

European Family Law:

Faster Divorce and Foreign Law

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Executive Summary

We make the following recommendations in the interests of encouraging international family stability, supporting international marriages, reducing antagonism in the process of family breakdown, maintaining the UK traditions of justice, fairness and support for family life, and fundamentally giving every opportunity for reconciliation and amicable resolution of matrimonial disputes. In summary:

- The principle of first to issue, *lis pendens*, in European Family Law directly encourages international couples to rush to the divorce court to gain personal and financial advantage over the other spouse. It must be removed at the very earliest opportunity; it is thoroughly anti-family, anti-settlement and contrary to the whole ethos of family law and family life.
- A number of European countries will not necessarily apply their own law in certain circumstances, but the family law of the country with which the couple in matrimonial proceedings have a close connection (known as applicable law). England and Wales only ever apply English family law, built up over centuries to create a sense of fairness and justice in the English and Welsh courts and for English and Welsh settlements¹. Brussels wants to impose applicable law on the UK. This would create much injustice and unfairness, increase costs of getting a divorce settlement and decrease prospects of settlements.
- The country with the closest connection to an international couple should be able to deal with their case and then apply its local law to their matrimonial proceedings.
- Brussels should go more slowly in its programme of European family law reform to take account of the very different traditions of family life and family law around Europe. Some seemingly minor changes in family law can have dramatic impact on relationships, families and community life and need much care and reflection before implementation.

¹ The Courts of Northern Ireland also apply only their own law. There are certain narrow circumstances under which the Scottish Civil Courts may apply the law of another country.

Introduction

The background: international family law

There are around 2.2 million marriages in the European Union every year, around 350,000 of which involve an international couple. With divorce rates comparatively high within the European Union, especially in the United Kingdom itself, it follows that there are a large number of divorces with an international element taking place within the European Union every year, a proportion of which will involve couples that live or have lived in the United Kingdom, or where one or both parties living or working abroad has UK nationality. The rising number of international marriages over the last twenty years, mainly as a result of enhanced travel and employment opportunities, and the potential for the subsequent breakdown of these marriages, has led to new world-wide challenges in the family law arena. The laws and courts of individual states are not always capable of dealing with the complexities of this new found mobility, and as such a body of international family law is growing up to meet these challenges.

The issues identified in this paper now also affect UK civil partnerships and our comments equally relate.

The lack of representation for European international families

One of the major difficulties for international families is that they have no obvious representation, apart from individual lawyers at the micro-level and the European Union at the macro-level. It is all too easy for national governments to put national families and national family life first. Often these international families have no suffrage where they are then living and working. Yet they are many and increasing in number.

Many are living in international communities, working in international market places, trading in international shopping malls with international brands, with their children attending international schools and taking internationally recognised exams and preferring to use international currencies. However, if their relationships break down, in their matrimonial proceedings they face the combined problems of:

- Directly conflicting laws on outcomes
- Directly conflicting laws on jurisdictions, certainly outside Europe

- Directly conflicting (and/or very unsatisfactory) laws on the temporary or permanent halting of proceedings (stays)
- Directly conflicting laws on divorce
- Directly conflicting laws on child support
- Directly conflicting laws on the financial outcome
- Directly conflicting laws on working out the best arrangements for children
- Laws which favour the first party to break up the marriage
- Laws which favour the wealthy
- Major difficulties in the international enforcement of court orders.

International families have no constituency, no lobby group, no uniformity and often very little interest beyond their own family affairs, yet they now represent a significant percentage of the world population, at least in the developed world and certainly in Europe. Considerable work is needed to improve the situation for international families and their children. Indeed there are now millions of international children within Europe, crossing international borders with their families as parents travel for work, for financial betterment, to live in the home country of the other parent, for lifestyle reasons and simply because the opportunity allows international travel.

When family relationships break down, international children particularly suffer. There are issues of international child abduction, permanent child relocation from one country to another at the request of one parent, leaving the other parent behind and absent geographically from the child, enforcement of contact orders when parents are in different countries, international child support and other matters directly affecting the welfare of the children of international families. This briefing paper does not cover these issues, but they are as important as its focus on matters of divorce, forum and applicable law.

The development of international family law

This body of law has developed in a haphazard way, but four sources of it may be identified. These are:

1. The Council of Europe
2. The Hague Conference
3. The United Nations
4. The European Union.

The Council of Europe has developed a number of significant conventions in the family law field in the past, and remains important in the development of international family law. The Hague Conference, originally created in 1893, has sought to develop a code of international family law by developing conventions

in the areas of obvious need concerning family life. To date it has had incredible success in the areas of international child abduction and international child adoption. The United Nations Convention on the Rights of the Child has been of great significance in the context of both internal and international family law. In contrast to these other sources of international family law, the European Union has made its contribution to this body of law in more recent times.

The first significant European Family Law is to be found in the Regulation that arose from The Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters 1998, and signed by the United Kingdom on 28 May 1998. This Convention, which became part of domestic law on 1 March 2001, sets out rules for determining jurisdiction in matrimonial disputes in all the countries of the European Union, including the accession states that joined in 2004 and 2007, except Denmark. It was subsequently repealed and superseded in November 2003 by Council Regulation (EC) No 2201/2003, Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and Matters of Parental Responsibility (referred to in this paper as 'Brussels II'), which came into force on 1 March 2005.

Perhaps more than any other area of social life and community life, family life is deeply rooted in the social mores, traditions and beliefs of communities, including sovereign states. It is an aspect which requires considerable sensitivity and care. There are dramatic differences in family life and expectations from family life across Europe, however close the commercial and business ties may be. Two neighbouring countries, perhaps with elements of a shared history, may nevertheless have very different perspectives on the priorities and concerns for family life including justice and fairness in family breakdown. Of the very many examples which could be given, one is the difference in roles and respect for men and women in family relationships, another is the importance of independence post-separation and how this may be balanced with the impact of recognising and supporting marital commitments and sacrifices made within marriage.

The deeply-rooted nature of family life within communities and Member States is a primary difficulty for the European Union in this area of European community life. A fair and just way of dealing with matrimonial matters across Europe must be found for these international families, but which does not trespass upon our roots, heritage and valuable traditions.

This is an area of law and national life where some seemingly minor changes and reforms can have dramatic social effects on changed behaviours and changed relationships. The European Union may be one of the only macro-organisations able to look after the interests of international families effectively; this makes the ongoing European Union Family Law Programme absolutely crucial. However it cannot go too fast without first considering the consequences of reform.

EU family law reforms: an introduction and progress report

Brussels II applies to proceedings relating to divorce, legal separation and marriage annulment and also to proceedings relating to parental responsibility for children. The underlying purpose of the EU is to move towards harmonisation of the laws of Member States in matrimonial cases.

It is right to acknowledge that excellent work has been undertaken as part of the EU Family Law Programme so far, and that some good progress has been made towards the goal of harmonisation of the laws of Member States in matrimonial cases. Mutual recognition of the status of domestic relationships between Member States has made good progress, making life easier for international families across Europe. Cross-border judicial and state co-operation in issues regarding children has increased as a result of Brussels II, building on the excellent work of the Hague Conference.

Brussels II made great strides in providing for the automatic recognition of contact and return orders for children and there is now Europe-wide enforcement of maintenance orders. As far as procedure is concerned, the European Union is making considerable progress with service abroad, transmission of legal aid, taking evidence abroad, video conferencing, translations and other areas. Again, this is helping the international family considerably by reducing costs, uncertainties and delays and unnecessary procedural hurdles.

As far as Alternative Dispute Resolution (ADR) is concerned (which tries to bring about a resolution of more cases without final court hearings), the recent EU Mediation Directive is to be thoroughly supported, coupled with developments such as the French Ministry of Justice initiative on cross border mediation, known as GEMME.

Importantly, in respect of divorce itself, Brussels II laid down common principles for determining which countries across Europe are able to hear a particular case (known as jurisdiction). There are a number of grounds which can be relied on, but the decision is primarily based on where the couple (or one spouse) live (residence) and where they (or one spouse) live most of the time (habitual residence).

The United Kingdom has been fully supportive of many of these initiatives. Lord Justice Thorpe is the UK Family Law International Liaison Judge and has worked tirelessly for international families across Europe from a UK perspective. So in these and a number of other areas, very considerable benefit has accrued to the population of the European Union and especially to European families. There are some excellent foundations already laid.

Areas of concern

There are, however, two major areas of concern for those who place a priority on saving those marriages that can be saved and ensuring predictability of outcome in proceedings ancillary to divorce. One area of concern arises from

Brussels II and the other is within a proposed draft Regulation known as Rome III. In these particular respects, there is the distinct danger that the European Union is creating laws that are anti-family and which will militate against the early settlement of cases. Rectification and resolution of these areas are fundamental for the further consensual construction of a European family law system on the foundations already well laid. If not satisfactorily addressed, these issues are likely to cause real difficulties in the future for international families. They are:

- The 'first to issue' principle in Brussels II, *lis pendens*, and
- The concept of applicable law imposed on all local law jurisdictions.

First to Issue (*Lis pendens*)

After Brussels II, many international families across Europe still find that two or sometimes more countries may be able to deal with their family's affairs. The direct aim of Brussels II was to prevent complex and costly arguments over which country's courts should ultimately deal with a case when more than one country was able to do so by law (known as forum disputes). Due to financial outcomes being so dramatically different in Member States across Europe, there were many of these disputes taking place before Brussels II, with each spouse wishing to have the divorce case heard in the country that would most advantage them. The EU solution to this problem in Brussels II was that whoever issued the proceedings first gained priority and the proceedings took place in that country (known as *lis pendens*). Article 19 of Brussels II provides as follows:

1. *When proceedings relating to divorce, legal separation or annulment between the same parties are brought before courts of different Member States, the court second seised shall, of its own motion, stay its proceedings until such time as the jurisdiction of the court first seised is established.*
3. *Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court...*

These provisions mean that if divorce proceedings are issued in two Member States, the court first validly receiving papers (or first seised) has *exclusive* jurisdiction; the court of the second Member State must decline jurisdiction. This is a cast-iron rule. Therefore, in order to secure their advantageous jurisdiction of choice, a spouse must issue first. This race may be won by a matter of minutes. Moreover, once a court has validly received papers in proceedings, there is no provision to decline dealing with the case on the basis that another country, perhaps with a closer connection to the family, is a more appropriate place for the case to be heard. Of crucial importance is the fact that the court that hears the case will apply its own rules to the divorce and to any 'ancillary' matters. This in turn will determine the financial outcomes.

Variation in financial outcomes across Europe

The variations in financial outcomes for the same case decided under the laws of different European countries are extensive. A few examples of the many that could be given are as follows:

- How vigorous or otherwise a country is in its requirements of financial disclosure. English law for example, expects disclosure of assets worldwide and has vigorous enforcement powers. In contrast some countries rely on self-disclosure (relying on what a person says is their financial position) and require minimal corroborative evidence and some routinely ignore assets held abroad. Clearly financial outcomes can only be as good as the financial disclosure upon which they are based.
- Speed of resolution of proceedings. Some countries are very slow in their proceedings, with litigation lasting many years, perhaps without any financial support provided in the meantime; whereas some countries are relatively fast.
- Whether or not the state provides financial assistance for legal costs e.g. legal aid.
- The extent to which redistributions of marital wealth are made to produce a fair outcome. Some countries will barely re-arrange the way assets were held during the marriage, whereas others will make large redistributions.
- The way pre-nuptial agreements are treated. Some countries across Europe will consider themselves bound by agreements reached by the spouses, perhaps many years previously and without independent legal advice and disclosure, even when there have been dramatic changes in the lives of the spouses during the marriage. Other countries will ignore such agreements if they are not considered to be fair.
- Spousal maintenance after divorce. Some countries will only allow spousal maintenance for at most a couple of years after the divorce, after which the financially weaker spouse is expected to be self-supporting or dependent upon welfare benefits. In contrast some countries allow long-term spousal maintenance especially in circumstances where a spouse has made financial commitments and prejudice to their own career for the marriage, child raising and home support.

There are many other examples. In short, the financial outcomes and the ancillary disclosure and procedures across Europe are still dramatically different. Very little has been done by the European Union to create harmonisation in this area. It therefore means that there are dramatic reasons to try to have the proceedings in the country more advantageous to one spouse. Forum shopping, which is taking advice as to which is the most advantageous country, is as rampant and financially important as ever.

Consequentially, after the introduction of Brussels II and the principle of priority jurisdiction to the first to issue, all that is needed to succeed in securing the most advantageous country is to issue the proceedings before the other spouse. As long as that country has jurisdiction it will deal with the financial matters. One party gains significantly, the other is very much the loser. Whilst *lis pendens* or 'first to issue' produces certainty and eradicates forum disputes, this is not a good way to deal with matters within families across Europe.

Every opportunity must be taken to save saveable marriages and other relationships, particularly where children are involved and it is therefore of the utmost importance that the operation of the law does not defeat this paramount objective. The principle of *lis pendens* or 'first to issue' to proceedings in two different Member States as an absolute rule, with no discretion, appears to do exactly this. It directly encourages the practice of racing to issue into international family law practice. Despite clearly achieving the objective of removing forum disputes, *lis pendens* operates unfairly and militates directly against re-conciliation in matrimonial proceedings.

It is worth recording the views of English judges before Brussels II about the actions now forced upon spouses by *lis pendens*. Judges publicly deprecated the party who broke first from the marriage and unilaterally issued proceedings without any attempt to negotiate or resolve. They publicly turned their backs on being influenced by which party is the first to issue. In *Mytton* (1977) 7 Fam. Law 244 the dismissal of English proceedings were refused, although Swiss proceedings were earlier in time, because the wife and children with the agreement of the husband had made their home in England. In *S v S* (Divorce: Staying Proceedings) (1997) 2 FLR 100.112 Wilson J made clear that in this jurisdiction at least not much turns on being first to issue. '*It would be indeed unfortunate to encourage litigants to think that they can win an advantage by racing.*' Thorpe J in *M v M* (1994) 1 FLR 399.403G condemned stealth and deceit in relation to the issue of proceedings in the other jurisdiction. This is entirely in keeping with the Resolution/ SFLA Code of Practice and the Law Society Family Law Protocol and accepted family law good practice. But it was demolished overnight within Europe by Brussels II.

Disadvantages of first to issue

Brussels II *lis pendens* is certainly simple to apply and immediately ends the substantial costs of discretionary forum litigation; this clearly has great appeal for law reformers. But it has had major consequences in practice, for example:

- No one should mediate (or propose or engage in any other Alternative Dispute Resolution or ADR) until they have first issued to secure jurisdiction. This then greatly reduces the chances for successful mediation or other ADR as one party knows the other has taken unilateral and tactical steps to secure their interests in litigation. Many mediators give little prospect of successful outcomes in mediation after such an ominous and acrimonious start. It is good practice for lawyers never to propose mediation or any other ADR in a potential Brussels II forum dispute without securing jurisdiction by issuing first. This is thoroughly contrary to the intentions of the EU Mediation Directive and the preferred style of approach of lawyers in many Member States. It works directly against amicable out of court settlements.

- Even more significantly, this encouragement to issue quickly in the most advantageous country seriously discourages one party from suggesting relationship counselling – by doing so this admits the marriage is in difficulties which might prompt and then precipitate the other spouse to issue first to their significant advantage. After having (tactically) issued first, this again greatly reduces the chance for successful counselling. Brussels II *lis pendens* directly encourages and endorses the party who is making the break in the marriage. It curtails opportunities to overcome relationship difficulties and save saveable marriages. This is totally contrary to all good family law policy which must be to do everything possible to encourage reconciliation and save saveable marriages.
- Agreements about jurisdiction, choice of law and location for any proceedings are irrelevant under Brussels II to gain priority of jurisdiction. Issuing first in time trumps any prior agreement. So pre-marriage agreements with jurisdiction clauses, choice of law regimes, marital agreements, and even post-separation agreements about preferred jurisdiction count for nothing. Private ordering in family matters is highly encouraged and favoured by many spouses. Yet Brussels II simply ignores such agreements. Entering into a separation agreement is highly dangerous if another country's courts might later deal with the case; it is good practice for lawyers to issue for divorce immediately instead. Brussels II does not even allow courts to transfer divorce cases abroad consensually.
- Finally, obtaining advice as to which is the best jurisdiction requires good lawyer contacts in other countries and an ability to pay for that advice, and invariably pay upfront and quickly. In short Brussels II favours the wealthier spouse with easy access to specialist – often expensive – lawyers with international experience. The less wealthy spouse suffers. The spouse requiring legal aid or other public funding is highly vulnerable.

So *lis pendens* favours the wealthy, the one initiating the relationship break up and the one who is not prepared to consider mediation and counselling. It is difficult to conceive of a more anti-family concept, or one that is more out of step with the whole global ethos of family law practice and pro-marriage policies. Premature or unilateral issuing of divorce petitions, especially when perceived as being for tactical financial reasons, invariably creates huge ill will which casts a shadow over all remaining resolution of issues. It destroys prospects of reconciliation. It hampers co-parenting. It negates meaningful mediation or helpful dialogue. Distrust between the parties is inevitable in all that follows. The court first seised may be far from the country with the most connection with the parties or the one previously agreed by the parties as their chosen country or law. The court first seised may be very slow, may have inadequate disclosure powers and other causes for concern about outcome. Brussels II is certainty and avoidance of litigation against opportunities for fairness and justice, for reconciliation and conciliation. Yet local and national

politicians have been powerless. Attempts by family law professionals since March 2001 to alleviate some of the worse elements of *lis pendens* have come to nothing.

It should not have been introduced without first reforming and harmonising across Europe the different financial outcomes and financial disclosure and other procedures on relationship breakdown. Until such reform arrives, lawyers and clients have each to work to their own advantage with this law, however much it offends the whole basis on which the remainder of family law work is undertaken.

Contrast with the rest of the world

Brussels II 'first in time' applies only to Europe. It is unfortunate that one set of provisions, encouraging precipitous, unilateral action by one spouse, fares well in Europe but is specifically deprecated in cases outside Europe! No other group of countries applies this first in time policy. Across the US there are many disputes between Federal States yet they have not resorted to this policy and invariably rely on various forms of ascertaining the closer connection.

Summary of *lis pendens*

Brussels II has given a Europe-wide identical jurisdiction basis for divorce and abolished any need for lengthy and expensive forum disputes. However, a comprehensive jurisdiction system and mandatory stay laws can only work fairly when there is also a comprehensive, uniform, financial provision law on divorce with uniform procedures, disclosure obligations and court powers. One without the other creates certainty of forum but also injustice and unfairness on financial outcomes.

Forum races under Brussels II have been won and lost by one party issuing proceedings in a matter of minutes before the other party in another jurisdiction. Where financial outcomes can differ so dramatically across Europe, even in average income, average capital cases, spouses will continue to race to the finish line of issuing the divorce petition first.

However, a resolution of this situation by a return to unfettered discretion of forum disputes is not the answer across Europe. There is a better way, which has found favour across many family law professions in Europe and which also resolves the issue of applicable law. This solution is referred to below, after addressing the second area of concern, that of applicable law.

Applicable Law

In the Family Courts of England and Wales, the law that is applied is English family law.² This has always been the case. A number of other countries in the European Union also always apply only their own local law. However, when dealing with family law cases of a couple from another country, the courts of some other European countries will in certain circumstances apply the law of that other country. They have particular rules to determine in which circumstances and when they would do so. These rules are known as conflicts of law. More generally the policy of applying the law of another country is known as applicable law. Some countries allow couples to specify the applicable law in marital agreements. Austria, France, Germany, The Netherlands, Greece, Italy, Portugal and Spain apply the divorce laws of other states in some circumstances.

The circumstances in which these European Union countries apply foreign law, the choice of law rules, vary between countries. The European Union decided that some harmonisation was needed and produced a draft Regulation known as Rome III. The UK supported this harmonisation amongst those countries with different conflicts of law rules.

Unexpectedly, however, the European Union in its draft Regulation did not limit itself to the countries which have historically adopted the policy of applicable law. Instead it suggested imposing applicable law on all countries of the European Union, including those, such as England and Wales and the rest of the UK, who throughout their history have always only applied local law. By their proposal (Rome III), the European Commission wishes to establish common rules on the applicable laws in cross-border divorce and other family law cases. The objective would be to ensure that divorce and ancillary financial issues are governed according to the law with which the couple has a particular connection. This would mean that local law jurisdictions, such as England and Wales, would routinely be obliged to apply foreign law in their own courts; a concept completely alien to their court systems. There was a consultation and the UK, unusual among EU countries, had the power to opt out and did so. Subsequently a couple of other European Union countries who always only apply local law, emboldened by the UK approach, indicated that they were also unhappy with this new legislation, even though they did not have an opt out power.

² English law is used as an example throughout this section. The arguments used would similarly apply to Northern Ireland and Scotland.

The consequence is that the European Union has temporarily shelved its plans to impose applicable law on all European Union countries. Nevertheless Brussels has made it clear that it wants to review the position and still seeks to impose applicable law wherever possible. The UK must therefore be ready to deal with this proposed change in the law.

It is unreasonable, unfair and unrealistic to seek to impose applicable law on all jurisdictions across Europe, including those which have never throughout their history had any concept within family law of applying the law of another jurisdiction.

Disadvantages of applicable law

If applicable law were introduced it would take much longer to settle cases in England and Wales, as it would be necessary to thoroughly investigate and understand what the foreign law was, whilst significantly increasing costs and lowering settlement rates because of the uncertainty and unpredictability. All family lawyers in England and Wales would be dramatically affected. England would have to apply laws not debated by the English Parliament, even contrary to the principles of English law and English justice. It would make the most dramatic changes to English family law since family law left the ecclesiastical courts 200 years ago.

Applicable law would create the injustice of different outcomes in identical cases heard consecutively before the family courts in England and Wales due simply to different laws being applied; an element which we do not believe the public would find acceptable. Following are some of the many possible examples of mainstream differences that would be encountered:

- Since 1984 divorce has not been possible in England and Wales in the first year of marriage. This is not so in some other European countries. Therefore the Judges of England and Wales would find themselves granting divorces after perhaps only three months of marriage if the couple came from abroad. England and Wales would in reality no longer have one divorce law applied across the country.
- England and Wales expect a spouse to maintain the other spouse on divorce if they are able to do so, at least for a period until they can re-train for self sufficiency and especially if they would otherwise be reliant on welfare benefits. The laws of other countries either do not allow spousal maintenance, or they allow it for only a couple of years after divorce at most. English welfare benefit agencies might therefore have a higher cost, as spouses who would be required to maintain their now divorced spouse under English law would not have to do so if they both came from abroad. Wives would find themselves unmaintained, yet the husband could be earning a large income.

- English family law ignores the behaviour of the spouses when it comes to financial matters on divorce, unless particularly exceptional. The laws of other countries routinely take conduct significantly into account, even if it appears to have little bearing on financial matters. English judges might therefore find themselves refusing spousal maintenance to a wife who has committed one act of adultery, even if it is not the cause of the breakdown of the marriage and even if the husband has himself committed adultery, because they are applying the law of another country. In an identical case involving a national English couple, perhaps heard by the judge immediately afterwards, medium or long-term maintenance might be ordered. We predict that this type of difference of outcome in identical cases will cause much public dissatisfaction and adverse comment, perhaps including against those from abroad who bring proceedings before the English court and then obtain what might be perceived as more favourable outcomes.
- There will be very real conflicts with other country's judges and legal systems, as England and Wales is likely to continue to apply its vigorous policy on disclosure even if they have to apply the law of another country, whose laws have weak and ineffective disclosure obligations. England and Wales is unlikely to stop trying to find out the truth of disclosure. There stands the very real possibility of English and Welsh judges when having to apply the law of other countries, making decisions which, knowingly or inadvertently, conflict directly with the national law of those countries. It will be almost impossible for English and Welsh judges and lawyers not to make orders which are deeply ingrained within the principles and precepts of English family law justice and fairness, even though they may then directly conflict with foreign law as applied abroad.

A considerable issue arises about how foreign law is ascertained. This is not a difficulty for those countries whose law is contained within a code or statute, with very little weight or influence from case law decisions. However for countries which have considerable discretionary elements and are more based on precedent and case law than statute, such as England and Wales, summarising the law is very hard and very unreliable. In a number of European Union countries judges applying foreign law read a textbook explaining what the law is in other countries, or they go to a European Union website which attempts to summarise the law. This is highly unlikely to be the process which would apply if England and Wales was forced to adopt applicable law.

The present procedure when it is necessary to learn foreign law is for a lawyer from abroad to come to the English court to explain the law, perhaps being subject to cross-examination. Sometimes where the foreign law is open to dispute, one lawyer attends on each side, which proves very expensive. It seems unlikely that spouses and family lawyers in England and Wales in any

particular case will be willing to rely on what can be read on a website regarding the application of the law of another country. The uncertainty of ascertaining what precisely the law is of the other country will add greatly to the delay in producing a settlement. It will be much harder for English family lawyers to guide parties on appropriate terms of settlement. At present in England and Wales the vast majority of family law disputes are resolved without a final court hearing. English family lawyers predict that many more cases will go to a final hearing if the court has to apply the law of another country.

There is much anecdotal evidence to indicate that applicable law is not applied consistently or fairly abroad. First, even in an applicable law case abroad, it is only the substantive foreign law which is applied and the local law is invariably applied to procedural matters, yet England and Wales does not have such a demarcation between the substantive and procedural. The gathering of financial information and disclosure could be argued to be procedural, yet the court cannot do fairness and justice in a case without full and proper disclosure. The procedural and the substantive go closely hand-in-hand. Secondly, if a judge cannot comprehend the foreign law to be applied, and this is not at all surprising in many cases, it is often said that he simply substitutes and uses his own local law.

In short, applicable law will certainly not stop forum shopping. Even though two countries may apply the same country's law it does not mean the outcome will be the same. Due to issues of disclosure, costs, timetable, interpretation of the law and many other reasons, there will still be dramatically different outcomes. Forum shopping will become more sophisticated but will continue nevertheless. The European Union is deceiving itself if it thinks that applicable law will end forum shopping and the race to issue.

Contrast with the rest of the world

A major concern is that the imposition of applicable law into England and Wales will put us at considerable odds with many countries with which we have close historic links and many ongoing family law cases and connections. Countries like Australia and the United States will continue with local law only. We do not want to abandon our strong and historic family connections with many countries across the world by being forced into adopting applicable law as part of UK family law. It would be unfair, disproportionate and unreasonable.

Summary on applicable law

The UK government opted out of Rome III in November 2006. However the European Union is pursuing its applicable law proposals, hoping that the UK will join in later.

Within the family law context applicable law will dramatically increase the costs, the delay in reaching an outcome and make reaching an outcome even more difficult, because of the uncertainty of the law being applied. Like Brussels II *lis pendens*, it would run completely counter to the entire ethos and spirit of family law work in this jurisdiction, with its emphasis in practice on keeping costs down, resolving matters reasonably quickly and doing so by out-of-court settlements through ADR. It would lead to public dissatisfaction as two identical cases would have dramatically different outcomes before the English court because different laws were being applied.

However, there would undoubtedly be significant difficulties if applicable law were to cease to feature. It is deep seated in some jurisdictions just as application of local law is deep seated in the UK and some other jurisdictions. A consensual pan-European way forward is suggested below.

The Way Forward

The following areas therefore need urgent reform in a future programme within the European Union for family law and family life:

- The race to issue, *lis pendens*, which alone gives exclusive jurisdiction even though another country may have a much closer connection with the family
- The adoption of applicable law, found in many continental European Union countries
- Other forthcoming and urgently needed family law legislation which are presently posited on the introduction of applicable law.

There are currently seven possible grounds for jurisdiction within Brussels II. Any of them can be used. There is no priority between them and their breadth often allows more than one country to have jurisdiction, hence the racing.

The proposal is to introduce a hierarchy of jurisdiction. The grounds for jurisdiction would be graded so that in each case the most appropriate court to hear the case could be determined.

This hierarchy, the ordering in priority of the different grounds of jurisdiction, would thereby indicate the more appropriate country to deal with the family's affairs. This would be the country with which the family had the closest connection on this hierarchy of jurisdiction. That country would then apply its own local law on the basis that it was the country with the closest connection with the couple. There would then be no more need for conflicts of law or applicable law, as this would be satisfied by the hierarchy of jurisdiction. There would be no more races to issue as it would be clear which country had primary jurisdiction, being the country highest up the hierarchy of jurisdiction. The *lis pendens* race to issue would immediately be removed. Future European Union family law legislation would then build on this hierarchy of jurisdiction so applicable law would not be needed in future legislation. A couple moving around Europe would have certainty and clarity about which country would deal from time to time with their family law affairs, which is a fundamental criteria for European law reformers.

Crucially, an agreement reached between a couple after disclosure and independent legal advice would probably be treated as top of the hierarchy. These agreements should carry weight. Thereafter hierarchy of jurisdiction would probably be dependent upon lengths of joint residency, then perhaps

nationality or domicile and then periods of sole residency. The jurisdictional hierarchy grounds would be wider than Brussels II in order to make sure that all possible cases were covered.

In this way, the issues of conflicts of law, the race to issue, applicable law and status of marital agreements would all be resolved.

Centre stage in all future consideration of any family law programme of reforms must be the prospects of ADR: resolving cases without final court hearings. The experience of many mediators is that once one party has tactically raced to issue in their preferred jurisdiction, the prospects of a successful mediation are dramatically reduced. The *lis pendens* race to issue is thoroughly contrary to the encouragement to ADR. Moreover, mediating a settlement against the backdrop of foreign law is not easy. The costs increase as the mediator seeks to understand the foreign law to help the couple reach a resolution in the shadow of the law, specifically the shadow of the foreign law. The above proposal removes these difficulties and makes it much easier and simpler for ADR to take place and for family lawyers to have greater confidence in referring cross-border cases into mediation. This is the intention of the European Union Mediation Directive.

Within Brussels II there is already a very limited opportunity for the transfer of children cases between jurisdictions where it is in the best interests of the child. This limited opportunity could be available in divorce and ancillary relief cases, with the emphasis being on 'very limited', so that the discretionary stays jurisprudence does not enter by the backdoor.

This proposal was originally put forward by Resolution, formerly the Solicitors Family Law Association, representing 5000 specialist family lawyers in England and Wales. The proposal has been well received by other family law professionals across Europe and by others. It is a constructive family law and family life-orientated settlement. It deals with the present major problems and stumbling blocks in the way of development of family law across Europe for international families.

Conclusion

The jurisdictional provisions in Brussels II must be amended. We propose creating a hierarchy of jurisdiction for divorce and ancillary financial matters. This would indicate the country with the closest connection to the family and this country would then deal with the divorce and other family law proceedings. In such a way, there would no longer be any requirement for the race to issue in Brussels II, which is so detrimental and so contrary to the whole ethos of settlement-orientated resolution and reconciliation opportunities. Applicable law would no longer be an issue as the country with the closest connection to the family would apply its own local law. Other proposed European Union family law reform could proceed without the continued impediment of applicable law.

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