Judicial cooperation in civil matters: jurisdiction, applicable law and recognition and enforcement of decisions in matters of matrimonial property regimes

2011/0059(CNS) - 21/08/2013 - Committee report tabled for plenary, 1st reading/single reading

The Committee on Legal Affairs adopted, in the framework of a special legislative procedure (Parliament' s consultation), the report by Alexandra THEIN (ADLE, DE) on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

The committee approves the Commission proposal subject to the following amendments:

Scope and definitions: Members stipulate that the Regulation is neutral in its definition of 'marriage' and that it does not affect the definition of the concept of marriage in the national law of the Member States.

Members propose that the following should be excluded from the Regulation : (i) the existence, validity or recognition of a marriage; (ii) issues relating to succession due to death with reference to the surviving spouse; (iii) questions governed by the law of companies and other bodies, corporate or unincorporated; (iv) any recording in a register of rights in movable or immovable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register, and; (v) the system of maintenance settlements under German law and other similar arrangements in other Member States.

On the other hand, Members consider that gifts between spouses should not be excluded from the scope of the Regulation.

Concept of "court": the report suggests adopting the definition of "court" as defined in Regulation (EU) No 650/2012 on matters of succession in order to take into account the different models of organisation in the Member States in property matters as well.

Jurisdiction in matters of matrimonial property regimes within the Member States: it is states that this Regulation shall not affect domestic jurisdiction over matrimonial property cases in the Member States.

Jurisdiction in case of divorce: in divorce cases, it seems sensible not to provide for an automatic concentration of jurisdiction, including for associated issues of property rights, in order to preserve the interests of the parties concerned more effectively and to ensure that they accept the jurisdiction of the divorce court.

Choice-of-court agreement: Members propose that the spouses may agree that the courts of the Member State whose law they have chosen as the law applicable to their matrimonial property regime are to have jurisdiction to rule on matters of their matrimonial property regime. Members also state that the spouses may also agree that, if no court has been chosen, the courts of the Member State whose law is applicable are to have jurisdiction.

Jurisdiction based on the appearance of the defendant: it is proposed to add a new article on jurisdiction based on appearance.

In order to protect less well advised spouses against tacit consent to a jurisdiction unfavourable to them, which they therefore would not wish, it seems desirable at the same time to provide for instruction concerning jurisdiction based on appearance and its consequences in law.

A clearer formulation is proposed for the alternative jurisdiction rule in Article 6.

With regard to the rule on *forum necessitatis*, the text makes it clear that this is intended only to cater for extreme exceptions.

Applicable law: Members are supportive of the principles of 'unity of the applicable law' and universal application, which are proposed by the Commission.

For the purpose of determining the scope of the applicable law, she proposes a positive list, which enumerates by way of example issues which are subject to the law applicable, such as:

(i) the division of the spouses' property into different categories before and after the marriage; (ii) the transfer of property from one category to another; (iii) liability for the other spouse's debts, where necessary; (iv) the spouses' rights of disposal during the marriage.

Choice of applicable law: the amendments concerning agreements on the applicable law are intended to combine Articles 16 (choice of applicable law) and 18 (change of applicable law) in order to eliminate the structural and systematic weaknesses in the Commission proposal.

The text states that unless the spouses indicate otherwise, a change of the law applicable to the matrimonial property regime made during the marriage shall be effective only in the future.

If the spouses choose to make that change of applicable law retroactive, its retroactive effect shall not affect the validity of previous transactions entered into under the law hitherto applicable or the rights of third parties deriving from the law previously applicable.

Establishing the applicable law in the event of no choice: the provision governing the applicable law in the event of no choice having been made has been revised.

The agreement on the choice of applicable law shall be expressed in writing, dated and signed by both spouses. That agreement shall comply with the formal requirements of the law applicable to the matrimonial property regime or of the law of the State in which the agreement was concluded.

Adaptation of rights in rem: this Regulation – like Regulation (EU) No 650/2012 – should not affect the limited number ('numerus clausus') of rights in rem known in the national law of some Member States. A new article states that where a person invokes a right in rem to which he or she is entitled under the law applicable to the matrimonial property regime and the law of the Member State in which the right is invoked does not know the right in rem in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right in rem under the law of that State, taking into account the aims and the interests pursued by the specific right in rem and the effects attached to it.

Recognition, enforceability and enforcement: the report proposes, in view of the complexity of the procedures, to retain the exequatur procedure and hence to incorporate the corresponding provisions of the Regulation on succession.

Overriding mandatory provisions: this Regulation shall not restrict the application of the overriding mandatory provisions of the law of the forum, without prejudice to the transaction protection provisions applicable.

A recital makes it clear that protection of the family home and assignment of rights of use in relations between the spouses are an important instance where overriding mandatory provisions should be applied.

Parallel amendments are proposed in the committee report on the proposed Council Regulation as regards jurisdiction, applicable law and recognition and enforcement of decisions regarding property consequences of registered partnerships.