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Berlin, 19. Oktober 2007

## **Common civil law and family law in the European Union**

### **ELWN lunch on the occasion of the ELDR Party Congress**

**Friday, 19 October 2007, 1:15 to 2:45 p.m.**

***Atelier Restaurant***

Dear Ms. Pusic,

Thank you very much for your kind introduction.

[Salutation],

I, too, am very pleased that so many of you have joined us here today. I would like to warmly welcome you on behalf of the FDP Parliamentary Group in the German Bundestag.

My parliamentary group felt strongly that this Congress of the European Liberal Democrat and Reform Party should be utilized to help the members of the national parliaments, the European Parliament and the members of the Liberal Party become better acquainted. To this end, four panel discussions have been scheduled on issues of foreign policy, research policy,

environmental policy and legal policy. As one of the co-chairs for legal policy, I have suggested a topic from the area of European legal policy for this meeting so we have a topic that concerns all of us equally.

Under the European Treaties, European legal policy has been established *among others* in the field of judicial cooperation in civil matters. The object is not so much the formulation of identical substantive legal provisions – the issue of whether there should be a single European contract law, for instance, is highly controversial. Rather, the primary aims are, on the one hand, the simplification of Community-wide access to the courts and the enforceability of court decisions in disputes involving parties from different EU Member States. And, on the other hand, a unification of international private law, in other words, resolving the issue of which law is applicable in cases that touch upon the legal systems of more than one state. I would like to focus our discussion on this last point.

To begin with, I would like to briefly outline the progress that has already been made in this area at European level:

Ever since the founding of the European Community, the Treaties have afforded the Member States the possibility of concluding international agreements on the mutual recognition and enforcement of judicial decisions and arbitral awards. On this basis, a Convention on jurisdiction and the enforcement of judgments in civil and commercial matters – the "Brussels Convention" – was concluded in the year 1968. Efforts were subsequently undertaken to achieve a codification of conflict-of-law rules. In the interest of concluding the negotiations within a reasonable period of time, their scope was limited to the question of which national law should apply to contracts with a connection to more than one state. These efforts culminated in the Convention on the law applicable to contractual obligations – the "Rome Convention of 1980".

Since the Treaty of Amsterdam, such matters need no longer be regulated by an international agreement between the Member States. Now it is also possible for the European Community to adopt a Regulation. On this basis, the aforementioned Brussels Convention was converted in 2001 into a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters – the "Brussels I Regulation". Similar progress has been made in areas that were discussed in considerable detail in the 1970s. Even though it was not possible

at that time to come to an agreement which national law should apply in particular to cross-border claims for damages, the work was evidently so fruitful that it was possible to adopt a regulation in this area as well – the "Rome II Regulation" – on 11 July of this year. The Commission has also presented a proposal for converting the Rome Convention into a Regulation on the law applicable to contractual obligations – the "Rome I Regulation". This proposal has already been discussed by the Council but is not adopted yet.

In the following, however, I would like to emphasize the area of family law in order to especially involve those many European Liberal women came here today.

Here I would like to discuss with you the Commission's proposal for a Regulation on matrimonial matters. This proposal is based on a Council Regulation that was adopted in the year 2000 and already amended once in the year 2003. The Regulation sets out rules on international jurisdiction for – to put it briefly – divorce, custody of children and visitation rights. In addition, it regulates how a decision handed down in such matters in one Member State is recognized and enforced in another Member State.

The distinctive feature of the Commission's proposal of 2006 is that it seeks to enable the parties to reach an agreement conferring jurisdiction, in other words, to choose the court that should rule on their divorce. In addition, the proposal contains rules on which national law should be applied by the court seized of the case. Here, too, it is worth noting that the parties are to be afforded the possibility of choosing the applicable law, in other words, they make an agreement, which national law should govern their divorce. In the absence of such an agreement by the parties, the proposed Regulation contains a provision for designating the applicable national law. There is however one restriction in both cases: A derogation may be made from such applicable law – which can, by the way, also be foreign law for the court seized of the case – if its application would otherwise be clearly incompatible with the *ordre public* of the forum State. This provision is designed in particular to ensure that a court is not forced to knowingly hand down a decision that is incompatible with the basic rights in its own constitution. It is striking that these new rules are only to concern divorce, although the original Regulation also concerns decisions on custody of children and visitation rights. Here we could perhaps consider whether parents should not also be afforded the possibility of choosing the place of jurisdiction and the applicable law for decisions on custody of children and visitation rights.

I would also like to mention a second Commission proposal here. It concerns maintenance obligations and seeks to regulate the international jurisdiction and applicable national law in such matters as well as the recognition and enforcement of maintenance decisions. This proposal also affords the possibility of choosing the place of jurisdiction and the applicable law. Exceptions to this choice of law are, however, made in cases involving maintenance creditors who lack full legal capacity. A further exception provides that the designated law pursuant to the Regulation may be deemed non-applicable upon request of the debtor. The debtor may oppose the claim under another specifically designated national law (Art. 15).

I would like to devote particular attention to the question of whether the moral concepts, the values and constitutions of the Member States are indeed congruent or similar in such a way that we now no longer need the obligation to leave foreign law unapplied if it obviously violates the fundamental basic rights of our legal order in the constitutional law. In contrast to the aforementioned proposal for matrimonial matters, an exception of this kind is to be no longer possible in the case of maintenance obligations. The same applies to the recognition and enforcement of a foreign decision. Here, too, the Commission seeks to eliminate the *exequatur* procedure, which has thus far provided for the possibility of refusing to recognize and enforce a foreign decision if such recognition and enforcement would obviously stand against the *ordre public*. There will be no chance in the future for example to object that the right to be heard before the judgment was not given to the defendant. According to the position taken by the Commission, the decision must nevertheless be enforced.

This *ordre-public* reservation we find in all the conventions and regulations that we have adopted thus far in the field of international cooperation in matters of private law. For decades it has enabled a way of cooperating which makes it possible for us to accept the differences in national legal systems without any problem because we can, in exceptional cases, give priority to the values in our own constitution. In my opinion, our constitutions have a very special significance. They are *the* expression of the democratic right of self determination of nations. And they are also an expression of the legislators' commitment to a state governed by the rule of law. I do not believe that we can afford to ignore these commitments just because we cooperate internationally. If in the case of free movement of goods, free movement of persons, free movement of services and free movement of capital – in other words, the truly fundamental freedoms that constitute the basic of our single market – the European Treaties allow the Member States to give priority to their national law for overriding reasons relating to the pub-

lic interest, then in my opinion there is no reason why we ought not be able to do the same in the case of decisions handed down by foreign courts.

At this point I will also mention the Green Paper dealing with property consequences of divorce, the Green Paper on matrimonial property law. But here, too, discussion essentially revolves around the same issues:

- Are we in favour of affording the parties the possibility of choosing the court having jurisdiction by mutual agreement?
- Are we in favour of affording the parties the possibility of choosing the applicable national law by mutual agreement?
- Are we in favour of affording the court the possibility of giving priority to its own constitution if the foreign law to be applied is incompatible with that constitution?

And, finally:

- Are we in favour of affording a State the possibility of refusing to recognize and enforce a foreign decision that contradicts its constitution?

I would like to close with these questions. I am now looking forward very much to your contributions to the discussion!