CURRENT DEVELOPMENTS

PRIVATE INTERNATIONAL LAW

Edited by Peter McEleavy

I. THE CODIFICATION OF PRIVATE INTERNATIONAL LAW: THE BELGIAN EXPERIENCE

Last year saw the 200th anniversary of one of the most influential national codes,[1] the French *Code civil* of 1804. The celebration of this Napoleonic achievement has led in turn to renewed discussions on the understanding, purpose and contemporary form of codification.[2] At the same time 2004 saw Belgium adopt its very first Code of private international law.[3] Codification is so closely associated with continental Europe[4] that it may be startling to read that civilian legal systems are not entirely codified. In fact despite the arguable closeness of domestic substantive rules and conflict of law rules, this area of law largely escaped the codification process of the 19th century. What is more remarkable is the fact that the new *Code de droit international privé* appears to be a codification in the classical form. It represents not simply a compendium of existing statutes but a detailed reform of the entire area.[5] It is certainly true that in contemporary Europe the elaboration of classical codes, once viewed as the expression of affirmed political power,[6] has become a rather exceptional occurrence. This is not to say that codification is no longer a fundamental constant of the civilian tradition. Civil law systems are still essentially founded on the precedence of enacted and in principle codified[7] general rules on the basis of which solutions are to be deduced. However,

[1] The *Code Napoléon* was not the first modern civil code to be elaborated in Europe; over a century before the Danish civil code had entered into forces first in Denmark itself (*Danske Lov*, 1683) and then in Norway (*Norske Lov*, 1687). However, the French code is notable for the strong influence it has had on other legal systems, a fact that has been attributed to the Napoleonic conquests, colonization or its inherent qualities (among which its revolutionary legacy). See, eg, K Zweigert & H Kötz, *An Introduction to Comparative Law* (3rd edn OUP Oxford 1998) 98–118.

[2] Y Lequette and L Leveneur *Le Code civil: 1804–2004: un passé, un présent, un avenir* (Dalloz Paris 2004); Cour de cassation *Le Code civil, 1804–2004: le livre du bicentenaire* (Dalloz Litec Paris 2004); 'Bicentenaire du Code civil' *Le Dalloz* 8 Apr 2004; '1804–2004: Bicentenaire du Code civil', *Journal des Tribunaux* (2004), 224 et seq. See also E Clive 'Thoughts from a Scottish Perspective on the Bicentenary of the French Civil Code' 8 *Edinburgh Law Review* (2004) 415–420.

[3] *Loi du 16 juillet 2004 portant le Code de droit international privé*, *Moniteur Belge* 27 July 2004, ed 1, 57344-57374. An English translation by C Clijmans and P Torremans, is available online: <http://www.ipr.be/data/B.WbIPR%5bEN%5d.pdf>.

[4] On the different acceptation of the notion of codification in common law systems, see D Tallon 'La codification dans le système de common law' *Droits* (1998) 39–47; P North 'Problems of Codification in a Common Law System' *RabelsZ* (1982) 490–508.

[5] Cf G Braibant, v° codification, *Encyclopedia universalis*.

[6] The code was viewed as serving the personal prestige of the leader (Hammurabi, Justinian, Napoleon . . .) or the unity of a newly-emerged nation.

[7] On the close relationship between enacted and codified rules, see D Bureau, v° Codification, in D Alland and S Rials (ed) *Dictionnaire de la Culture juridique* (Lamy-PUF Paris 2003).

[*ICLQ* vol 54, April 2005 pp 499–519]

https://doi.org/10.1093/iclq/lei015 Published online by Cambridge University Press

codification is polymorphic,[8] and codes, which ideally display a number of attributes—coherence, logical structure, absence of contradiction, conformity of codified and applied law, completeness, clarity, ease of use and publicity[9]—may seek to achieve the general purpose of the formal simplification or systematization of the law in different ways. Indeed in Europe the aspiration of creating 'perfect laws'[10] that prevailed throughout the golden age of classical codification in the 19th century, has largely given way to less demanding forms of codification.[11] Recent years have concurrently seen movements of decodification[12] as well as recodification,[13] and witnessed the creation of generally less ambitious codification-compilations[14] which gather and order existing rules in specific areas without engaging in reform.[15] This final development ought not to be regarded as surprising as the combination of reform and codification is far from simple:

> experience shows that it is very difficult truly to do both at the same time [. . .] The reform shall precede the codification process so that the latter may integrate the former, or the codification shall precede the reform in order to facilitate its realisation: it is more opportune and more intelligible to reform in view of the legal state clearly revealed by codification.[16]

Today the growing complexity of legal rules, whether domestic, regional (in the case of European Community legislation) or international in character, and their increasing instability both supports and paradoxically complicates or even prevents the elaboration of codes, whichever model is followed. On the domestic level the phenomena of legislative inflation and legal atomization renders the need for rationalization through compilation more pressing than ever. But it has become increasingly difficult to reach

[8] On the different types of codifications see B. Oppetit 'De la Codification' *Recueil Dalloz* 1996 Chr 33.

[9] J Vanderlinden *Le concept de code en Europe occidentale du XIIIè au XIXè siècle—essai de définition* (Institut de sociologie Brussels ULB 1967) 163 et seq.

[10] F Ost 'L'amour de la loi parfaite' in J Boulab Ayoub et al (eds) *L'amour des lois* (PU Laval 1995) at 53.

[11] There are, however, exceptions: the Belgian *Code judiciaire* of 1967 is also a classical code.

[12] Decodification affects several legal systems of the romano-germanic family. See B Oppetit 'De la Codification' *Recueil Dalloz* (1996) Chr 33; X Thunis and F-R Van der Mensbrugghe 'Codification and décodification: le droit comparé à contribution' *Annales de Droit de Louvain* (2001), 59 et seq.

[13] The recent renovation of the law of obligations in Germany or the introduction of a number of family law reforms in France in the past decades may be described as attempts at a recodification of these areas.

[14] H Simonart 'La codification en droit belge: rayonnement et limites de la codification napoléonienne' *Actualité Juridique Droit Administratif* (1997), 672 et seq; J Hoeffler 'L'avenir de la codification en Belgique' *Revue Juridique et Politique. Indépendance et coopération* (1986), 770 et seq.

[15] Codification-compilations do not induce a structural reform of the law but nevertheless alter it by improving its textual consistency, removing archaic concepts or obsolete norms and guaranteeing respect for the normative hierarchy. See Art 3 of the (French) Law No 2000-321 of 12 Apr 2000 *on the rights of citizens in their relations with administrative entities*. Other, more surreptitious, modifications might result from the mere gathering and thematic organization of what used to be distinct sets of provisions, Cf A Lienhard & C Rondey, 'Incidences juridiques et pratiques des codifications à droit constant (à propos du nouveau code de commerce)', *Recueil Dalloz* (2000) Chr 523. See also N Molfessis, 'Les illusions de la codification à droit constant et la sécurité juridique' *Revue Trimestrielle de Droit Civil* (2000) at 192.

[16] Rapport d'activité de la Commission Supérieure de Codification (2003) *La documentation française* (Paris 2004) 11–12 (author's translation).

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and maintain the assumed objective of legal certainty.[17] The multiplication of microcodes and the growing development of territorial or sectoral codification may not in fact contribute to the increased accessibility and intelligibility of the law concerned.[18] This normative instability and the profusion and proliferation of legal rules is not restricted to domestic legal orders. It equally affects the European Union,[19] indeed to such an extent that a vast, albeit insufficient, process of simplification has been on the agenda of the European institutions for a decade and a half.[20] Whatever the results or merits of this endeavour there will certainly remain the problem of the coordination of domestic codifications and European rules. The constant flow of EC legislation, whether or not directly applicable, will inevitably disrupt the coherence and supposed comprehensiveness of domestic codes and could render codification in general questionable or pointless.

Against this background it might seem at first glance peculiar that Belgium has decided to go down the road of codification, in particular one reforming private international law. Even in civil law countries private international law has traditionally been deemed unsuitable for legislative intervention;[21] the oracles of this discipline, unlike any other legal domain, have never been legislators and technocrats.[22] In addition private international law has been and is concurrently the beneficiary of an ever expanding number of international and regional instruments, so that the necessity to engage in domestic codifications could appear tenuous. Nevertheless a brief look at the sources of private international law in European States reveals that most countries have now codified their private international rules, some of them very recently. Faced with these positive foreign experiences and an internal, pressing need to provide more legal certainty, Belgium has chosen to maintain its relatively defiant position with regard to international instruments and to lay down its own clear and comprehensive set of conflict of laws rules (A). Following a closer examination of the affirmed objectives of the new private international law code, a presentation of some of the most notable aspects of the *Code de droit international privé* will be provided (B).

[17] See, pleading for the end of codification-compilations, H Moysan 'La codification à droit constant ne résiste pas à l'épreuve de la consolidation' *La semaine juridique (JCP) ed G* (2002) I 147.

[18] F Ost 'La codification: idéal et métamorphoses' *Journal des Tribunaux* 2004, 227 et seq; G Braibant and A Zaradny 'L'action de la Commission supérieure de codification' *Actualité Juridique Droit Administratif* (2004) 1858–9.

[19] See the communication of the European Commission COM (2003) 71 final, at 5: at the end of 2002, the legislative corpus represented 97000 pages in the OJ. This far exceeded the estimates made just two years before; see COM (2001) 645 final, at 7.

[20] See: Resolution of the European Parliament of 26 May 1989 *on the simplification, clarification and codification of Community law* (OJ 1989 C 158/0386); Inter-institutional Agreements of 20 Dec 1994 (OJ 1996 C 102/02), of 22 Dec 1998 (OJ 1999 C 73/01) and of 28 Nov 2001(JO 2002 C 77/01). On the codification and simplification of European rules, see M Petite et al 'L'accessibilité du droit, la méthode communautaire' *Actualité Juridique Droit Administratif* (2004), 1862 et seq; S Dragone 'La codification communautaire: techniques et procédures' *Revue du Marché Unique Européen* (1998) 77 et seq.

[21] S Symeonides 'Private International Law Codification in a Mixed Jurisdiction: The Louisiana Experience' 57 *RabelsZ* (1993) at 461.

[22] B Oppetit 'Droit international privé, droit savant' *Collected Courses of the Hague Academy of International Law* 234 (1992 III) at 342.

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A. Belgium and the Codification of Private International Law Rules in Continental Europe

For a long time, even after the great material codifications of the 19th century, the prevailing idea in Europe was that the elaboration of private international law was best left to judges, as inspired by internationalist scholars.[23] However, from the 20th century greater attention has been focused, domestically (A) and internationally (B), on the creation of a clear and independent system of unified private international law rules.[24]

1. Domestic legislations

While the majority of the continental conflictualist 19th century doctrine was universalist, a more realist view became progressively prevalent: today the conflict of laws is considered as falling to a very large extent within domestic jurisdiction with international sources playing a relatively limited role therein.

The French civil code of 1804 paid little regard to the treatment of private relations having an international element.[25] But with the development of industry and transportation during the course of the 19th century international relations increased and there was a consequent need to augment the number and precision of private international law rules.[26] However, legislation in this area remained largely incomplete and lacked specificity, for example, the Italian enactment of 1865, which was the first *autonomous*[27] codification of private international law rules,[28] was limited in scope[29] and even the German EGBGB,[30] which was not adopted until 1896, only covered some aspects of the conflict of laws.[31] It was not until the second half of the 20th century that more detailed and systematic private international law rules were adopted. This was originally done within the adoption or reform of private law codes.[32] In Eastern Europe

[23] Ibid 339 et seq.

[24] See the definitions of the codification of private international law given by B Nolde 'La codification du droit international privé *Collected Courses of the Hague Academy of International Law* 55 (1936 I) at 299; E Jayme 'Considérations historiques et actuelles sur la codification du droit international privé' *Collected Courses of the Hague Academy of International Law* 177 (1982 IV) 9 et seq.

[25] The main articles in this area were Art 3 (devoted to choice of law) and Arts 14–15 (on jurisdiction). While they contain important principles, some of which have inspired later codifications, they cannot be deemed to constitute a codification.

[26] See, eg, the Greek code of 1856, replaced in 1940; the Italian code of 1865, the Spanish code of 1889 or the Swiss federal law of 1891. See M Gutzwiller 'Le développement historique du droit international privé' *Collected Courses of the Hague Academy of International Law* 29 (1929 IV) 332; B Nolde 'Les étapes historiques de la codification legislative du droit international privé' *Revue Critique de Droit international privé* (1927) at 362.

[27] E Jayme op cit, 39 et seq.

[28] Its provisions were later largely reintroduced in the preliminary title of the 1942 civil code.

[29] E Jayme op cit at 48; also G Broggini 'La nouvelle loi italienne de droit international privé' *Swiss Review of International and European Law* (1996) at 2.

[30] *Einführungsgesetz zum bürgerlichen Gesetzbuch*, (Introductive law to the German civil code), containing the private international provisions.

[31] G Kegel *Internationales Privatrecht* (CH Beck Munich 1995), 163–5 suggests historical reasons for this.

[32] This was on the basis that a private law code was not complete if it did not provide the key for the territorial application of the rules it contained.

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the codification movement was inspired by the desire to give effect to a newly endorsed ideology,[33] while in Western Europe the changes were often prompted simply by the necessity to modernize outdated codes.[34] Then, from the 1970s, specific[35] private international codifications were increasingly drafted, notably in Austria,[36] Germany,[37] Switzerland,[38] Italy,[39] and Liechtenstein.[40]

Interestingly, this phenomenon had not, until the Belgian Law of 16 July 2004, affected States in which the *Code Napoléon* had remained in force (France, Luxembourg and Belgium). These countries had nevertheless all been tempted at various times and in different forms by the codification of private international law. In France no less than three attempts to codify private international law were made in the late 1940s,[41] 1950s,[42] and 1960s.[43] In Luxembourg and Belgium, as part of the Benelux economic Union, a draft private international law codification was drawn up first in 1950 and then in 1969.[44] This was never adopted, with the Benelux Convention of 3 July 1969 failing to receive any ratifications.

It is difficult to explain properly the absence of codification in these countries. In France this has been attributed to the specific nature of conflict of laws rules combined with their contemporary structure.[45] The need to codify is not felt when the effort it would entail would not greatly contribute to strengthening the coherence of the law and facilitating its accessibility. Indeed French courts have, on the basis of the few existing written private international law rules, developed a number of general principles which ensure a measure of coherence in the treatment of international private law disputes.[46] In these circumstances it can be questioned whether a code would greatly improve the

[33] For instance the Czechoslovakian Private International Law Statute of 4 Dec 1963, No 97/1963 Sb; or the Polish Law of 12 Nov 1965, *Dziennik Ustav* 17 Nov 1965 No 46 pos 290.

[34] See, eg, the new Portuguese civil code of 1966. In France the first attempt to codify private international law rules was made by the Commission on the Reform of Civil Law which aimed at renovating the entire civil code after the Second World War.

[35] Outside the existing codes.

[36] *IPR Gesetz*, 15 Jun 1978, *Bundesgesetzblatt* No 304/1978.

[37] Art 3-49 EGBGB, *Bundesgesetzblatt* (1994) I 2494.

[38] *LDIP*, 18 Dec 1987, *RO* 1988, 1776.

[39] *Riforma del sistema italiano di diritto internazionale privato*, 31 May 1995, Suppl Ord GU Serie Gen 128, 3 Jun 1995 .

[40] *IPRG*, 19 Sept 1996, *Liechtensteinische Landesgesetzblatt* (1996) No 194, 290.

[41] See the text of the first draft (*avant-projet de la Commission de réforme du Code civil*), *Revue Critique de Droit international privé* (1950), 111; P Louis-Lucas 'Les principes directeurs posés par le projet de codification du droit international privé français' *Revue Critique de Droit international privé* (1951) 393–415.

[42] The draft remained unpublished for a decade: *Revue Critique de Droit international privé* (1970), 832.

[43] *Projet de loi complétant le Code civil en matière de droit international privé*, *American Journal of International Law* (1970), 614 ; J Foyer 'Le nouvel avant-projet de réforme du droit international privé français' *Journal du Droit International* (1971) 31–49.

[44] F Rigaux 'Le nouveau projet de loi uniforme Bénélux relative au droit international privé', *Journal du droit international* (1969), 334; De Winter 'La nouvelle version du projet Benelux de loi uniforme de droit international privé (1968) *Revue Critique de Droit international privé* 577.

[45] H Muir Watt 'La codification en droit international privé' 27 *Droits* (1998) 149–60. This author also examines—and rejects—conjectural and epistemological hypotheses.

[46] B Oppetit 'Les principes généraux en droit international privé' (1987) 32 *Archives de Philosophie du Droit* at 179; B Ancel and Y Lequette *Les grands arrêts de la jurisprudence française de droit international privé* (4th edn Dalloz Paris 2001), at VII; H Muir Watt op cit at 157.

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consistency of French private international law rules.[47] Furthermore it is generally recognized that one of the great merits of unwritten conflict of law rules is their relative flexibility and adaptability, characteristics which are viewed as the prerequisites of a satisfactory treatment of private international situations.[48] Thus the formalization of these elements in a code would, as has been suggested, imply the enactment of general and abstract conflict of law rules, with the addition of an escape clause so as to retain their traditional Savignian spirit.[49] Yet this would be somewhat inconsistent with the notion of a code, for such rules while easily accessible and apparently normative would not necessarily ensure predictability.

Nevertheless a codification would at the very least provide private international law with the advantages of a structure, uniform terminology and clear methodology. This appears more necessary in Belgium than in France. While Belgian private international law rules are rooted in the same texts, their development has been quite different from those of their French counterparts. In some areas Belgian courts have not been able to lay down guiding principles; this may have been because they were not seised of the same matters, cases were not analysed in the same detail[50] or written rules were simply much more rigidly adhered to.[51] In addition there have been great divergences in the interpretation given by courts in different regions of the country.[52] Indeed one of the specific motivating factors which led to the call for codification was a series of controversial and highly criticized decisions rendered by the *Cour de Cassation* on the law applicable to matrimonial regimes.[53]

In the light of these substantive problems and given the generally positive impression of foreign codification experiences by the mid-1990s the circumstances seemed particularly favourable to a complete private international law codification in Belgium. The different degree of involvement of France and Belgium in international codifications may also explain why both countries made contrasting choices in terms of the codification of private international law rules.

2. *International codification*

In addition to a few customary principles of public international law that can apply to international private law relations, the field of private international law is now to a

[47] F von Schwind 'Problems of Codification of Private International Law' (1968) 17 *ICLQ* at 430 supported codification on the basis that in the late 20th century no international legal body of general principles as had been created by the universalist doctrines of the Commentators and of Savigny's international community existed that could provide an adequate guide for the development of judicial decisions.

[48] Showing that these should not necessarily constitute an obstacle to a codification, P Louis-Lucas 'Le colloque des 20 et 21 mai 1955 sur la codification du droit international privé français' (1956) Revue Critique de droit international privé at 394.

[49] eg, H Batiffol and P Lagarde *Droit International Privé* (8th ed LGDJ Paris vol 1 1993) at 456.

[50] Doc Chambre 51–1078/005 at 7.

[51] Doc Sénat 3-27/7 (2003-2004), at 12.

[52] ibid at 11.

[53] M Verwilghen 'Vers un code belge de droit international privé' *Travaux du Comité français de droit international privé* (1998–2000) (Pedone Paris 2001), at 126. Over 20 years the Cour de Cassation had rendered several decisions which were criticized as lacking coherence and clarity by Belgian scholars and practitioners alike.

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significant extent regulated by written sources, there being an increasing number of international and regional instruments unifying choice of law, jurisdiction, and recognition and enforcement rules. That being so it cannot be regarded as a surprise that in reviewing the draft bill on the code of private international law the Belgian *Conseil d'Etat* drew attention to the advantages of international codification and doubted whether a domestic code could as a consequence be justified.[54]

(a) International treaties

Aside from bilateral agreements, the international conventions concluded in the field of conflict of laws have been negotiated primarily under the aegis of the Hague Conference on Private International Law.[55] This international organization has been responsible for the codification of private international law rules for over a century and Belgium has been a member since 1955. Nevertheless Belgium has chosen to remain largely outside this international movement aiming at the unification of conflict of law rules. It has participated in negotiations and signed Hague instruments but, crucially, at the time of the inception of the domestic codification project in 1995, it had not ratified any Hague convention in twenty years.[56]

Proponents of the code, in response to the *Conseil d'Etat,* explained that this was due to certain undesirable characteristics of Hague Conventions:[57] they often appeared to be far more complex than non-conventional rules; they evolved out of compromises which resulted in impractical provisions; their substantive and geographical scope was limited;[58] unification was more apparent than real given the risks of diverging national interpretations of convention rules; and, finally, the instruments were not able to adapt to societal changes.[59]

It is certainly true that international conventions are unable to create a flawless and complete system of rules, despite the presence of unifying factors,[60] but does this mean that international harmonization should be abandoned? And would the adoption of a domestic code not encourage this? The *Conseil d'Etat* indeed indicated that the enactment of a Belgian private international law code would probably imply that Belgium

[54] Advisory opinion of the *Conseil d'Etat* 29.210/2 of 12 Feb 2001, Doc Sénat 2-1225/1 (2001–2), annex at 243.

[55] The International Commission on Civil Status as well as the Council of Europe also play a part, albeit limited, in the unification of private international law rules. On the role of the EC institutions, see below at 506.

[56] Belgium is a party to the 1954 Convention on Civil procedure, the 1956 and 1958 Conventions on Maintenance obligations relating to children, the 1961 Convention on the *Conflict of Law relating to the Form of testamentary Dispositions*, the 1961 Convention *abolishing the requirement of legalisation for foreign public documents*, the 1965 Convention *on Service abroad of judicial and extrajudicial documents in civil and commercial matters* and the 1971 Convention *on the law applicable to traffic accidents*. The final instrument was ratified in 1975. No other Hague Conventions were ratified until 1999 when Belgium belatedly became a party to the 1980 Convention *on the civil aspects of international child abduction*.

[57] On the relativity of conventional instruments, see B Oppetit 'Droit international privé, droit savant', op cit, at 421 et seq.

[58] Doc Sénat 2-1225/1 (2001–2) at 8. It was nevertheless recognised that Hague Conventions dealing with aspects of jurisdiction, recognition and enforcement attracted far more parties (40 to 70), but only applied to situations involving contracting parties, so that domestic rules remained necessary to deal with other situations.

[59] ibid at 7.

[60] eg the use of identical connecting factors, or a common definition of public policy etc.

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would have to persevere 'forever, or at least for a long time'[61] in its refusal to participate in the international unification movement.[62] However, whilst this political decision could be made with regard to international instruments, it was not an option with regard to EC instruments following the entry into force of the Treaty of Amsterdam.

(b) Community instruments[63]

At the time the first discussions on the draft code were taking place, private international law initiatives were still a matter for intergovernmental negotiation within the context of the European Union.[64] This meant there was no centralised agenda and that States, whilst constrained to some extent by wider political considerations, could at least prolong negotiations and delay ratification and thereby the entry into force of instruments. However, on 1 May 1999 the private international law landscape changed dramatically within Europe with the entry into force of the Treaty of Amsterdam. This afforded the Community competence in effect to take measures in the field of private international law which were necessary for the proper functioning of the internal market.[65] Unlike Denmark,[66] the United Kingdom and Ireland,[67] Belgium accepted these reforms in their entirety thereby rendering the arrival of directly applicable Community conflict of law rules virtually inevitable.

That this has subsequently happened[68] does not however inexorably mark the immediate end of domestic private international law. In the context of jurisdiction, recognition and enforcement, most Community provisions apply only if the dispute has a certain link with the EC; with regard to choice of law issues, the situation may be different,[69] and indeed the 1980 Rome Convention on the law applicable to contractual

[61] Advisory opinion of the *Conseil d'Etat* op cit at 244.

[62] For its proponents the code was not an obstacle to the ratification of international instruments; should Belgium decide to become a party to new instruments, the *Code de droit international privé* would simply have to be amended accordingly, see Senate Doc 2-1225/1 (2001–2) at 8.

[63] This section will focus on the instruments containing private international law rules. However, the organs of the EC had and have also enacted other rules which apply to international private relationships. In addition to a number of directives containing material rules affecting the operation of choice of law provisions in certain areas (eg Directives 96/71, OJ 1997 L 018/1; 93/13, OJ 1993 L 095/29; 94/47, OJ 1994 L 280/83; 97/7, OJ 1997 L 144/19; 99/4, OJ 1999 L 066/26) or jurisdictional rules (eg Directives 96/71, OJ 1996 L 018/1, 93/7, OJ 1993 L 074/74), several directives have undertaken to harmonize choice of law rules applicable to insurance contracts (Directives 88/357, OJ 1988 L 172/1; 90/619, OJ 1990 L 330/50 and 92/96, OJ 1992 L 360/1).

[64] Under the then Art 220 EC Treaty (now Art 293) or the then Art K3 Treaty on European Union.

[65] Art 65 EC Treaty.

[66] See Protocol to the Amsterdam Treaty on the Position of Denmark, OJ 1997 C 340/101.

[67] See Protocol to the Amsterdam Treaty on the Position of the United Kingdom and Ireland, OJ 1997 C 340/99.

[68] See, eg, Council Regulation (EC) No 1347/2000 of 29 May 2000 *on jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for children of both spouses* OJ 2000 L 160/19, Council Regulation (EC) No 1348/2000 of 29 May 2000 *on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters* OJ 2000 L 160/37, Council Regulation (EC) No 44/2001 of 22 Dec 2000 *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* OJ 2001 L 012/1, Council Regulation (EC) No 2201/2003 of 27 Nov 2003 *concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000*—OJ 2003 L 338/1.

[69] The partisans of the code have expressed the view that non-universal regulations could be

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obligations provides an example of a universal instrument. The adoption of universal choice of law regulations would lead to the abrogation of the traditional (or codified) rules in the area covered.[70] Nevertheless, these regulations might not for political as well as substantive reasons deal with all relevant choice of law issues. This might notably be the case in family law matters where under the Nice Treaty unanimity will continue to be required for Community action.[71] Notwithstanding the possible and growing incidence of the nascent European codification, it was, according to the *Conseil d'Etat*, possible to justify the adoption of the Belgian private international law legislation on the basis of a pressing need to pursue objectives 'the realization of which cannot be deferred'.[72] The advocates of the code, which did not consider the project to be superfluous or counterproductive, also stressed that a code responded to an 'urgent need'.[73]

B. The Belgian Code de droit international privé of 2004

1. Origins of the Code

In 1996 the Belgian Justice Ministry invited a number of scholars to undertake research with a view to establishing a code of private international law. Academics had called for the codification of this area of law which, despite its increasing practical importance, was paradoxically governed by an insufficient, dated and unclear set of rules.[74] It took three years for the 'Belgian private international law Group' to complete a first draft. Despite its scientific origin, the text was principally aimed at responding to the needs of legal practitioners who were consulted throughout the entire process. In 1998 a review by government experts led to certain changes and a draft Bill was then adopted by the government. This, in accordance with legislative procedure, was forwarded to the *Conseil d'Etat* for comment in April 1999. A detailed advisory report published in 2001[75] led to further modifications, before the bill was first introduced before the Senate in 2002.[76] The law on the code of private international law was finally promulgated on 16 July 2004,[77] and entered into force on 1 October 2004.[78]

adopted, which would enable the continuing applicability of domestic rules or Convention rules to situations which would not fall within the territorial scope of the regulations in question. See Doc Sénat 2-1225/1 (2001–2), at 10.

[70] Even though work is already planned on several regulations, see for example Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ('ROME II') COM (2003) 427(01); the authors of the draft bill also indicated that EC legislation could well take the form of directives, which would imply that Member States would still have to provide appropriate implementation provisions.

[71] Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, OJ 2001 C 80/1, Art 2(4).

[72] Advisory opinion of the *Conseil d'Etat* op cit at 247.

[73] See the introductive presentation of Professor Erauw, Doc Chambre 51—1078/005 of 23 June 2004 at 3 and 6. The short-term need to give global responses was also generally felt by the members of the Justice Commission, Doc Sénat 3-27/7 (2003–4), at 240.

[74] See above.

[75] Doc Sénat 2-1225/1 (2001–2), 242–94.

[76] ibid 1–241. The bill was reintroduced before the Sénat a year later following the dissolution of the parliament. See Doc Sénat 3-27/1 (2003).

[77] *Loi du 16 juillet 2004 portant le Code de droit international privé*, *Moniteur Belge* 27 July 2004, 57344-57374.

[78] Art 140 (1). An exception was made for provisions relating to adoption, Art 140 (2) and (3),

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2. General purposes of the code

(a) Transparency

Transparency is obligatory in any form of codification given the underlying objective of establishing a coherent and fully comprehensive set of rules which will guarantee legal certainty and predictability.

To this end a relatively short, single volume[79] code was established in both official languages: French and Flemish. In addition certain existing provisions were retained whilst others were updated with antiquated terms and concepts replaced; moreover accessibility was increased through consistent wording, by grouping provisions together in identifiable sections and giving each article its own heading.[80] In creating 140 articles the drafters sought to ensure clarity yet allow sufficient flexibility for the new rules to apply to all possible international legal situations.

The provisions are organized on the basis of a logical and understandable structure: chapter 1, entitled general provisions, contains definitions of the scope of the Code (Art 2) and of the principal connecting factors (Art 3), as well as general rules applicable to jurisdiction (Arts 5–14), choice of law (Arts 15–21) and recognition and enforcement (Arts 22–31). In addition the code comprises 12 chapters devoted to natural persons (Arts 32–41), marriage and matrimonial causes (Arts 42–57), co-habitation (Arts 58–60), filiation (Arts 61–72), maintenance obligations (Arts 73–6), succession (Arts 77–84), goods (Arts 85–95), obligations (Arts 96–108), legal persons (Arts 109–15), insolvency (Arts 116–21), trusts (Arts 122–5) and final provisions (Arts 126–40). Apart from the first and last, it is notable that each chapter generally contains provisions dealing with jurisdiction, choice of law and recognition and enforcement.[81] There are however exceptions with certain chapters not containing special rules on recognition and enforcement (eg chapters 6, 9, and 12). In these cases resort must be made to the general provisions of chapter one.

Finally, the goal of transparency would not have been attained if the drafters had not incorporated clear transition provisions.[82] Arts 126 and 127 are based on the principle that the new rules will only apply to legal acts and facts that occur after the code has entered into force.[83] While these provisions are crucial it is important to point out

the entry into force of which was postponed until the entry into force of the law of 24 Apr 2003 reforming adoption. This solution results from an amendment introduced by the government, convinced that the importance of a number of the provisions of the code required that its entry into force take place just three months after its publication instead of seven months as was initially provided.

[79] Note should be taken that a separate article remains in the Code of civil procedure for service abroad; see J Erauw 'Brief Description of the Draft Belgian Code of Private International Law' 4 *Yearbook of Private International Law* (2002) at 147 *ad notam*.

[80] This is relatively unusual. In principle, legal provisions are not given titles in Belgium. The fact that the private international law code's provisions are does not only signal the will of its drafters to provide a clear text, it also reveals the influence of comparative law; the German, Austrian, Italian and Swiss private international law codes all contain titled provisions, as does the 1980 Rome Convention *on the Law applicable to contractual obligations*. But one might wonder what legal effect, if any, these headings will be given in Belgium.

[81] This division, which is foreign to the Belgian legislative technique, is based on that of the Swiss Statute on Private International Law of 1987. It was supported by the Justice Minister.

[82] The Council of State stressed the potent impact the adoption of new conflict of law rules might have on the individuals concerned (Advisory opinion of the *Conseil d'Etat* op cit 245–6).

[83] See Arts 126–7. There is however one notable exception—marriage (Art 126 (2) in fine and

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that in many instances the question of transitional application will not arise, as the new rules have not systematically broken from the previous regime.

(b) Modernity

The adoption of a substantive code is by definition innovative.[84] However, the framers did not seek to revolutionize the entire area. The code takes account of the judicial interpretation of the former written rules,[85] but important changes have been introduced, some inspired by foreign and international[86] codifications, others dictated by specific needs of contemporary Belgian society.[87] Not only has the international movement of persons or goods become rather banal, notably within Europe, but Belgium has also welcomed a large immigrant population from a non-European background. As a result less weight has been given to the traditionally essential principle of allegiance and more importance has been accorded to the modern principle of proximity.[88] Consequently the criterion of habitual residence has largely been substituted for that of nationality. It is to be noted that the concept of nationality had already lost some of its advantages in terms of permanency[89] and unity[90] so that its continuing use as a connecting factor had begun to appear less appropriate than in the past.[91] A systematic reference to the criterion of habitual residence, which could have been justified by the desire to facilitate the assimilation or integration of immigrants, could at the same time have been rejected by many foreigners if they felt deprived of important aspects of their identity.[92] The *Code de droit international privé* avoids this pitfall by combining the use of this new connecting factor with that of nationality. For example, issues relating to the status and capacity of natural persons remain in principle governed by the law of nationality,[93] which also applies to the substantive validity of marriages,[94] while the law of the joint State of habitual residence is, absent a valid *professio juris*, applicable to matrimonial property regimes,[95] or divorces.[96] The criterion of habitual residence has the advantage of endowing private international law rules with some flexibility but this is nevertheless limited since Article 4 (2) gives a partial definition of the concept for the purpose of the Code. A natural person's habitual residence is defined as the place where he/she has 'established his/her main residence'.[97] To make this determination account

Art 127 (3). This retroactive application of the code resulted from an amendment voted in Senate (Doc Senate 3-27/7 (2003–4), at 384).

[84] See above at 499.

[85] Doc Chambre 51-1078/5 (2003–4), 7–8.

[86] Even conventions to which Belgium is not a party have been influential. For example, the Hague Convention *on the Law Applicable to Trusts and on their Recognition* has inspired ch XII, even though it has not entered into force.

[87] See the provisions devoted to marriage and non judicial divorce below 514 et seq.

[88] P Lagarde 'Le principe de proximité dans le droit international privé contemporain' 196 *Collected Courses of the Hague Academy of International Law* (1986 I), 9-238.

[89] Rules enabling a change of nationality have been liberalized in recent years.

[90] While in the past the unity of nationality within the family was largely guaranteed, this is less often the case today.

[91] Doc Sénat 2-1225/1 (2001–2) at 4.

[92] Refer to D Gutmann *Le sentiment d'identité : étude de droit des personnes et de la famille* (LGDJ Paris 2000) para 468 et seq.

[93] Art 34. [94] Art 46. [95] Art 51. [96] Art 55.

[97] Art 4 also stresses the factual character of the criterion: registration is not necessary to acquire a habitual residence which can be recognized even in the absence of an authorisation of entry or stay in Belgium.

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should be taken notably of the personal or professional circumstances of the person in order to identify durable links with this place or the intention to create such links. A legal person will be considered habitually resident in the country in which it has its principal place of establishment. These definitions were inspired by the 1972 Council of Europe Resolution on the standardization of the legal concepts of domicile and residence[98] which reflects the third objective of the code, an international outlook.

(c) International outlook

The drafters responded to the concerns of the *Conseil d'Etat* as to whether a domestic codification was an opportune way to legislate in the field of private international law[99] by stressing that the national origin did not exclude an international spirit. In particular it was understood that the code would seek to uphold and respect existing rights which promote and facilitate the international movement of persons and goods.[100] This internationalist inspiration is expressed in several ways.

In the field of choice of law the code uses multilateral conflict of law rules, with the court itself determining the content of the foreign law designated by the rule.[101] Belgian mandatory rules remain applicable notwithstanding the designation of a foreign law by the codified choice of law rules, but the Code also provides that foreign mandatory rules may also be given effect in certain circumstances.[102] This new provision is not entirely unknown in Belgium as it is based on Article 7(1) of the 1980 Rome Convention *on the Law applicable to contractual obligations*, but this new rule has a much wider scope.

In the field of jurisdiction, and recognition and enforcement, the international spirit of the codification manifests itself in the admission of international *lis alibi pendens,*[103] as well as in the repeal of Article 15 of the civil code which allowed proceedings to be brought before Belgian courts on the basis of the Belgian nationality of the defendant. In addition, and very importantly, foreign decisions are now recognised *de plano* in Belgium with no prior judicial control or authorization.[104]

More generally the international openness of the code is reinforced by the fact that its drafting was largely influenced by comparative and international law,[105] which certainly constitutes a small step towards international harmony.[106] It is also to be noted that some Conventions are even entirely incorporated into the Code. Article 83 states that the form of wills and revocation thereof are governed by the law applicable by virtue of the 1961 Hague Convention *on the conflict of laws relating to the form of*

[98] Res (72)1, 18 Jan 1972.

[99] Advisory opinion of the *Conseil d'Etat* op cit at 243.

[100] See repudiation and same-sex marriages 514 et seq.

[101] Belgian law will only apply if it was manifestly impossible to identify the content of the foreign law designated by the choice of law rules, Art 15.

[102] Art 20. [103] Art 14. [104] Art 22.

[105] Many provisions of the code have been inspired by provisions of international instruments. Both the Rome Convention of 19 June 1980 and the Brussels I Regulation have marked the code, which may not be surprising as they are in force in Belgium. But, more interestingly, some articles of Hague Conventions (most notably the 1978 Convention on the law applicable to matrimonial property regimes, the 1989 Convention on the Law applicable to the estates of deceased persons, the 1973 Conventions on maintenance obligations or the 1985 Convention on the law applicable to trusts and their recognition) have been by and large copied.

[106] See P Mayer and V Heuzé, *Droit International Privé* (7th edn Montchrestien Paris 2001), at 23.

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testamentary dispositions.[107] Article 98 (1) and Article 99 (2) (5) provide that the law applicable to contractual obligations is determined by the 1980 Rome Convention *on the law applicable to contractual obligations* and that obligations resulting from a road traffic accident are governed by the law applicable by virtue of the 1971 Hague Convention *on the law applicable to traffic accidents*. These references may seem redundant as Article 2 indicates that the code applies without prejudice to the application of international treaties. But as the drafters of the code have indicated, such references have more than a declaratory effect for were these conventions to disappear their provisions would still continue to apply in Belgium.[108]

3. Brief remarks on some notable provisions[109]

(a) Jurisdiction

In the field of jurisdiction the code is largely inspired by the Brussels I Regulation, so that practitioners will be able to apply often identical rules wherever the defendant is domiciled. A number of important innovations are nevertheless worth mentioning.

(i) Lis alibi pendens

Until the entry into force of the new code, Belgium ignored the exception of *lis pendens*, unless the matter fell within the scope of the Brussels I or Brussels II Regulations. If these Regulations were not applicable, the fact that proceedings were pending abroad was not taken into consideration by a Belgian court. As a result two conflicting decisions could coexist and in this case the foreign decision could never be recognised in Belgium if a local decision had also been rendered. The new rule introducing *lis pendens* in Belgian law is enshrined in Article 14. This provision is based on the French solution,[110] which had already inspired both the Swiss[111] and Italian[112] private international law statutes. It enables a Belgian court to stay its proceedings until a foreign court, which had been seised first of the same action,[113] renders its judgment. This form of judicial cooperation is to be welcomed as a sign, albeit limited, of the international openness of the code. This is because the exception of *lis pendens* does not apply automatically: the foreign judgment must be likely to be amenable to recognition in Belgium, and the court seised must 'take account of the requirements of due process' before deciding whether or not to stay its proceedings. In this Article 14 may be distinguished from Article 27 of the Brussels I Regulation. This is perfectly understandable as it may be that the foreign proceedings are based on jurisdictional rules and/or on circumstances that could render the Belgian stay of proceedings inappropriate. The level of discretion introduced might also be viewed as correcting the defects inherent in a strictly chronological approach; if a Belgian court seised second notes that the foreign proceedings were started by a fraudulent 'rush to the courthouse' it will

[107] Art 83 (2) even extends the application of the 1961 Convention to other wills.
[108] Doc Sénat 2-1225/1 (2001–2), at 11.
[109] For a systematic commentary of the provisions of the new code, see H Boularbah et al 'Le nouveau droit international privé belge' *Journal des Tribunaux* March 2005.
[110] Since Civ 1e 26 Nov 1974 *Miniera di Fragne*, *Revue Critique de Droit International Privé* (1975), 491 et seq, note D Holleaux.
[111] Art 9 LDIP.
[112] Art 7 of the 1995 Italian Private International Law Statute.
[113] ie an action between the same parties, with the same object and the same cause.

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have the power to decide not to stay its proceedings. But the same level of discretion is not open to the Belgian court in the opposite situation, ie if the Belgian court is seised first, this is because the jurisdiction has no doctrine similar to that of *forum non conveniens*.

(ii) Exceptional attribution of international jurisdiction

Article 11 introduces a *forum necessitatis* in Belgian private international law; notwithstanding the other provisions of the code Belgian courts will have jurisdiction, exceptionally, when the matter is closely connected to Belgium and foreign proceedings prove impossible or when it would appear unreasonable to demand that the action be brought abroad. This provision, as with many others in the code, has been influenced by the Swiss Private International Law statute.[114] It was not entirely unknown to Belgium where courts had in the past admitted that a Belgian claimant could exceptionally bring proceedings in Belgium in family matters, despite the absence of a link between the dispute and the jurisdiction.[115] This was remarkable, as this solution had been maintained even after the abrogation of Article 14 c.civ.[116] in 1948.[117] Article 11 can be seen as justified by the need to compensate for the inflexibility of the Belgian jurisdiction rules in cases which could lead to a denial of justice. The very limited admission of this *forum necessitatis*, which responds to a real need, has probably enabled the elimination of more controversial exorbitant grounds of jurisdiction.

(b) Choice of Law

(i) Renvoi

The *Code de droit international privé* further departs from traditional Belgian law in that it generally rejects recourse to *renvoi*. Article 16 provides that unless otherwise stated the choice of law provisions of the code refer solely to the substantive rules of the State designated. While *renvoi* is excluded from international conventions[118] it is accepted by a large number of European countries[119] and was included in several recent private international law codifications notably in Germany[120] and Italy.[121] In Belgium lower courts had regularly applied the concept but the position of the *Cour de*

[114] Art 3 LDIP.

[115] See Doc Sénat 2-1225/1 (2001–2), at 35 *ad notam*.

[116] Art 14 c. civ. provided that Belgian courts had jurisdiction if the claimant had a Belgian nationality. It was followed by Art 15 which gave jurisdiction to Belgian courts in cases in which the defendant was a Belgian national. While Art 14 was abrogated in 1948, Art 15 continued to be applied until the 2004 code entered into force.

[117] See, in a divorce case, Brussels 22 May 1985, *Journal des Tribunaux* (1986), 251.

[118] Conventions concluded under the aegis of the Hague Conference often exclude this technique, which is also rejected in the 1980 Rome Convention *on the law applicable to contractual obligations* (Art 15). See however Art 3 (2) of the 1978 Hague Convention *on Celebration and Recognition of the Validity of Marriage* which considered that a marriage shall be celebrated where 'each of the future spouses meets the substantive requirements of the internal law designated by the choice of law rules of the State of celebration'. See also Art 3 of the 1980 Hague Convention *on the Civil Aspects of International Child Abduction*.

[119] See, however, Art 14 of the Swiss Private International Law Statute and s 9(5) of the UK Private International Law Act (Miscellaneous Provisions) 1995.

[120] Art 4(1) EGBGB.

[121] Art 13 of the 1995 Private International Law Statute. Art 13 (2) however comprises a number of exceptions.

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cassation had been criticized as lacking clarity until a decision of 17 October 2002[122] clarified that *renvoi* had to be applied ex officio. The drafters noted however that many problems were associated with the technique.[123] In addition it was 'a little dated'; Belgian statistics showed it generally had the advantage of enabling the judge to apply the law of the forum[124] but the drafters pointed out that it was now easier to ascertain the content of foreign laws so a *renvoi* appeared less justified.[125] Yet this obviously implies that the court has ascertained the content of foreign choice of law rules, which the drafters concurrently denounced as being particularly complex.[126] The drafters further insisted on the idea that accepting this technique was contrary to the objective of transparency. While there is certainly some truth in this argument it is remarkable that the same objection did not prevent the drafters from including a general escape clause in Article 19 which clearly impairs legal certainty.[127]

Arguments linked to the uncertainty of *renvoi* and its potential to lead to the application of unpalatable rules seem in fact to have been more decisive. The new Belgian code has often attempted to give effect to the principle of proximity. In this context admitting *renvoi* would mean giving up this principle. Perhaps more importantly a general admission of *renvoi* could lead courts to apply choice of law rules that are objectionable as reflecting unacceptable values.[128] The importance of this argument is confirmed by the fact that the code exceptionally admits a limited *renvoi* in cases where it supports specific Belgian policies.[129] So despite a clear exclusion of the mechanism of *renvoi* it appears that this instrument may still be used in a number of cases. It is also remarkable that it is also present in some form through Article 19.

(ii) Escape clause

One of the most important innovations of the code is the introduction of a general exception to the application of the codified choice of law rules. Article 19 provides that when it is clear that the matter has a tenuous link with the State designated by a choice of law rule but a very close connection exists with another State, the court seised of the dispute may exceptionally apply the law of the latter. This safety valve, modelled on the Swiss Statute on Private International Law of 1987,[130] is intended to introduce a certain degree of flexibility that judges can rely on in extraordinary cases, when the application of the relevant rules would lead to an undesirable result.[131] The ensuing

[122] Cass 1è 17 Oct 2002, No JC02AH1-1 *RTDF* 2003, 341 note M Fallon.

[123] See P North and J Fawcett *Cheshire and North's Private International Law* (13th edn Butterworths London 1999), 50 et seq.

[124] Doc Sénat 3-27/7 (2003–4), at 38.

[125] ibid.

[126] ibid at 45.

[127] See below at 513.

[128] During the debates in Senate Professor Fallon referred to a case in which a Belgian court had been led to apply a Japanese choice of law rule designating the law of the State of nationality of the husband as governing the matrimonial property regime of the couple, even though it was contrary to the principle of equality between men and women. See Doc Senate 3-27/7 (2003–4), at 44.

[129] A *renvoi* to Belgian law is admitted in the field of capacity (Art 38 (1) (2)) so that one may achieve the specific goal of extending the protection of foreign incapable adults. This solution was introduced by the Senate. A *renvoi* to the law of habitual residence of the deceased is accepted under Art 78 (2) (2) in the area of succession to immovable property. This enables the whole succession to be governed by the same law. Equally, a limited renvoi is also open by Art 110 (2). If the law of the State in which a legal person has its main establishment designates the law of the State under which the legal person was created, then this law will apply.

[130] Art 15 LDIP.

[131] Doc Sénat 3-27/7 (2003–4) at 48.

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risk of legal uncertainty, a major flaw in the view of continental jurists,[132] has been denounced by some,[133] including the *Conseil d'Etat*.[134] It cannot be contended that the risk could appear as particularly large; in the absence of any qualifications, and given its place in chapter I (General provisions), Article 19 might be used as a corrective tool in respect of virtually any choice of law rule. In this context it seems difficult to reconcile this choice with the objective of transparency affirmed by the drafters. However, the latter have attempted to frame the escape clause very narrowly. According to Article 19 (2), the escape clause may not apply where the parties have chosen the applicable law, or when the choice of law rule is materially coloured (in other words, when the designation of the applicable law is based on its content).[135] In addition Article 19 (1) is expressed in very restrictive terms; the exception clause can only be used 'by way of exception', if it 'manifestly' appears that the matter has only a 'very slight' connection with the State whose law was designated but a 'very close' connection to another State. Taking account of the comments made by the *Conseil d'Etat*, the drafters have also introduced in Article 19 (1) a further sub-paragraph aimed at guiding courts; when applying Article 19 (1) (1), 'special consideration is given to the need of predictability of the applicable law and to the circumstance that the relevant legal relationship was validly established in accordance with the private international law of the State with which the legal relationship was connected when it was created'.[136] The fact that Article 19 has been formulated very carefully may not entirely solve the issue of uncertainty that it brings, particularly in cases in which Article 19 would be combined with special exception clauses.[137] Article 67 provides one example of such a special escape clause; while paragraphs (1) and (2) provide that the law applicable to the conditions for adoption is that of the State of nationality of the adopter or adopters, or absent a common nationality, the law of the State of their habitual residence (or Belgian law if the adopters do not reside in the same country), paragraph (3) indicates that the *lex fori* is applicable if the court considers the application of the foreign law to be harmful to the best interests of the adoptee and the adopter(s) has/have a close connection with Belgium. Could Article 19 also be applied to adoption cases and lead to the application of yet another law? Probably not; how could one justify the application of the law of the State with which the matter has very close connections to cases in which it would harm the best interests of the adoptee? Special escape clauses which, as in Article 67, pursue specific objectives can probably be seen as linking the general designation of the law to its content and should therefore not be affected by the general exception clause of Article 19.

[132] See above at 500.

[133] See, eg, the exchange following a presentation of the draft Belgian private international law code to the French private international law committee, *Travaux du Comité français de droit international privé* op cit 158–9.

[134] Advisory opinion of the *Conseil d'Etat* op cit at 272.

[135] As in Art 35 (Law applicable to parental authority, guardianship and protection of incapable persons): if the law of the place of habitual residence does not provide the sufficient protection for the person or the assets, the protection will be governed by the law of the person's State of nationality. The use of alternative connecting factors in this article has been made because it responded to a specific goal of the legislator. Applying Art 19 in this situation would disregard this policy choice.

[136] This sub-paragraph shows that the escape clause may be used to validate a legal relationship in the same way as the mechanism of *renvoi* might have. See Doc Sénat 3-27/7 (2003–4) at 49.

[137] M Verwilghen op cit at 138.

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(c) *Family law*

(i) Same-sex marriage; cohabitation

This domain of family law has profoundly changed and can now be said to be relatively 'progressive'.[138]

With regard to the law applicable to marriage the drafters of the code had originally maintained the traditional rule which provided that the conditions regarding the material validity of a marriage are governed, for each spouse, by the law of the State of their nationality at the time of the celebration. The use of nationality as a connecting factor could appear to be in line with the international spirit of codification; not only foreign individuals' attachment to the law of their State of origin was taken into consideration but this classical rule also ensured that limping marriages were limited, in that marriages validly celebrated in the spouses' State of origin would be recognized in Belgium and, reciprocally, marriages celebrated in Belgium could be recognized in the spouses' home countries. Even though a similar rule exists in most European civil law countries—with the notable exception of Switzerland, which uses domicile as a connecting factor, or Luxembourg and the Netherlands, which have ratified the 1978 Hague Convention *on Celebration and Recognition of the Validity of Marriages*—the traditional rule was the object of much controversy in the Belgian Sénat. Indeed while the continuing reference to the criterion of nationality had the important advantage of avoiding cases of 'matrimonial tourism', it was felt that it was inappropriate being too restrictive in the context of same-sex marriages. Under this rule a homosexual marriage could not be celebrated or recognized in Belgium unless the national law(s) of both spouses allowed it.[139] This seemed contrary to the intentions of the drafters of the law of 13 February 2003 opening marriage to persons of the same sex.[140] Article 46 was therefore altered on the basis of an amendment proposed by the Government. According to the first paragraph the connecting element remains the spouses' nationality but an important exception is added in the second paragraph of this article; if a provision of the national law of the spouses (or one of them) prohibits homosexual marriages, then this provision will not be applied provided one of the spouses is a national of a State which allows same-sex marriages *or* has his/her habitual residence in such a State. One might wonder why the inclusion of this exception in Article 46 was necessary given that chapter I of the code contains a general public policy exception (Article 21); indeed provisions prohibiting same-sex marriages could now be deemed to be 'manifestly incompatible with (Belgian) public policy'. However, a closer look at this provision reveals that the required incompatibility will very much depend on the closeness of the connection of the situation with the Belgian legal order.[141] It is unclear

[138] Doc Chambre 51-1078/5 (2003–4) at 6.

[139] A Fiorini 'New Belgian Law on Same-sex Marriage and its PIL Implications' (2003) 52 ICLQ at 1047. See however the terms of the *Circulaire du 23 janvier 2004 remplaçant la circulaire du 8 mai 2003 relative à la loi du 13 février 2003 ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil*, *Moniteur Belge* 27 Jan 2004 ed 2, 4828–31, which states that provisions in foreign laws prohibiting same-sex marriage should not be applied as discriminatory and contrary to Belgian public policy.

[140] *Loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du code civil* , *Moniteur Belge* 28 Feb 2003 ed 3, 9880–3.

[141] Art 21 (2). This innovation introduces in Belgian law a variation of the intensity of the reaction against unacceptable foreign provisions based on the proximity of the situation and the forum, which is similar to that first identified by German authors at the end of the 19th century

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whether the fact that just one of the spouses has his/her habitual residence in Belgium would justify the refusal to apply the rule prohibiting same-sex marriages to couples not otherwise connected to that country under Article 21.[142] But it is difficult to admit that Article 21 could lead to the refusal to apply a foreign rule prohibiting same-sex marriages were neither of the spouses Belgian nationals or habitually resident in Belgium, whereas Article 46 (2) does, provided one of the spouses is a national of, or habitually resident in, a State in which same-sex marriages are allowed. It is obvious that the marriage of two men or women one of whom is Dutch or habitually resident in the Netherlands could be celebrated[143] or at least recognised in Belgium.[144] The Netherlands, like Belgium, has opened marriage to same-sex couples but the scope of Article 46 also extends to marriage-like institutions. This is not surprising as in the past the rule applicable to marriage was always deemed to apply to a relatively large category comprising types of marriages unknown in Belgian law such as polygamous,[145] retroactive[146] or posthumous marriages.[147] For the drafters therefore Article 46 will apply equally to Nordic partnerships.[148]

Other forms of cohabitation are however governed by Articles 58–60. The dividing line between marriages and marriage-like institutions on one hand and relationships of cohabitation ('relations de vie commune') on the other might not always be easy to identify. The latter are defined by Article 58 as situations of cohabitation that require registration with a public authority and that do not create a bond equivalent to marriage. This idea of an 'equivalent bond to marriage' will of course be appreciated under the law of the country of registration, but what will be decisive? The label of this institution will obviously not be considered important.[149] But will the similarity be appreciated on the basis of the ease with which the relationship can be dissolved, or will the similarity of *all* the effects of such partnerships as compared with those of marriages matter? Will the fact that the partnership has *some* impact on the personal status of the partners be considered sufficient?[150] Given the sheer variety of these partnerships in comparative law it makes little doubt that the respective scope of Articles 46 and 60

(*Inlandsbeziehung*). See F Kahn 'Die Lehre vom Ordre Public (Prohibitivgesetze)', 39 *Jherings Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* (1898), 1–112.

[142] But since the determination of the incompatibility also depends on the 'significance of the consequences produced by the application of the foreign law', it might have been the case.

[143] Provided the conditions of Art 44 are met: one of the spouses needs to be Belgian, domiciled in Belgium under Art 4 or habitually resident in Belgium for over three months.

[144] It is to be noted that Art 127 provides that Art 46 (2) applies to any marriage concluded on or after 1 June 2003 (ie when the law opening marriage to same-sex couples entered into force). Art 126(2) also provides that a marriage between persons of the same sex may produce effects in Belgium as of 1 June 2003 provided the marriage satisfies the requirements of the *Code de droit international privé*.

[145] eg Trib Brussels 15 Jan 1992, No JI921F1-1, *Pasicrisie Belge* 1992 III 42.

[146] eg Trib Brussels 20 Nov 1990, No JB02299-1; see MC Foblets 'Quelques réflexions à propos de la regularization retroactive de marriages solo consensu' *Revue du droit des étrangers* (1990) 354.

[147] Cass 1è 2 Apr 1981, No JC81422-1, *Pasicrisie Belge* 1981 I 835.

[148] Doc Sénat 3-27/7 (2003–4), at 96.

[149] ibid at 97.

[150] In the mind of the drafters, the function of the foreign legal construct will be decisive; in particular the fact that an obligation of fidelity or an impediment to contract a subsequent marriage are attached to a foreign 'relationship of cohabitation' would lead to a characterization as marriage, cf Doc Sénat 2-1225/1 (2001–2), at 92. This is confirmed by the circular of 23 Sept 2004 ('*Circulaire relative aux aspects de la loi du 16 juillet 2004 portant le code de droit international privé concernant le statut personnel*'), *Moniteur Belge* 28 Sept 2004 ed 2, No M5 at

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will raise difficulties in practice.[151] Yet it is particularly important to find the delineation. While the same law would apply to both the validity and the effects of relationships of cohabitation,[152] a different law will often be applicable to the validity[153] and the effects of marriage and marriage-like institutions.[154] Failing to characterise the foreign partnership properly could therefore lead to numerous cases of limping marriages/partnerships.

(ii) Repudiation

Article 57, which deals with foreign divorces based on the sole will of the husband (*repudiations*), was also the object of long debates in the Sénat, primarily of a political nature. While the *Conseil d'Etat* had been very critical of this form of separation, the drafters of the code have followed the tendency shown by Belgian courts to evaluate *repudiations* on a case-by-case basis in the light of all the relevant circumstances. This by no means implies that the *Code de droit international privé* allows a liberal recognition for these forms of unequal divorces. Article 57 makes it clear that while Belgium objects in principle to *repudiations*—whether in the form of *talaq* or *khula*—as contrary to the principle of equality between men and women—they *may* exceptionally be recognized. It was thought that an absolute refusal to grant recognition could possibly lead to unjust results if a Moslem woman, national of, and at the relevant time residing in, an Islamic State could not invoke, for example in support of a petition for social security benefits, a *repudiation* which had taken place abroad without fraud and ended a marriage that had no link with Belgium. So under Article 57 (2) recognition may be granted if the foreign repudiation meets a series of cumulative requirements: the separation deed has been controlled, approved and sanctioned by a court in the State of origin;[155] none of the spouses was, at the time of the judicial control, a national of a country which does not allow such a form of divorce;[156] neither of the spouses was, at

69607. However, the situation of the German *eingetragene Lebenspartnerschaft* shows how complex this appreciation may be. The 2001 *Gesetz über die Eigetragene Lebenspartnerschaft*, which was modified by the *Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts* (BGBl 2004 p 3396, entered into force on 1 Jan 2005) and the *Gesetz zur Änderung des Ehe- und Lebenspartnerschaftsnamensrechts* (accepted by the lower house of the German Parliament on 26 Nov 2004, BR-Drucks. 928/04) has created a construct which is not easy to characterize; it is very close to the Scandinavian partnerships (as the drafters of the Belgian code recognized in Doc Sénat 3-27/7 (2003–4), at 97), which would seem to justify the application of Art 46, and it does have a number of implications for the personal status of the partners; these may decide to bear a common name; their partnership also creates obligations of solidarity, mutual care and support; a partner is even given minor custody rights with respect to children of his/her partner, but the *Lebenspartnerschaft* does not create any impediment to contract a subsequent marriage, which the 2004 circular interprets as a sign that it should fall within the scope of Arts 58–60.

[151] In para No M1 of her circular of 23 Sept 2004, op cit at 69605-69606, the Belgian Justice Minister indicated that her services were trying to ascertain if some forms of registered partnership currently existed that could be assimilated to marriages. An additional circular clarifying this point is to be circulated 'as soon as possible'.

[152] Art 60.

[153] Governed by the national law of the spouses (Art 46).

[154] In principle governed by the law of the State in which the couple has its common habitual residence (Art 48).

[155] Compare the wider notion of 'judicial or other proceedings' laid down in Part II of the Family Law Act 1986.

[156] In the event of a bi-nationality, Art 3 (2) (1) applies: if one of the spouses possesses the Belgian and a foreign nationality, he/she will be considered a Belgian national.

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the time of the judicial control, habitually resident in a country which prohibited such a form of divorce; the woman had unambiguously and without coercion accepted the dissolution of the matrimonial bond and none of the grounds for refusal of recognition of foreign judgments set forth in Article 25 applied. In drafting Article 57 the legislator has thus opted for a functional approach rather similar to that which also inspired the public policy exception enshrined in Article 21, but one which tightens the existing judicial attitude.

(d) The extension of opinio juris *in family law*

The 2004 code innovates in that it introduces in divorce and succession cases the possibility of a *professio juris*, which was until then only accepted in the area of matrimonial property regimes (and, of course, contracts).

In the area of divorce Article 55 (1) is a three-step provision that designates the law of the State of the common habitual residence of the parties or, absent a common residence, that of their common nationality or, absent common nationality, the Belgian law.[157] Following the example of the Dutch law, the private international law code also allows the parties to choose the law applicable to their divorce. In essence this enables the parties to change the order of the steps of this Kegel's ladder for they may only designate the law of their common nationality or Belgian law. The freedom of the parties is further limited in that they must express their choice at the time the divorce proceedings are initiated. The introduction of this narrow *opinio juris* may enable the parties to refer to the law of their country of origin, which may be important if they wish to return to their home State and/or wish to guarantee that their divorce be recognised in countries which consider that divorces shall be governed by the law of common nationality of the parties and control the application of the applicable law at the recognition stage.[158] This *opinio juris* is a way of counter-balancing the effects of the use of habitual residence as a connecting factor.[159] But of course Belgian judges would refuse to apply foreign laws contrary to the principle of equality between men and women on the basis of the public policy exception (Art 21), particularly if the parties were habitually resident in Belgium.

In the field of succession, the *Code de droit international privé* also opens a limited form of *opinio juris*. While this is new in Belgium this is already admitted in a number of European countries[160] and was also provided for by the 1989 Hague Convention *on the Law applicable to Succession to the Estates of Deceased Persons*. While the drafters have certainly been inspired by this Convention they have opted for a more limited form of choice.[161] Article 79 provides that only the law of the State of nationality or of the State of habitual residence of the person—whether at the time of the designation or at the time of death—may be designated. In addition the chosen law will

[157] A similar rule applies to the effects of international marriages (Art 48) and to international matrimonial property regimes (Art 51).

[158] Doc Sénat 2-1225/1 (2001–2), at 86.

[159] See above at 509.

[160] eg Art 46 of the Italian Private International Law Statute of 1995 or Art 90 of the Swiss Private International Law Statute of 1987.

[161] For a comparison between the 1989 Hague Convention and the new Belgian code, see F. Bouckaert, 'Professio Juris dans le Code de Droit international Privé Belge', *DNotl* (2004) 417–29.

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apply to the entire estate[162] and the chosen law must not result in depriving heirs of the indefeasible interests that they have under the law applicable in the absence of *opinio juris*. Finally, the choice of law must be made in the form of a valid will.

Conclusion

The Belgian *Code de droit international privé* can certainly be seen as displaying all the key attributes of a classical code and, as such, should be promised a similar destiny. Its aspiration to transparency and permanency however risk being compromised more quickly than that of the founding codes; the continuing and relatively rapid development of Community private international codifications will regularly and increasingly interfere with the new code. In the field of jurisdiction and recognition and enforcement a number of Regulations already exist which do not substitute themselves for domestic sets of rules, but create a duality of regimes. This might generate difficulties for practitioners but will not as such adversely affect the new Belgian private international law system or render it without object. However, universal EC instruments, several of which are planned, will progressively render domestic choice of law obsolete in the areas falling within their scope. These sectoral and often complex instruments which pursue Community objectives essentially different from those of the code, will eventually and inevitably disrupt the substantive and purposive consistency of this major Belgian work, which will have to be partially but repeatedly amended as a consequence. This is paradoxical because it was the absence of coherence and the ensuing lack of clarity and predictability which led to the code being drafted. If a time ever comes when a European private international law group pleads in favour of the establishment of a Community private international law code in order to re-instil some legal certainty in this area, it is hoped that a methodology similar to that used in Belgium between 1995 and 2004 will be followed.

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[162] In Belgium, traditionally as well as under the new code, the law of the last habitual residence of the deceased only applies to succession of moveables while immovables are governed by the *lex rei sitae*. While Belgian practitioners were very much attached to this traditional two-tier rule, the possible disadvantages of the absence of unity were recognized. This partly explains why limited forms of *renvoi* and *opinio juris* were accepted in this field.

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https://doi.org/10.1093/iclq/lei015 Published online by Cambridge University Press

https://doi.org/10.1093/iclq/lei015 Published online by Cambridge University Press