

THE NEW PROVISIONS ON PRIVATE INTERNATIONAL LAW IN THE TREATY OF LISBON

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§1. INTRODUCTION

Private International Law (PIL) is often considered to be a topic neglected by Community lawyers.¹ The original EEC Treaty merely made one reference to PIL. In Article 220 EEC (currently Article 293 EC, but now repealed by the Lisbon Treaty) the Treaty stipulated that Member States will enter into negotiations with each other concerning the simplification of recognition and enforcement of judicial decisions. Based on that provision, the Brussels Convention on jurisdiction and the enforcement of foreign judgements in civil and commercial matters was concluded in 1968.² Moreover, the 1980 Convention on the Law applicable to Contractual Obligations, also initiated by the EEC, had no basis in the EEC Treaty but was based on the desire to continue the unification of PIL as set by the Brussels I Convention.³ In recent years, the Community interest in PIL has been growing. Since the Treaty of Amsterdam, the Community has been empowered to take measures in the field of PIL where this is necessary for the internal market (now Article 65 EC; after Lisbon Article 81 TFEU). The Treaty of Nice changed, save for family matters, the voting requirements from unanimity to qualified majority voting (QMV). Moreover, the European Court of Justice has increasingly been willing to answer questions of a PIL nature. The United Kingdom, Ireland and Denmark, however, enjoy a privileged position in relation to the whole title of visa, immigration and asylum policy, including Article 65 EC: while the latter Member State is not bound by measures taken on the basis of Article 65 EC, Ireland and the United Kingdom enjoy the privilege

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¹ J. Basedow, 'The Communitarisation of the Conflict of laws under the Treaty of Amsterdam', 37 *C.M.L. Rev.* 687 (2000).

² OJ L 299/32 (1972).

³ OJ L 266/19 (1980); cf the 3rd recital of the preamble.

of an opt-out. Ireland and the United Kingdom may decide *ad hoc* whether they desire to take part in the preparations of a specific measure.⁴

The Community's growing interest in PIL is not surprising. The general consensus is that, despite calls for the creation of a European Civil Code,⁵ the Community has no competence to introduce a comprehensive codification.⁶ Even the Commission has acknowledged that some areas of private law will not be harmonised in the near future, or even ever.⁷ The harmonisation of PIL improves therefore the legal certainty required in an area of freedom, security and justice without interfering with national substantive law in private law matters.⁸ The harmony of decisions within the Community ensures individuals that a legal relationship is governed by the same legal system in every Member State, and this decreases regulatory burdens and strengthens consumer confidence in the internal market.⁹ Harmonising PIL would not necessitate changes of national substantive law and therefore, by its very nature, respects the principles of proportionality and subsidiarity while at the same time contributing to the achievement of the Lisbon strategy.

The purpose of this reflection is to consider the extent to which the Lisbon Treaty continues the trend of the communitarisation of PIL.

§2. WHAT WILL LISBON CHANGE?

The Treaty of Lisbon replaces Title IV on visas, asylum, immigration, and other policies related to free movement of persons by a Title IV, with the heading 'area of freedom, security and justice'. Article 81 TFEU (the renumbered Article 65 EC) corresponds to Article III-269 of the Constitutional Treaty.¹⁰ The most notable changes with regard to PIL are the widening of Community competences, the introduction of a special passerelle clause and the granting of full competence in preliminary questions to the European Court of Justice. Furthermore, Denmark has changed its attitude regarding the measures

⁴ D.Chalmers *et al*, *European Union Law* (CUP, 2006), 620–621.

⁵ European Parliament Resolution Pb C 158/400 (1989). See M. Röttiger, 'Towards a European Code Napoléon/ABGB/BGB? Recent EC Activities for a European Contract Law', 12 *Eur. L.J.* 807 (2006).

⁶ W. van Gerven, 'The ECJ Case-Law as a Means of Unification of Private Law?' in A. Hartkamp (ed.), *Towards a European Civil Code* (Ars Aequi Libri, 2005), 102.

⁷ Commissioner Vitorino: 'Il existe certains domaines du droit civil en du droit pénal, tant en ce qui concerne le fond que la procédure, que ne seront pas harmonisés pendant très longtemps entre les membres de l'Union européenne, et peut-être même jamais', quoted in: O. Remien, 'Private International Law, the European Community and its Emerging Area of Freedom, Security and Justice', 38 *C.M.L. Rev.* 53 (2001), 63.

⁸ *Ibid.*, 64.

⁹ Goal 3.2.3 of the Lisbon Strategy is to improve European and national legislation. Communication to the Spring European Council, Working together for growth and jobs: A new start for the Lisbon Strategy, COM (2005) 24 final.

¹⁰ The Treaty establishing a Constitution for Europe. OJ C 310/117 (2004).

to be taken on the basis of Title IV: in the future Denmark will have the possibility of opting-in. This fact caused the deletion of Article 293 EC.

A. DENMARK

Article 1 of the Protocol on the position of Denmark determines that Denmark will not participate in the adoption of acts under Title IV of the Treaty.¹¹ Denmark has seized the opportunity of the Lisbon Treaty to modify its position and it now enjoys a position similar to that of Ireland and the United Kingdom. Article 3 of the annex to the protocol concerning the position of Denmark now provides:

1. Denmark may notify the President of the Council in writing, within three months after a proposal or initiative has been presented to the Council pursuant to Title IV of Part Three of the Treaty on the Functioning of the European Union, that it wishes to take part in the adoption and application of any such proposed measure, whereupon Denmark shall be entitled to do so.
2. If after a reasonable period of time a measure referred to in paragraph 1 cannot be adopted with Denmark taking part, the Council may adopt that measure referred to in paragraph 1 in accordance with Article 1 without the participation of Denmark. In that case Article 2 applies.

Even if Denmark does not decide to participate in the adoption of a measure pursuant to Title IV, it may after the adoption notify to the Council that it desires that it accepts the measure.¹² The procedure for enhanced cooperation provided for in Article 280(1) TFEU shall apply *mutatis mutandis*.¹³

B. COMMUNITY COMPETENCES

The Lisbon Treaty will enlarge the Community's competences in the field of PIL. Since the Treaty of Amsterdam, Article 81 TFEU provides that measures in the field of judicial cooperation in civil measures may be taken insofar as '*necessary for the proper functioning of the internal market*'. The Lisbon Treaty adds to this phrase: '*particularly when necessary for the proper functioning of the internal market*'. The decision to adopt measures on the basis of Article 81 TFEU thus no longer depends on the internal market criterion. This does however not give the Community a *carte blanche*. Not only is the Community limited by its general purposes but, moreover, the objectives that Community may

¹¹ Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community.

¹² Article 4 of the Annex to the Protocol on the position of Denmark annexed to the TFEU.

¹³ The procedure concerning the modification of acts pursuant to Title IV by which Denmark is already bound cannot be described here. See, though, Article 5 of the Annex to the Protocol on the position of Denmark annexed to the TFEU.

pursue on the basis of Article 65 EC are listed in the second paragraph of this article. The Treaty of Lisbon adds to the grounds listed in the second paragraph of Article 81 TFEU by the following: '(e) ensuring effective access to justice, (g) the development of alternative methods of dispute settlement and (h) support for the training of the judiciary and judicial staff'.

The relationship between Article 81 TFEU (Article 65 EC) and Article 114 TFEU (Article 95 EC) has been subject to much debate. In principle, there is nothing that would exclude the conflict of laws from of the scope Article 114 TFEU. The question is instead whether Article 81 TFEU should be seen as a *lex specialis* of Article 114 TFEU or whether Article 81 TFEU could be attributed a different meaning and thereby complement Article 114 TFEU.¹⁴ Article 114 TFEU empowers the Community to take harmonisation measures where necessary for the functioning of the internal market. Article 81 TFEU is, following the Treaty of Lisbon, not limited to the internal market, and therefore the position that Article 81 TFEU is but merely a *lex specialis* of Article 114 TFEU can no longer be maintained.

In terms of the new wording of the first paragraph of Article 81 TFEU, the judicial cooperation that this paragraph seeks to establish shall be based on the principle of *mutual recognition of judgements and of decisions in extrajudicial cases*. Although the principle of mutual recognition can be found in several Community PIL-instruments, such as for example the Brussels I Regulation, the introduction of PIL into the Treaty is a novelty. It will be interesting to see whether the principle of mutual recognition will remain limited to judgements and decisions in extrajudicial cases or will also expand into, for example, the recognition of decisions duly taken by the public authorities of another Member State. The decision of the ECJ in *Grunkin-Paul bis* may provide a rapid answer to this question.¹⁵

C. PASSERELLE CLAUSE

The Lisbon Treaty does not alter the legislative procedure. Measures on the basis of Article 81 TFEU are still to be adopted on the basis of the ordinary legislative procedure, while Article 81(3) TFEU establishes a special legislative procedure which requires unanimity with regard to family matters. The Lisbon Treaty does however introduce a passerelle clause. The Council may decide by unanimity and after consultation with the European Parliament, and on a proposal of the Commission, that certain aspects of family law may be subject to acts adopted by the ordinary legislative procedure. The passerelle clause is however different from other passerelle clauses in the EC Treaty¹⁶ because the 'PIL passerelle' also requires that the national parliaments be notified of the Commission

¹⁴ J. Israël, 'Conflicts of Law and the EC after Amsterdam. A Change for the Worse?', 7 *MJ* 81 (2000).

¹⁵ Case C-353/06 *Grunkin Paul bis* (pending case).

¹⁶ See Article 137(2) EC (153(2) TFEU) and Article 42 EU (repealed by the Lisbon Treaty).

proposal. If a national parliament objects to the proposed decision within six months, the Council cannot adopt the decision. In the absence of any opposition from the national parliaments, the Council shall adopt the decision. Although the passerelle clause was already contained in Article III-269(3) of the Constitutional Treaty, the notification to the national parliaments is new. The role of the national parliaments in the passerelle procedure in the Treaty of Lisbon is thus stronger than in the Constitutional Treaty.

Denmark, Ireland and the United Kingdom may participate in the adoption and application of specific acts within three months of the Commissions publication of a proposal. In order to facilitate the opt-in of these Member States, the passerelle clause as it refers to the notification of national parliaments also applies to these Member States. Their possibilities to object to the Commission proposal are however limited. Article 3(2) of the Protocol on the Position of the United Kingdom and Ireland provides that if a measure cannot be taken within a reasonable period of time with Ireland or the United Kingdom included, the Council may adopt the decision without either country.¹⁷ Article 3(2) of the Annex to the Protocol on the Position of Denmark contains a similar provision relating to that kingdom. The conclusion must therefore be that the Council may, after a reasonable period of time, adopt a passerelle decision even where it involves passing over the objections of the parliaments of either Denmark, Ireland or the United Kingdom. The decision will then of course not apply to these Member States. This raises legal difficulties. If, for example, the Danish parliament were to object to the use of the passerelle clause in surname law, but the decision was nevertheless adopted and the Commission were to initiate a proposal for regulation concerning surname law and Denmark were to make use of its opt-in in the preparation of that regulation, the voting requirement for Denmark would require unanimity while for the other Member States, it would be passed by a qualified majority. In such a case, the protocol does not provide for a solution.

The use of the passerelle clause will most likely be reserved for three different situations. In the first such scenario, the Community legislator may want to establish the legal basis of a measure beyond any doubt. It has for example been debated as to whether succession and wills are part of family law. The use of the passerelle clause would exclude the risk of choosing the wrong legislative procedure, while on the other hand avoid the requirement of unanimity of the special legislative procedure for the development of PIL-rules in the field of family law. The second type scenario consists of family matters that are politically less sensitive than other family matters and therefore do not require the privilege of a special legislative procedure, such as matters relating to maintenance based on a family relationship or after divorce.¹⁸ The final category consists of family matters in which the leading principles have already been developed by the case-law of

¹⁷ Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community.

¹⁸ The jurisdiction in matters of maintenance is now regulated in Article 5(1)–(2) Regulation Brussels I.

the ECJ. One thinks for example of PIL rules in the field of surname law, in particular if the ECJ concludes in the case of *Grunkin-Paul bis* that the German PIL rules in this field violate European law.

D. THE COMPETENCE OF THE EUROPEAN COURT OF JUSTICE

Prior to Lisbon, the ECJ enjoyed only a limited jurisdiction under Article 68(1) EC. The ability of a national court to refer a case for a preliminary ruling to the ECJ was limited to national courts against whose decision there was no legal remedy. The Treaty of Lisbon deletes Article 68 all together and thus makes the normal preliminary procedure of Article 267 TFEU (Article 234 EC) also applicable to Title IV. The Treaty of Lisbon will thus have the effect that every national court may request a preliminary ruling. We view this extension of the Court's jurisdiction as highly positive. With the increased adoption of acts on the basis of Article 81 TFEU, that national courts have the widest possibility to address the European Court of Justice is necessary to guarantee a uniform interpretation of regulations and directives necessary.

§3. CONCLUSION

The changes brought by the Treaty of Lisbon in the field of PIL are thus anything but small. The competences of the Community in this field have been enlarged and the empowerment to adopt decisions no longer depends upon the internal market criterion. Although the special legislative procedure for family law matters is maintained, a special passerelle clause is introduced that enables the Community legislator, in co-operation with the national parliaments, to make some aspects of family law subject to the ordinary legislative procedure. Last, but certainly not least, the Treaty of Lisbon abolishes the limitations on the jurisdiction of the ECJ with regard to Title IV. Consequently not only national courts of last resort, but *all* national courts (bar those of Denmark, Ireland and the United Kingdom) will soon possess the ability to refer a preliminary question to the ECJ. The possibility for the courts of these recalcitrant Member States to start preliminary ruling procedures in this field depends entirely on the position taken by these countries in respect of the instruments developed on the basis of Article 81 TFEU.

In sum, the Treaty of Lisbon acknowledges the growing interest of PIL for Community lawyers. The Communities enlarged competences and the extension of full jurisdiction in preliminary questions to the ECJ will most likely continue the trend of the communitarisation of PIL.