

Session of Helsinki - 1985

**The Law Applicable to Certain Effects
of a Marriage After its Dissolution**

(Sixteenth Commission, Rapporteur : Mr François Rigaux)

(The French text is authoritative. The English text is a translation.)

EXPLANATORY NOTE BY THE RAPPORTEUR

1. The work on the law applicable to the effects of a marriage after its dissolution has brought to light the difficulty inherent in the task of the Institute when dealing with private international law. The founders of the Institute had faith in the future of a universal system of private international law that would be constructed, *pari passu*, with the same methodology as public international law. However, the uncertainties to which the various positivist schools of thought have given rise in that respect are no justification for failing to elaborate solutions that would be common to the different States. As a matter of fact, one should welcome the existence of an institution where experiences can be exchanged between specialists of the various branches of international law. The excessive element in the positivist reaction was the drawing of a strict dividing line which is no longer acceptable today between international law and private international law, reduced to a mere subdivision of internal law. Chiefly, but not exclusively, it appears that a sharp separation between the domain of internal law and that of international law is no longer suitable for economic, financial and monetary relations.

2. Rather than draw a boundary line between international law and private international law, one ought to explore the problems of the confines, and reflect on methodological aspects where the rules of international law and of internal law appear to coincide in substance. Assuming that a legal system does not simply amount to a pyramid of norms but is a living organism consisting of rules and institutions, one can easily make out the main difference in methodology between international law and private international law : while there is a system of international law having its own institutions, there is no such system of private international law. Even if conflict-of-laws rules originate in international treaties, and however broad the scope of these treaties may be, such rules are necessarily enforced through the institutions, whether administrative or judicial, of every State in which the treaties are in force. The internal or international character of the rules of conflict therefore proves less conclusive than the fact that private international law has no institutions of its own.

3. When agreeing on common rules of private international law at intergovernmental conferences, State representatives act in view of the reception of the new *corpus juris* in the legal system familiar to each of them and consequently are in a position to estimate the true purport of those rules and their impact on the institutional framework in which they are going to be incorporated. A purely scientific society works under completely different conditions. While the members of the Institute do contribute to the debates with their specific knowledge of the various national systems of law, the most palpable difference here lies in that they are not able to appreciate the degree of relevance of the proposals in respect of any particular system of internal law since the Institute's resolutions in the sphere of private international law give an outline of an abstract legal system, a set of normative propositions, the meaning of which can be perceived whereas their implications cannot be determined. At times it may be apprehended that the worst of two worlds should thus be combined : it could be that, while the solution proposed for adoption appears to be universally applicable, individual options in favour of a given solution may sometimes be based on the manner in which it will be received in the legal system most familiar to the person who expresses an opinion in this regard.

4. Considerations of this kind can easily be illustrated by the experience gained from the work on the law applicable to the effects of a marriage after its dissolution. Emphasis should first be placed on two difficulties common to all codification attempts in private international law, even within intergovernmental organizations. One is due to the variety of national systems of internal law, which can be observed in respect of both rules of internal substantive law and solutions of private international law. Any attempt to codify private international law is bound to fail if it is not substantiated by a thorough study of comparative law from the two points of view just mentioned, *i.e.* a comparison of both substantive law and private international law. The present policy of the Institute to introduce a better geographical distribution of new Associates can contribute to take the non-Western legal systems more adequately into consideration in the future ; nevertheless there is a pressing need to improve the working conditions of the commissions between sessions ; one might expect from members of the commissions that with regard to subjects of private international law they address written contributions to the Rapporteurs as to the law in force in their respective countries and even in the systems of law in which these countries participate.

5. The second difficulty common to all codification attempts in private international law consists in the lack of comprehensiveness of such attempts. After agreement has been reached on specific issues under review, the solutions thus elaborated should be consistent with the rules that remain peculiar to each of the internal legal systems applicable to the issues excluded from the codification. The problem appears all the more acute as the traditional connection categories - personal status, marriage property systems, inheritance, maintenance obligations - are linked with a dogmatic cutting-up of subject-matters which is often unsuited to the complexity of solutions of substantive law. The law applicable to the effects of a marriage after its dissolution provides an excellent illustration of such difficulties.

In the first place the meaning of "dissolution of marriage" should be made clear. Some forms of nullity (or non-existence) of the marriage do not deserve, strictly speaking, this designation. This first difficulty can easily be obviated by giving the concept of dissolution of marriage a conventional meaning that includes declaration of nullity and annulment in addition to divorce. The essential effect of the dissolution of a marriage with this meaning consists in the termination of the marriage bond. It is obtained as soon as the act of dissolution, whether administrative, judicial or merely private, is recognized : to examine the "effects of a marriage after its dissolution" in a given legal system implies as a working assumption that the dissolution of the marriage as such is recognized in the legal system considered.

The dissolution of a marriage, which establishes the failure of the initial plan to live together, normally leads to the liquidation of the relations, in particular patrimonial relations, between the spouses and thereafter, where appropriate, to a readjustment of those relations. Its main implications are the sharing or redistribution of parental authority over children whom they have in common, the adoption of new arrangements on remaining maintenance obligations, rights to succession or rights to a survivor's pension, and the impact of the dissolution of the marriage on the name of each of the former spouses (in case marriage itself has had some effect in this regard). Such implications are to be considered in relation to the different institutions on which the dissolution of the marriage exerts its own disturbing influence. The terms "effects of a marriage after its dissolution" should be taken to include such aspects.

6. From the foregoing it follows that no single conflict-of-laws rule covers all effects of a marriage after its dissolution. Besides, in many legal systems, especially those of common law, the issues mentioned are matters of conflict of jurisdictions rather than of conflict of laws. For example, as regards orders relating to the custody of minors or even maintenance obligations in general, the court that declared itself competent will apply the substantive law solutions of its internal system, without excluding the substantive rules of private international law. No foundation supports the idea of a "status of dissolution of marriage" (or a "status of divorce") that would govern all the effects of the act of dissolution on the relations of former spouses as a whole.

7. A quick look at the recent Hague Conventions having some link with one or other of the effects of a marriage after its dissolution shows the drawbacks of non-comprehensive codifications. The second paragraph of Article 1 of the Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations excludes from the scope of the Convention "ancillary orders pronounced on the making of a decree of divorce or legal separation [,] in particular ... orders relating to pecuniary obligations or to the custody of children". Such recognition, though restricted to decisions "which ha[ve] given judgment on a maintenance claim" is provided for in Article 8 of the Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, on condition that the jurisdiction of the authority of the State of origin in matters of divorce or annulment or nullity of marriage is recognized in the requested State, which condition is verified, in States in which the above-mentioned Convention of 1 *June* 1970 is in force, in accordance with that Convention.

As to minors, a distinction is to be made between custody measures, which fall under the Convention of 5 October 1961 on Jurisdiction and Applicable Law Relating to the Protection of Minors (save in respect of States which made use of the reservation provided for in Article 15, allowing them not to apply the Convention to measures of custody after divorce), and maintenance orders, which are subject to the two Conventions of 2 October 1973.

For the purpose of determining the law applicable to maintenance obligations between (former) spouses, Article 8 of the Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations makes a distinction depending on whether or not the act of dissolution of the marriage is recognized in the Contracting State in which maintenance is claimed. In the second case the general conflict-of-laws rules of Articles 4 to 6 will apply, but, from the point of view of the court seized, they refer to the status of spouses. In the first case the maintenance obligation is governed by the "law applied" to the divorce or, where appropriate, to the declaration of nullity or annulment, except in States which reserved the right not to apply this solution if the marriage was dissolved by default in a country in which the defaulting party did not have his habitual residence (Art. 14).

8. The concept of "law applied to the divorce" is distinct from that of "law applicable to the divorce". The second phrase means that, if a former spouse claims maintenance from the other in a given State, the law governing such a claim will be identical with that governing divorce proceedings in the same State, whether the latter was applied or not. The first phrase appears to state a mere fact., *i.e.*, to specify the law that was actually applied by the foreign authority whose act of dissolution of the marriage is recognized in the State in which maintenance is claimed. This solution is, however, far from being satisfactory as it is not always easy to find out under what law a marriage was dissolved, particularly when the court or authority failed to give the reasons for its decision on this point or when the relevant rule of conflict prescribes that several laws be applied cumulatively ; moreover, in most cases the court will have applied to the divorce the internal substantive law of the *lex fori*. Yet, there is no justification that for a period of time which may last long maintenance obligations between former spouses should remain subject to the law of the court or authority that dissolved the marriage, one additional flaw in this being the incitement to *forum shopping*.

9. Thus, it does not suffice to dismiss the idea of any global conflict-of-laws solution that would be applicable to all effects of the dissolution of a marriage on the relations between former spouses : one cannot help observing that such a solution even falls short of what would be suitable for the more restricted, indeed too restricted, domain of maintenance obligations. In fact even a brief survey of comparative law shows the ingenuity of legislators and courts who endeavour today to make up for the loss through divorce of the pooling of the resources of each of the spouses. Maintenance orders may be one means of preserving some form of connection between the respective patrimonies of former spouses. But divorce has its logic and coherence : in many cases it is followed by a second marriage and only few men or women are in a position to contribute to the upkeep of several households. It is therefore tempting to put an end to financial relations between former spouses, using various procedures to that effect : maintenance payment by one former spouse to the other on a calculation basis not subject to revision, capital payment by one former spouse to the other, constitution with such capital of a rent to be paid by a financial institution, allocation to one former spouse of common property or even separate property of the other, and, in anticipation of the time of retirement of the spouses, set-off of

pension rights or distribution of a right to a survivor's pension between successive spouses of a predeceased spouse or former spouse. Such final settlement has some advantages for the former spouse who benefits from it, but there are also a few disadvantages to it : while the advantages lie in the financial independence resulting in part from the immediate control over capital or other property and in the protection against the risk of insolvency or ill-will of the debtor of recurring allowances, it may prove that, if the final settlement at the time of dissolution of the marriage causes each former spouse to be deprived of the right to claim anything beyond the enforcement of the causes of settlement, there are drawbacks to freezing each party's position, de denying each former spouse any benefit from a possibly improved economic situation of the other, and to relying on public welfare for the support of a former spouse who squandered or mismanaged his capital. It may also occur that at the time of dissolution of the marriage both parties are similarly well off and that final settlement consists in freeing them from any maintenance obligation in the future, or one former spouse may even, because of his position in the divorce proceedings, be definitely deprived of any maintenance aid from the other.

10. On the level of substantive law concepts, the concept of "maintenance obligation" appears too narrow to cover all the assumptions considered above. Furthermore, any form of overall settlement is necessarily linked with the liquidation of the matrimonial property regime and it is sometimes difficult to determine what property is allocated under the rules of partition or for maintenance purposes.

The set of solutions envisaged in the previous section may assume at least three quite different forms and be included either in a private agreement entered into at the time of celebration of the marriage, or during marriage in anticipation of its dissolution, or even after the dissolution as a result of it ; or in an agreement approved by the court which dissolved the marriage ; or in a decision adopted by the same court or by another court in the same other States.

Whatever its form, the final settlement of pecuniary relations between former spouses raises problems of private international law that differ greatly from those likely to be solved by a rule of conflict which designates the law applied to the divorce. Whether it is contained in an act or in a judgment such a settlement has two effects : a positive and a negative one. The positive effect consists in that, in the territory of a State other than the State under which law the agreement was concluded or in which a court approved the agreement or made an order, each of the former spouses may seek enforcement of the clauses of the agreement or of the terms of the decision. The negative effect consists in that, in the same other States, the final character of the settlement reached may be invoked to oppose any claim for maintenance excluded under the terms of the final settlement. The reasons for which such a negative effect which actually amounts to a deprivation of entitlement to maintenance or at least of the right to obtain a revision of the method of calculation of the maintenance allowance, is granted or denied do not coincide with the reasons for which enforcement of the clauses of attribution or transfer of property or allocation of maintenance is granted or denied.

11. Except for the specification of solutions which help to make the procedures for global and final settlement of pecuniary relations between former spouses internationally more efficient, there is no reason to exclude from the general law of maintenance obligations in private international law obligations of that type which continue after the dissolution of a marriage. The solution contained in the principle of the Hague Convention of 2 October 1973 on the Law Applicable consists in subjecting all maintenance obligations, with the exception of precisely the obligation between divorced spouses, to the law of the habitual residence of the maintenance creditor. Nothing can warrant that this solution should not be retained in the case of spouses whose marriage has been dissolved, since in that case as in all other cases the need to be satisfied is located at the residence of the creditor. The principle as well as the extent and variability of the obligation between divorced spouses should be governed by that same law. In particular, the competence conferred on the "law applied" or even the "law applicable" to the divorce, which at best purports to crystallize a connecting circumstance that is no longer appropriate for the interests to be protected, appears unjustified. On the other hand, one should take account of the patrimonial settlement actually effected at the time of the dissolution of the marriage, ensure that in principle the maintenance creditor shall benefit from agreements entered into or orders obtained by him, but also, for the sake of a fair balance between the parties, encourage courts of States other than the State in which a final settlement was reached to take such a settlement into consideration. Provisions relating to these various issues should be carefully formulated so that no aspect of the situation is neglected ; there are mainly provisions of private international law requesting courts before which a claim for maintenance is brought not to apply the law of the divorce, but to give due consideration to provisions that really incorporate the situation of the parties.

12. It is in the light of the foregoing explanations that the Resolution adopted by the Institute at the Helsinki Session should be read. Although it appears in the form of normative provisions, the Resolution should rather be regarded as a set of directives attempting :

- to maintain a proper balance between the various objectives that any codification of the rules applicable to the effects of a marriage after its dissolution should pursue in private international law ;
- to have due regard to the variety of methods resorted to in the different States ;
- to reserve reconciliation of the proposed peacemeal solutions with related issues that cannot be dealt with.

RESOLUTION

The Institute of International Law,

Considering that a marriage continues to produce certain effects after a decree of divorce has been pronounced or after the marriage has been declared void or annulled and that consequently the law applicable to such effects should be determined ;

Considering that conflict-of-laws problems arising from the effects of a marriage after its dissolution cannot be settled without regard to questions of judicial jurisdiction and of the international effectiveness of decrees already granted, in particular the decree dissolving the marriage ;

Nothing that the effects of a marriage after its dissolution are connected with several institutions of private law and that, to serve their purpose, any resolutions on this specific subject should be incorporated into the legal systems of the various States in which these institutions are likely to be governed by differing rules, in relation both to private international law and to substantive law ;

Taking into account The Hague Conventions concerning, *inter alia*, the recognition of divorce, the recognition and enforcement of judgments relating to maintenance obligations and the law applicable to such obligations, while observing, however, that certain effects of a marriage after its dissolution are dealt with in three different instruments which may have led to gaps and inconsistencies ;

Noting that numerous codifications of private international law have been enacted at a national level during the past decade and that important draft codifications have been published recently ;

Taking into account the particular role of the Institute in the field of private international law.

Adopts the following Resolution :

I - Definitions and Scope

1. For the purposes of this Resolution :
 - a) "Dissolution of marriage" means dissolution of the marriage by divorce or by declaration of nullity or annulment.
 - b) "Effects of the marriage after its dissolution" means, apart from the termination of the marriage bond, the effects that are produced even after the termination, either during the lifetime of the former spouses or after the death of one of them.
 - c) "Former spouse" means a man or a woman whose marriage has been dissolved by divorce, or has been declared void or annulled.

2. The rights and duties of former spouses in respect of their children are excluded from the scope of this Resolution.

II - Exclusion of the Application of a Single Law to all Effects of a Marriage After its Dissolution

3. Since no rule of private international law is able to cover satisfactorily all effects of the marriage after its dissolution, it is necessary to take into consideration the exact nature of each legal issue arising from these various effects.

4. The law applied to the dissolution of the marriage shall not govern, *inter alia* :

a) the effects of the dissolution on the name acquired as a result of the marriage by the spouses, or by one of them ;

b) the limitations introduced as a result of the divorce in respect of the right to re-marry of either of the former spouses.

III - Maintenance Obligations and Compensation Payments

5. Maintenance obligations between the former spouses shall be governed by the law applicable to maintenance obligations in general ; that law shall, in particular, determine the possibility of varying the obligations and of changing previous obligations.

6. In applying Article 5, whenever an agreement has been concluded according to the law of a given State or an order has been made in a given State, the courts and authorities of other States shall take into consideration the following principles ;

a) Whenever, with a view to, or by reason of, the dissolution of their marriage, the spouses have entered into a valid agreement which provides for a maintenance pension, a compensation payment or an equivalent benefit, that agreement shall be binding in all the States in which the act dissolving the marriage is recognized.

b) Whenever a judicial order has provided one of the spouses with a maintenance pension, a compensation payment or an equivalent benefit, or has approved an agreement by the parties to the same effect, this order will in principle be recognized on the same terms as the order that dissolved the marriage.

c) Whenever, under the applicable law, a valid agreement or a recognized judicial order constitutes a final settlement which prohibits each of the former spouses from making further claims against the other, this final character shall be one of the elements to be taken into consideration by the court dealing with such a further claim.

d) If two consecutive orders determining the extent of maintenance rights satisfy the conditions for recognition of a given State, or if one of them has been made in that State, the more recent order shall be enforced.

IV - Survivors' Pensions and Set-off Pension Rights

7. The law of the institution which provides for a survivor's pension shall determine whether, and to what extent, a former spouse may claim the pension.

That same law shall determine whether the right to a survivor's pension is affected by the grounds on which the divorce was granted.

8. Set-off of pension rights shall be governed in principle by the law applicable to the divorce. If there is no such set-off under that law, the set-off shall be governed by the law applicable to the personal effects of the marriage.

It is desirable that public or private institutions operating a pension fund should cooperate in the enforcement of orders by which a foreign court effected a set-off of the pension right of a member of that fund.

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(28 August 1985)