EUROPEAN PARLIAMENT

2004 *2009*

Committee on Legal Affairs

2006/0135(CNS)

11.9.2008

OPINION

of the Committee on Legal Affairs

for the Committee on Civil Liberties, Justice and Home Affairs

on the proposal for a Council regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters
(COM(2006)0399 – C6-0305/2006 – 2006/0135(CNS))

Rapporteur (*): Carlo Casini

(*) Procedure with associated committees – Rule 47

PA_Legam

SHORT JUSTIFICATION

The Commission proposal deals solely with the question of determining the applicable law and jurisdiction in the case of applications for divorce or separation. It does not, therefore, cover marriage annulment or entitlement to maintenance. The proposal is presented as a partial amendment of existing Council Regulation (EC) No 2201/2003, whose scope is much broader, as it also covers grounds for marriage annulment, parental responsibility and the recognition of judgments in matrimonial matters in an interstate setting.

The proposal mainly relates to 'international couples', in other words spouses of different nationalities or who live in different Member States or in states of which they are not nationals. The main new feature of the regulation is that it offers spouses the possibility of choosing the competent court and the applicable law, albeit only from a limited range of options, namely the jurisdictions and laws which have an objective connection with the marriage in question. Under the proposal, the main 'connecting factor' is residence. It follows that, if both spouses have the same nationality and have both always lived in the state of which they are nationals, they have no other option than to apply to the courts of the state in which they live, which will apply the *lex loci*, in other words the *lex fori*.

Overall, the proposal seems to be reasonable. It is completely in tune with the free movement of persons, one of the fundamental freedoms on which the whole EU edifice is based, and upholds the principle of party autonomy by allowing parties to choose, if they wish, which courts and which law should govern the proceedings bringing their marriage to an end.

However, your rapporteur considers that some changes should be made to the proposal in order to make it even more effective.

First of all, it should be stipulated that the parties' freedom of choice should be restricted to the courts and laws of other *Member* States, and that, more generally, in line with the principle of subsidiarity, the proposal cannot oblige the authorities of a state which makes no provision for divorce, or which does not recognise the type of marriage in question, to dissolve a marriage.

Furthermore, under the Commission proposal spouses may choose any of the forums listed in Article 3 of Regulation 2201/2003. In this event, the more restrictive criterion set out in Article 3a(b) would be superfluous. The simplest solution in technical terms would be to delete the whole of point (b). However, it seems from the proposal that the Commission's intention is to establish a connection with the *lex fori* once the parties are given the possibility of deciding for themselves to which court they will apply. This intention is indicated by point (b). To maintain point (b) while bringing it into line with the substance of Article 3 (by enhancing the parties' autonomy), the rapporteur suggests that the whole of Article 3(a) should be reworded. Obviously, Article 3 will remain valid and applicable where parties do not exercise their freedom to choose the competent court.

AMENDMENTS

The Committee on Legal Affairs calls on the Committee on Civil Liberties, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission	Amendments by Parliament
Amendment 1 ARTICLE 1, POINT 2 Article 3a, paragraph 1 (Regulation (EC) No 2201/2003)	
1. The spouses may agree that ***a court or*** the courts of a Member State are to have jurisdiction in a proceeding between them relating to divorce or legal separation provided ***they have*** a substantial connection with that Member State by virtue of the fact that	1. The spouses may agree that the courts of a Member State are to have jurisdiction in a proceeding between them relating to divorce or legal separation provided ***there is*** a substantial connection ***between their marriage and the chosen*** Member State by virtue of the fact that
(a) ***any of the grounds of jurisdiction listed in Article 3 applies,*** or	(a) ***the spouses had their habitual residence in that State for a continuous period of at least three years, provided that period did not end more than three years before the application for a divorce or legal separation;*** or
(b) ***it is the place of*** the spouses' last ***common*** habitual ***residence for a minimum period of three years,*** or	(b) the spouses' last habitual residence ***was situated in that State, and the respondent is still residing there at the time the application is made;*** or
(c) ***one of the spouses is a national of that Member State*** or, in the case of the United Kingdom and Ireland, has his or her "domicile" ***in the territory of one of the latter Member States***.	(c) ***the applicant's current habitual place of residence is in that State and he or she has resided there for a minimum period of six months if he or she is a national of that Member State or one year if he or she is not a national of that State***, or, in the case of the United Kingdom and Ireland, ***the applicant*** has his or her "domicile" ***there; or***
	(ca) their marriage took place in that Member State.

Justification

Rewording Article 3a makes it possible to list the following criteria for connecting factors on a more rational basis: prolonged residence; residence, albeit brief, provided it is the last place of residence of the couple and the current place of residence of the respondent; the

current residence of the applicant for some time past; the place where the marriage was celebrated. This avoids any conflict between the criteria in question, or between those criteria and Article 3 of the regulation, which will continue to apply in the absence of any agreement between the parties.

Amendment 2
ARTICLE 1, POINT 2
Article 3 (a), paragraph 2 (Regulation (EC) No 2201/2003)

2. An agreement conferring jurisdiction ***shall be expressed in writing and signed by both spouses*** at the latest at the time the court is seised.	2. An agreement conferring jurisdiction ***may be concluded or altered at any time, but*** at the latest at the time the court is seised. ***It shall apply to every level of judicial proceeding.***
	The agreement shall be expressed in writing***, dated*** and signed by both spouses. ***If the law of the Member State in which one of the spouses has their habitual residence at the time the agreement is made provides for any additional formal requirements for such agreements, those requirements must be fulfilled. If the spouses have their habitual residence in different Member States whose respective laws provide for additional formal requirements, the agreement shall be valid if it complies with the requirements of one of those laws.***
	If the agreement forms part of a marriage contract, the formal requirements of that marriage contract must be fulfilled.

Justification

It is appropriate to clarify the formal requirements governing the agreement, stipulate its effects and maintain the general rules governing jurisdiction in the absence of agreement.

Amendment 3
ARTICLE 1, POINT 5 A (new)
Article 7 a (new) (Regulation (EC) No 2201/2003)

	(5a) The following article is inserted:
	"Article 7a
	Forum necessitatis

When the competent jurisdiction under this Regulation is situated in a Member State whose law makes no provision for divorce or does not recognise the existence or validity of the marriage in question, jurisdiction shall be allocated:

(a) to the Member State of the nationality of one of the spouses; or

(b) to the Member State in which the marriage was celebrated."

Justification

A Member State cannot be required to recognise as marriage, even for the sole purpose of its dissolution, an act that is not considered to be such by the law of that state. In the same way, it would be contrary to the principle of subsidiarity to impose on a judge in a Member State whose law does not provide for such an act the requirement to pronounce the divorce.

Moreover, an international couple has the right to obtain a pronouncement of divorce by at least one EU judge if the marriage has some connection with EU territory; accordingly, in the absence of a choice by the parties, the jurisdiction of the Member State of the nationality of one of the two spouses or in which the marriage was celebrated should by default be competent.

Amendment 4
ARTICLE 1, POINT 7
Article 20 a, paragraph 1 (Regulation (EC) No 2201/2003)

1. The spouses may agree to designate the law applicable to divorce and legal separation***. The spouses may agree to designate one of the following laws:***	1. The spouses may agree to designate the law applicable to divorce and legal separation***; their choice shall be confined to the laws of the Member States having a substantial connection with the marriage as specified in Article 3a.***
(a) the law of the State of the last common habitual residence of the spouses in so far as one of them still resides there;	
(b) the law of the State of the nationality of either spouse, or, in the case of United Kingdom and Ireland, the "domicile" of either spouse;	
(c) the law of the State where the spouses have resided for at least five years;	
(d) the law of the Member State in which the application is lodged.	

Justification

The criterion proposed here is broader than that put forward in the Commission proposal, which rules out the law of the place of residence of the applicant or respondent alone (even though that law could, in principle, become applicable by virtue of the choice of court, pursuant to Article 20a(b)).

Amendment 5
ARTICLE 1 – POINT **7**
Article 20 a – paragraph 2 (Regulation (EC) No 2201/2003)

2. ***An agreement designating the applicable law shall be expressed in writing and be signed by both spouses at the latest at the time the court is seised.***	2. ***The parties' choice shall be subject to the formal requirements set out in paragraph 2 of Article 3a.***

Justification

The amendment seeks to ensure that the formal requirements applying to the agreement designating the applicable law correspond to those applying to the choice of law.

Amendment 6
ARTICLE 1, POINT 7
Article 20b, introductory part (Regulation (EC) No 2201/2003)

In the absence of choice pursuant to Article 20a, divorce ***and*** legal separation shall be subject to the law of the State:	In the absence of choice pursuant to Article 20a, divorce ***or*** legal separation shall be subject***, in descending order,*** to the law of the ***Member*** State:

PROCEDURE

Title	Applicable law in matrimonial matters
References	COM(2006)0399 – C6-0305/2006 – 2006/0135(CNS)
Committee responsible	LIBE
Opinion by Date announced in plenary	JURI 28.9.2006
Associated committee(s) – date announced in plenary	15.2.2007
Rapporteur Date appointed	Carlo Casini 2.10.2006
Discussed in committee	4.10.2007 19.12.2007
Date adopted	9.9.2008
Result of final vote	+: 25 –: 0 0: 0
Members present for the final vote	Carlo Casini, Marek Aleksander Czarnecki, Bert Doorn, Monica Frassoni, Giuseppe Gargani, Lidia Joanna Geringer de Oedenberg, Othmar Karas, Piia-Noora Kauppi, Klaus-Heiner Lehne, Katalin Lévai, Antonio Masip Hidalgo, Hans-Peter Mayer, Manuel Medina Ortega, Aloyzas Sakalas, Francesco Enrico Speroni, Jaroslav Zvěřina, Tadeusz Zwiefka
Substitutes present for the final vote	Sharon Bowles, Vicente Miguel Garcés Ramón, Jean-Paul Gauzès, Georgios Papastamkos, Gabriele Stauner, József Szájer, Jacques Toubon, Ieke van den Burg
Substitutes under Rule 178(2) present for the final vote	Victor Boştinaru, Renate Weber