherlands: marriage open to homo-sexuals and lesbians, and easy divorce) or be more restrictive as to divorce of the traditional marriage (Ireland; Italy: three years of separation as a requirement; Spain: a period of separation).

I. The Present Situation, BRX IIbis

A. Jurisdiction

- Scope:

Article 3 applies both to purely intra-community cases and to cases presenting a relevant element that connects it to a third country.

If a Mexican or an Australian, habitually resident in his/her home country, or even a EC citizen habitually resident outside, wants to get a divorce, Article 3 applies to determine whether an EC court has jurisdiction if his or her spouse has habitual residence in the EC area.
Cfr. Brussels I.

BRX IIbis provides for recognition of Member State (MS) decisions only. It does not contain common standards and tests for the possible recognition of third country decisions in the MS. Cfr. Brussels I. BRX IIbis leaves it to the discretion of the MS to compensate for the possible recognition problems of third country decisions by the way of additional rules of jurisdiction, see Article 7 on 'residual jurisdiction' that MS are allowed to adopt each for itself. See case 4 of Greenbook (a German/Dutch couple living in a third country, I add: like Somalia, Zimbabwe or Dubai). Cfr. Brussels I, Article 4.

One could imagine EC rules on residual jurisdiction. Why then only for BRX IIbis and not for Brussels I? One may concede that as yet there is not a perfect system. Third country decisions may be recognised in one MS and not in another, which theoretically amounts to a distortion of the free EC market.

See Greenbook para. 2 intro, and example 4 in para. 2.4.

- lis pendens

Article 19 contains a strict rule: the court second seized has to give way to the court first seized. The rule has a large scope: it also applies if one of the courts is seized for a divorce order and the other for a nullity decree. See Article 19, para. 1, replacing Article 11, para. 2. The large scope explains the second part of para. 3 of both texts. The request submitted to the court second seized may be submitted to the court first seized. The competence of the latter has so been extended.

The determination of the moment of a lis being pendens is a notorious issue. Brussels I finally has a rule in Article 30. It had a parallel in BRX II, Article 11, para. 4 (not yet in Convention BRX II). **This para. 4 disappeared in Article 19 BRX IIbis, without any explanation in the preambles**.

The rather strict rule on lis pendens has raised the question of whether there would be a run to the court by the quarreling spouses, each wanting to have a decision of the court that is supposed to be the most favourable to his or her interests. A possible run to the court may be motivated by issues of maintenance and matrimonial property, not by divorce issues themselves. Cost of proceedings may also be an issue.

Where mediation may be a valuable approach to solve matrimonial problems, there should not be an incentive for a run to the court.

B. Recognition and Applicable Law

Courts are courts. Under general PIL, there is a strong tendency to recognise foreign courts as genuine courts. This principle is all the more evident in EC law. See Brussels I and BRX II, and also Lugano.

This is an explanation of the rule that excludes 'révision au fond' (Cour de cassation 7 January 1964, case Munzer)/review as to the substance, see Brussels I, Article 36, formerly Article 29, and BRX IIbis, Article 24, para. 3.

The recognition of foreign courts as courts equally is a possible, though not an inevitable, justification for recognition of a foreign decision regardless of the law applied. In the EC context, the test of the applicable law has been banned. See Brussels I, Article 34 implicitly, cfr. formerly Article 27, para. 4, and BRX IIbis Article 25. Although BRX IIbis, Article 22 lettera a, provides for non recognition of a MS divorce order that is manifestly contrary to public policy, its Article 25 does not leave much room for it. See already Articles 15 and 17 of Convention BRX II, and Explanatory Report by Alegría Borrás, paras. 69 and 76.

It is in line with a general tendency to do away with the applicable law test.

The self-evidence of this policy may be questioned.

At least a distinction should be made between decisions on money interests and decisions in the field of family law. Issues of family law are of a different order. Among other things, they are not capable of being settled by arbitration. In addition, their character justifies a more active role of the courts, and a role for the registrar and possibly the 'ministère public'.

One can live with this policy insofar as it would be a well founded presumption that on the main elements the possibly applicable laws converge or even concur so as to present a real equivalence. But precisely in the field of divorce this is not the case!

The indifference as to the law applied, in connection with a wide range of grounds of jurisdiction, warrants the **conclusion that BRX IIbis has been based on a wrong policy. The in Private International Law predominant objective to do justice by finding the proper law has been given a lower rank than the EU objective of enhancing a free circulation of decisions. The differences of views on marriage and divorce kept by the MS have been ignored. A MS is no longer free not to recognise a divorce order given in another MS that, in the circumstances of the case at hand, never would have been given in the MS that is requested to recognise that order.**

In fact, the EU has conducted a very liberal policy on substantive law of divorce.

II The Need for New Rules

A. Choice of law rules

Preliminary observations

- Agreement on common EC choice of law rules on divorce, separation and nullity of marriage may well be hampered by a tendency in each MS to allow its substantive law views to affect the would-be neutral choice of law rules. Example: the Netherlands has conducted a very liberal policy at the level of substantive law and certainly will therefore be in favour of the *lex fori* approach. The *favor divortii* is flagged as a Dutch PIL gospel!

Public policy will be invoked in order to set aside either a too liberal or a too restrictive applicable law, depending on the substantive law views of the forum-MS.

- In case of a divorce procedure, decisions have to be taken not only on divorce itself but on property, pension rights, maintenance, and with regard to children on parental responsibility/custody and access rights. The law applicable to divorce, is not necessarily the proper law for the other problems. This is widely agreed upon.

- New rules of choice of law on divorce are to be conceived for both purely intra-community cases and for cases that present some relevant connection with third countries.

- The lack of convergence on the main elements of MS and non MS substantive divorce laws amounts to a barrier to allow for *party autonomy*. Cfr. Greenbook para. 3.3.

Party autonomy is by now generally accepted for the field of contracts, and there is a clear tendency to extend its domain (cfr. Hague Conference conventions on matrimonial property, succession, securities). Again, this is acceptable to the extent that, as between the laws susceptible to be chosen, the entirety of checks and balances of one law is equivalent to that of the other laws. This is not true for divorce laws! Consequently, party autonomy in the field of divorce would amount to a liberal policy at the level of PIL : the spouses, or even a single spouse, is enabled to circumvent the obstacles he or she would come across if the law that is applicable in the absence of a choice, would apply.

It is conceded that a ground of a different order in favour of party autonomy may be to supplement the flaws of a not convincing or not conclusive choice of law rule.

- The *lex fori* solution has the undeniable practical advantage of avoiding the application of foreign law. This advantage carries much weight in the eyes of many of the experts that were interviewed for the EC exploratory study. Particularly, if the rules of the applicable foreign law are not contained in clear statutory provisions and have to be distilled from case law, the burden of finding the foreign law may well be too heavy.The willingness to apply any foreign law is simply inconceivable in some Member States.

Beyond that, however, the *lex fori* solution raises the same objection as party autonomy. If the *lex fori* would apply, it would really matter which Member State court will give the decision as substantial differences exist between the national substantive laws. This *lex fori* solution may, or even should,

affect the rules of jurisdiction. If there is a really substantial connection between the court and the spouses, application of the lex fori is fully justified. But insofar such a substantial connection does not exist, the *lex fori* solution has the effect of extending the choices that a plaintiff may make and gives unwarranted leeway for forum shopping.

- Both the extension of party autonomy and the extended *lex fori* solution would reinforce the liberal policy the EU has conducted so far in the field of divorce.

EC choice of law rules?

In Vienna, GEDIP agreed upon a text of choice of law rules. The first paragraph consists of traditional, 'neutral' choice of law rules, whereas its para. 2. allows for some party autonomy, to be exercised only jointly by the spouses (para. 3).

The GEDIP text reads as follows:

1. Divorce and legal separation are governed by:

> *a. the internal law of the State in which the spouses have their habitual residence at the time of divorce, subsidiarily*
>
> *b. the law of the State in which the spouses had their last habitual residence [if one of the spouses is still habitually resident in that State, NB: alternative: residence of a certain duration], subsidiarily*
>
> *c. the internal law of the State of which the spouses are effective nationals (in the UK and Ireland, domiciliaries) at the time of divorce, subsidiarily*
>
> *d. the law of the divorce forum.*

2. The spouses may, at the time of divorce, designate the following laws:

> *a. the internal law of the State in which either spouse is habitually resident at the time of divorce,*
>
> *b. the internal law of the State in which the spouses had their last habitual residence,*
>
> *c. the internal law of a State of which either spouse is a national (in the UK and Ireland, domiciliary) at the time of divorce,*
>
> *d. [the internal law of the State where the marriage was celebrated, NB:GEDIP did not agree on this point],*
>
> *e. the law of the divorce forum.*

3. The designation of the law governing divorce shall be expressed in court in the presence of the authority granting the divorce or shall be expressed in a document drawn up by a notary, registrar or attorney and signed by the spouses at the time of divorce.

4. The article applies to all marriages including those of same-sex spouses.

Para. 1: **A concession could be considered to the effect that MS courts shall apply the lex fori for spouses who both are their nationals (additional concession: also for bi-national spouses regardless of the most relevant nationality), regardless of a designation of that lex by the spouses; this rule has to be qualified so as to read it for English, Scottish, respectively Irish courts as meaning that they apply the lex fori for spouses who have 'domicile' in their country.**

This concession would be in line with the jurisdiction rule contained in BRX II bis, Article 3, para. 1 lettera b. If nationality, resp. 'domicile', is a sufficient ground for jurisdiction, it is equally a sufficient ground in such cases for applying the *lex fori*, i.e. the national law, resp. the law of the 'domicile'. This amendment to the GEDIP rules would increase the chances of para .1 to be adopted.

Para. 2:This amounts to a degree of party autonomy that politically may be unavoidable although, it is submitted, not fully orthodox.

B. Rules of jurisdiction

BRX II bis, Articles 3-7, contain rules of jurisdiction. The Regulation was only recently adopted. It may be too early to urge for amendments.

Possible amendment: Article 19, *lis pendens*:

- now the court first seized has competence: would it make sense to grant priority to the national court of both spouses (UK, IR: court of country of domicile) though second seized?

- would a choice of court agreement in favour of the court second seized be valid so as to affect the competence of the court first seized?

- would it make sense to add a provision on choice of court agreements, of course for cases where courts in more than one MS country have jurisdiction according to BRX II bis? (questions 13-15). See already BRX II bis Article 37, para. 2 lettera b.

Lis pendens problems arising out of a choice of court agreement where non-MS courts are involved could, or should, be dealt with by MS individually, in line with Article 7.

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