

## IX THEMIS FINAL

### KRAKOW 2014

#### DEBATE TOPICS

##### I. ITALY 1 vs. FRANCE 4

###### **The EU law creation system in family matters**

The TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU) proposes, without distinctions, the development of the three central themes of private international law: (a) international jurisdiction; (b) the applicable law and (c) the recognition and enforcement of foreign judgements – Article 81(2)(a) and (c). Nevertheless, the same Article, in its number (3), imposes a special legislative procedure according with which the adoption of family law rules requires unanimity.

Some can say that this generates a complex law-making procedure that imposes concessions susceptible of frustrating the objectives of the judicial cooperation in civil and commercial matters.

For some other, there are tools that allow to surpass this limitation, especially the procedure of enhanced cooperation used in the drawing of the *COUNCIL REGULATION (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation* («Rome III).

It can be said that the present method better respects the different national perspectives on family and society in such a sensitive area, thus allowing a consolidated and more consensual growth of the judicial cooperation in Europe. To confirm the importance of such new perspective we can point out the fact that this is not the only area where such solution was chosen – see the unitary patent protection Regulations No. 1257/2012 and 1260/2012 and the tendencies in the

field of the financial transaction tax.

About this path, it can be said that it also holds some strong risks. Namely, it can generate two speeds in the achievement of an European space of justice («*Multi-speed Europe*» or «*Europe 'à la carte'*») which represents the practical denial of such fundamental objective, since it needs to be build over the generalized adoption of coincident rules and practices and on the attainment of symmetrical results for the citizens and the businesses.

By other side, considering that family matters are now involved in such a complex process, it can arise the tendency to prioritise non-family subjects which is susceptible of generating strong regulatory asymmetries.

Text to take into account:

*'Enhanced cooperation allows those countries of the Union that wish to continue to work more closely together to do so, while respecting the legal framework of the Union. The Member States concerned can thus move forward at different speeds and/or towards different goals. However, enhanced cooperation does not allow extension of the powers as laid down by the Treaties, nor may it be applied to areas that fall within the exclusive competence of the Union. Moreover it may be undertaken only as a last resort, when it has been established within the Council that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole.*

*The general arrangements for enhanced cooperation are laid down by the Treaty on European Union (Title IV). In principle, at least nine states must be involved in enhanced cooperation, but it remains open to any state that wishes to participate. It may not constitute discrimination between those participating and the other states. Any acts that are adopted within the framework of such cooperation are binding only on the participating Member States and do not constitute a part of the *acquis*. Enhanced cooperation must further the objectives, protect the interests and reinforce the integration process of the Union. (...)*

*The Treaty of Amsterdam incorporated the "enhanced cooperation" concept into the Treaty on European Union as regards judicial cooperation on criminal matters and into the Treaty establishing the European Community. The Treaty of Nice introduced major changes aimed at simplifying the mechanism. In particular, a Member State may*

*not oppose the establishment of enhanced cooperation as originally allowed by the Treaty of Amsterdam. To further improve cooperation and to make it more purposeful, the Treaty of Lisbon introduced additional modifications mainly related to the procedure for the initiation of enhanced cooperation, as well as decision-making within the framework of such cooperation.'* – in [http://europa.eu/legislation\\_summaries/glossary/enhanced\\_cooperation\\_en.htm](http://europa.eu/legislation_summaries/glossary/enhanced_cooperation_en.htm), 27.09.2014.

**In this debate, ITALY 1 shall sustain and explain that the need for unanimity in the adoption of family law rules generates a complex law-making procedure that imposes concessions susceptible of frustrating the objectives of the judicial cooperation in civil and commercial matters and FRANCE 4 shall defend the thesis according with which it is possible to reach such objectives under the system created by the TFEU and that this Treaty do not create the pointed difficulty.**

**Each team should show, according with the referred position, its perspective about the future evolution of the family matters in the EU after the Lisbon Treaty.**

## II. NETHERLANDS 1 VS. SPAIN 1

### **Positions on EU Law codification**

Article 81(2)(f) of the TFEU shows us a very important way that – considering the short and non ambitious terms of the legal formulation – still leaves us far from the idea of compiling an European Judicial Code as sustained by Professor Dr. Marcel Storme (see the so called '*Storme Report*' and '*Procedural laws in Europe: towards harmonisation*', Marcel Storme, 2003). In fact, such paragraph aims the mere promotion of the compatibility of the rules on civil procedure, applicable in the Member States, where necessary to assure the proper functioning of civil proceedings.

It points out a fundamental intervention. It is through the suppression of the incompatibilities between the civil procedural rules that it is possible to build the cooperation system claimed by a common justice area. Such suppression is also demanded to create the conditions for the protection of the citizens and the legal persons' rights and, consequently, for the growth of the confidence required by the cross-border legal relations and the free circulation in the EU.

It is possible to dream with the progressive appearance of the conditions needed for the production, on a medium/long term basis, of a comprehensive legal compilation or a EU Private International Law code (whatever its structure might be, that is, corresponding to the simple merging of the existing instruments into one single instrument, a new code, a corrective code, or a codification with recast). Eventually, such process could start by the merging of Regulations Rome I and II into an obligations law ruling.

The advantages of that Code could be:

- (a) The reduction of the volume of the legislation;
- (b) The output of accessibility;
- (c) The clarity of the content of the private international law rules;
- (d) A better approach to the citizens and companies with the

consequent diminution of the obstacles to their entrance into cross-border economical and juridical relationships;

(e) The systematization of the rules under an all-embracing tool;

(f) The correction of redundancies;

(g) The attainment of a coherent structure of private international law rules;

(h) The reduction of the costs in cross-border litigation – not only for the parties but also at the level of the system functioning expenses;

(i) The simplification of the training of the legal professionals.

We can, in spite of these obvious advantages, foresee some important difficulties as disadvantages. The main seem to be:

(j) Eventual scarce political support;

(k) Non coincident perspectives on central notions of private international law;

(l) Strong differences on the conceptions of society and private life – for instance in sexual behaviours – with expression on substantive law, namely in the family domain, same-sex marriages, registered partnerships and names;

(m) Distinct scope and subject matters of the rules to merge;

(n) More complex legislative process;

(o) Harder process of gradual approval of instruments having incidence on specific topics, particularly if it is chosen a time concentrated or simultaneous adoption of such code;

(p) Attainment of substantial agreements on central principles – general concepts of private international law (e.g. the role of overriding mandatory law and the application of foreign law);

(q) Present tendency for the enhanced cooperation and the special positions of United Kingdom, Ireland and Denmark.

Text to take into account:

«(...) efforts aimed at harmonizing the Member States' procedural laws have,

*until recently, lagged behind. Even though the necessities of international litigation led the Member States to adopt various conventions addressing certain problems of international private law and international procedural law (most notably the Brussels Convention), none of these measures had a significant influence on core areas of the respective national procedures. However, some harmonizing effect can be attributed to the preliminary rulings of the European Court of Justice (ECJ). The ECJ occasionally even practically invalidated national provisions infringing upon the freedoms of the internal market or violating the general prohibition against discrimination on grounds of nationality (now Art. 12 EC).» – BOLT, Jan, 'Review Essay – Procedural Laws in Europe. Towards Harmonisation (Marcel Storme ed. 2003)', German Law Journal, Vol. 06 No. 04, p. 818.*

**Under the referred context, THE NETHERLANDS<sup>1</sup> should stand for the compilation of one (or more) EU judicial code(s), defining its object(s), contents, limits and advantages, and SPAIN<sup>1</sup> should develop the reasons that determine that such codification is not a valid objective of the judicial cooperation in civil and commercial matters and must not be expected to be adopted in the short, medium or long term.**

### III. ROMANIA 2 VS. AUSTRIA 1

#### **The functioning of the European Judicial Network in civil and commercial matters**

The area of the European judicial cooperation in civil and commercial matters was marked by The Treaty of Amsterdam of 2 October 1997 that changed dramatically this technical domain and introduced some particularly effective and exciting new criteria responsible for the subsequent extraordinary achievements. Its commands were initially developed by an also essential document – the Presidency Conclusions of the Tampere European Council of 15 and 16 October 1999.

One of the main tools designed to support the newborn cooperation was the European Judicial Network in Civil and Commercial Matters (EJNCCM) that produced some relevant fruits and helped to install the new logics of cooperation in the EU justice – Council Decision 2001/470/EC, in OJ L 174, 27.6.2001, p. 25, and Decision No 568/2009/EC in OJ L 168, 30.6.2009, p. 35.

The creation of this network was a natural step since it was aimed the direct communication between courts and the main activities of the new method were not intended to be conducted by the central authorities. In the new context, it was fundamental to have contact points coming from inside of the judiciary, in order to provide the support needed (judges or persons in conditions to grant 'effective liaison with the national judiciary' – see Article 1(2) of the Council Decision of 28 May 2001 amended by the Decision No 568/2009/EC).

In addition, with a view to call the citizens and the legal professionals to the building a new area of Justice, the Network assumed the obligation of providing rigorous and updated information on *'the establishment, maintenance and promotion of an information system for the public on judicial cooperation in civil and commercial matters in the European Union, on relevant Community and international instruments and on the domestic law of the Member States, with*

*particular reference to access to justice'* – Article 3(2)(c).

For some, the fact sheets containing abstract and generic data directed to the citizens and the legal professionals were not enough to grant the access to the new European justice. In particular, they considered that legal practitioners and, even, the citizens, should have direct communication with their national contact points in order to get answers to their specific questions. Some agreed with the main idea but considered that some distinction should be made between those professionals (judges, public prosecutors, lawyers, barristers and solicitors, notaries and registrars).

The most part agreed that all the legal professionals should contribute to the activities of the Network and that the citizens should be more aware and have a better access to it.

It was referred, by a working group of the EJNCCM, that it seemed fundamental to make a distinction between legal professionals that belong to a so called '*inner group*' and the legal professionals that integrate what would be named as an '*outer group*'. The professionals engaged in the European judicial cooperation under a public statute and representing institutions involved in such cooperation should be considered as having a connection with the first goal of the Network (e.g. judges and public prosecutors). They were the members of the "inner group". Under that condition, they could address direct questions to the contact points. They were also privileged recipients of the generic data included in the second goal of the Network.

Out of this circle of direct access to the National Contact Points would only stay the legal professionals that don't represent any of those institutions and merely have a private intervention in the judicial proceedings ('*outer group*' – e.g. lawyers and the barristers). These professionals should be addressees of generic but rigorous technical information through the fact sheets inserted in the internet web page of the project.

For this vision, there were ethical obstacles to the direct use of the Network structures supported by public resources in order to obtain information



used to get private economical profits.

For some, their access to the Contact Points should not be interdicted but only granted collectively, namely through their professional organizations.

It was also seen as a physical difficulty to the opening of the Network, since the reduced dimension of the Contact Points' services and their scarce human resources wouldn't allow them to deal with direct questions coming from the high number of private legal professionals (namely lawyers and barristers) practising in a specific Member State. This argument was used with more vehemence when questioning the possibilities of direct access from the citizens and businesses.

Some considered that there were also legal obstacles to the widening of the accesses since direct access from professionals that could use the results of the Contact Point's activity in the context of a private and paid service didn't seem to have been foreseen in the spirit of the Amsterdam Treaty, the Tampere Conclusions and the Council Decision of 28 May 2001 (2001/470/EC). They reasoned that each legal profession had a role in the activities of the Network. The private ones could ask the courts to use the Network's tools to facilitate judicial cooperation and to solve a specific problem. The other professionals could make an exhaustive use of the structure, asking intensively its intervention and using it to better apply the European juridical instruments.

For some other, there should be short or no limits to the granting of the advantages of the new judicial cooperation to all of its addressees and to the growing of the idea of a Common Space of Justice.

Consider the following text:

*'Dissemination of information and knowledge to national judges and public prosecutors is a task within the remit of the national contact points of the European Judicial Network in Civil and Commercial Matters (EJNCCM)286 and the European Judicial Network in Criminal Matters. They assist national judges and public prosecutors by providing them with essential information on cross-border procedures. In addition,*

*the websites and atlases of the two networks provide precise information on cross-border issues, and are used more and more extensively by the judiciary. An Internet-based information system for the public has been gradually established (hosted on the Europa website), which averages 100,000 visits per month. The European Judicial Atlases play a very practical role in helping individuals and businesses to access the information they need to initiate legal proceedings in another Member State (the civil Atlas averages 1,700 visitors per month, the criminal Atlas just under 8,000).*

*Both these Networks link to the European Judicial Atlases, information technology tools developed to improve access to justice in cross border-cases and judicial cooperation, by allowing individuals and practitioners to find out which court or judicial authority to contact and to fill in the relevant forms on line and send them electronically.'*

– Communication From The Commission To The Council, The European Parliament, The European Economic And Social Committee And The Committee Of The Regions Justice, Freedom And Security In Europe Since 2005: An Evaluation Of The Hague Programme And Action Plan: An Extended Report On The Evaluation Of The Hague Programme; Brussels, 10.6.2009 SEC(2009) 766 final.

**In this debate, ROMANIA 2 shall defend the thesis of the full opening of the EJNCCM to the citizens and the legal professionals and AUSTRIA 1 shall sustain the maintenance of the present ruling in the domain of the access to the Contact Points and to the information provided by the structure.**

**Each team should draw its own visions about the future of the European Judicial Network in civil and commercial matters according with the position assumed in this debate.**

#### IV. ROMANIA 1 vs. FRANCE 2

##### **The future of the suppression of the 'exequatur'**

After the Amsterdam Treaty, it was developed and materialised the new idea of the free circulation of judicial (or similar) decisions through the general suppression of the intermediate measures for enforcement (*exequatur*), thus implementing the principle of mutual recognition of judgements in civil matters – Article 61 TEC, Article 29 TEU and Article 67 of TFEU.

This principle was for the first time recognised and applied in the COUNCIL REGULATION (EC) No 2201/2003 of 27 November 2003 *concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II bis Regulation)*, in the domains of rights of access and return of the child – see its Articles 41 and 42 – and was several times materialised after that, becoming, apparently, the most important tool of the area of the judicial cooperation in civil and commercial matters.

For some, reasons of coherence and effectiveness impose that such principle should also be extended to the Regulation No. 1215/2012 of 12 December 2012, *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) – Brussels I Regulation* –, the emblematic and central legal text on civil matters in the EU, and it didn't happen. Some would say that such suppression should be generalised to all the fields of the civil judicial cooperation in Europe and that this generalisation is starting to be interrupted.

Some deny the interruption of the referred process, considering that the new *Brussels I* keeps on the path initiated by the *Brussels II* Regulation.

Other affirm that the absolute suppression of the mechanisms for the internal reception of the foreign judicial decisions is not a decisive tool for the building of an European Area of Justice since a light and quick recognition system can produce the same results and represent a way of the Countries not losing the

control over the external judgements susceptible of being enforced internally and of keeping the opportunity of affirming their national legal culture and procedural requisites.

Anyway, they might say that recognition mechanisms are now merely formal and don't represent nor a delay coming from a formal excrescence nor a break of the confidence needed for the cooperation. To confirm their reason, they could point out, as examples, the new *Brussels I* Regulation and the Regulation (EU) No 650/2012 in matters of succession, that abandon the route of the absolute suppression of the recognition procedures and exequatur, seen in other European Regulations in civil matters posterior to the *Brussels II bis* Regulation and just set up a system of full mutual recognition of decisions, authentic instruments and court settlements. This occurs in spite of the fact that the European legislator still envisages to make the Union an area of freedom, security and justice – Article 67(1) of the TFEU.

By other side, it can be said that Article 67(4) of the same Treaty determines that the '*Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters*'. Attending to this rule, one would say that the principle of mutual recognition of judicial and extra-judicial decisions in civil matters claims for the absolute suppression of the need for a declaration of enforceability, moves over any possibility of opposing the recognition of such decisions and needs to keep on being implemented, remaining at the centre of the EU strategy.

In the same direction, it can be affirmed that it is recommendable to assure the coherence of the law creation process and the common, symmetrical and rigorous interpretation and application of the legal tools available, since there is the risk of losing harmony and consistency if a large group of Regulations that affirm the principle of the free circulation of judgments are contemporary and need to be interpreted simultaneously with a few law texts of the same hierarchical grade and technical relevance that don't recognize such principle.

Consider the following text:

*'EU perfects suppression of exequatur on civil & commercial judgments*

*According to a press release, the European Council adopted on 6 December the recast (amended and codified version) of a regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the so-called "Brussels I" regulation) including a number of new improvements. The purpose of this regulation is to make the circulation of judgments in civil and commercial matters easier and faster within the Union, in line with the principle of mutual recognition and the Stockholm Programme guidelines (a multiannual set of measures to develop an area of security, freedom and justice). The updated instrument gives further substance to the principle of free circulation of judgments in civil and commercial matters by developing certain safeguards, including provisions to unify the rules of conflict of jurisdiction and to ensure better recognition and enforcement of judgments given across the Union.'* – in <http://regplus.blogspot.pt/2012/12/eu-perfects-suppression-of-exequatur-on.html>, at 27.09.2014.

**ROMANIA 1 shall defend and explain the thesis of the need for the total adoption of the principle of the absolute suppression of the *exequatur* as a *condition sine qua non* of the effective judicial cooperation in the EU and FRANCE 2 shall affirm that such absolute suppression is not a decisive tool for the building of an European Area of Justice, indicating reasons and alternatives.**

**Each group should imagine the future of the European judicial cooperation. in civil matters that can be foreseeing under the perspective of the thesis defended.**