



HOUSE OF LORDS

European Union Committee

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52nd Report of Session 2005-06

# **Rome III—choice of law in divorce**

Report with Evidence

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## **FOREWORD—What this Report is about**

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The principles of subsidiarity and proportionality help to define when the EU should act, and when action is better left to the Member States. At the 34th meeting of COSAC (the Conference of Community and European Affairs Committees of Parliaments of the European Union), held in London in October 2005, the Conference agreed that those national parliaments which wished to participate should conduct a subsidiarity and proportionality check on selected EU legislative proposals. The check would serve as a pilot to test national parliaments' systems for reaching decisions on subsidiarity and proportionality.

This Report is concerned with one of two proposals which the national parliaments collectively selected for investigation: the proposal for a Regulation on the applicable law and jurisdiction in divorce matters ('Rome III'). The aim of the proposal is to ensure legal certainty, flexibility and access to court in cases of international divorce, by clarifying which law should apply in such cases. The exercise was carried out by Sub-Committee E (Law and Institutions).

While the Committee concluded that the matter is one for international rather than national action (the objective could not be attained by Member States individually), it had doubts as to whether the Commission had proved that action was necessary, raising questions of both legal base and subsidiarity. The Committee also had concerns about whether the proposal was proportionate, and questioned whether the objective might be achieved by simpler and less prescriptive means.

The Committee has written to the Government expressing its views on Rome III. This Report publishes the Committee's conclusions and is copied to the COSAC Presidency, as well as to the European Commission, the European Parliament, and the Council of the EU.

# Rome III—choice of law in divorce

## The Commission's initiatives

1. In July 2006 the Commission brought forward two measures aimed at improving legal certainty in cross-border divorce proceedings. The first is a draft Regulation to determine the applicable law in such proceedings and to amend existing jurisdictional rules. The proposal is commonly known as Rome III.<sup>1</sup> The second initiative of the Commission is the publication of a Green Paper launching a public consultation on applicable law, jurisdiction and recognition in matters of property rights of married and unmarried couples.<sup>2</sup>
2. Introducing these initiatives, Franco Frattini, Commissioner for Justice, Freedom and Security said: “These initiatives will simplify life for couples in the EU. They will increase legal certainty and enable couples to know which law will apply to their matrimonial property regime and their divorce. The aim is not to harmonise the national laws on divorce, which are very diverse, but to ensure legal certainty, flexibility and access to court”.<sup>3</sup>

## Our scrutiny

3. Both measures have been, and remain, subject to scrutiny by Sub-Committee E (Law and Institutions). The proposed Regulation is of special interest and has required prompt attention for two main reasons. First, as a measure brought under Title IV of the EC Treaty the UK had three months in which to elect whether to opt in to the negotiations.<sup>4</sup> Second, it is one of the measures chosen by COSAC for a pilot exercise to test national parliaments' ability to opine on issues of subsidiarity and proportionality. To these ends we sought views of interested parties (academics and practitioners) and of the Scottish and Welsh Parliaments and took the opportunity to meet officials of the Department for Constitutional Affairs (DCA) to obtain clarification of the proposal and of the Government's position.
4. This Report describes the Sub-Committee's initial work on the draft Regulation and its response to COSAC. We publish with this Report the written submissions we received, the transcript of the meeting with the DCA and a letter from the Committee to the Government recording the Sub-Committee's conclusions on the application of the principles of subsidiarity and proportionality.

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<sup>1</sup> Proposed Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters. The Regulation is the third in a series of conflict of laws measures brought forward by the Commission. Rome I deals with choice of law in contract, Rome II with choice of law in tort. Both have been the subject of scrutiny by Sub-Committee E. Rome II was the subject of a detailed inquiry and Report by the Committee. See *The Rome II Regulation* (8th Report, 2003–04, HL Paper 66).

<sup>2</sup> Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition. COM(2006) 400 final.

<sup>3</sup> Commission Press Release IP/06/997. 17 July 2006.

<sup>4</sup> Ireland is similarly placed under Title IV and also decided not to opt in to Rome III.

## COSAC

5. The Protocol on the application of the principles of subsidiarity and proportionality attached to the Constitutional Treaty (the Protocol) gives a role to national parliaments in ensuring compliance with these principles and sets out how the Union's institutions should ensure such compliance.<sup>5</sup> In particular the reasons for any proposed Community legislation should be stated and must be substantiated by qualitative or, wherever possible, quantitative indicators.
6. As part of a pilot exercise being run by COSAC Rome III is being examined by national parliaments to see whether it conforms to the principles of subsidiarity and proportionality. The Sub-Committee had the advantage of seeing the opinions of the parliaments of 13 other Member States<sup>6</sup> as well as that of the Scottish Parliament.<sup>7</sup> Different opinions are emerging, but the large majority of those parliaments have concluded that the Commission's proposal complies with the principles of subsidiarity and proportionality.

## The proposal

7. It is important to make clear at the outset that Rome III would not harmonise the substantive domestic divorce laws of Member States. The Regulation would determine the applicable law in cross-border divorces and other divorces having a foreign element (*i.e.* should an English court apply its domestic divorce law to a marriage concluded between a German man and French woman?). Rome III would also amend existing jurisdictional rules (*i.e.* should the English court deal with the case rather than the court of another Member State with which the parties may be connected?). It is the first part of the proposal that is new. The Union already has common rules on jurisdiction in matrimonial causes, the Brussels II Regulation.<sup>8</sup>

## Applicable law

8. Under English and Scots law the *lex fori* is applied: once jurisdiction is established the courts apply domestic rules to determine whether a divorce should be granted. The UK is not the only Member State to adopt the *lex fori*.<sup>9</sup> The Commission's research reveals, however, that a majority (14) of Member States determine the applicable law by reference to a number of criteria (mostly by reference to common nationality but also to common domicile and (last) common habitual residence) aimed at identifying the law with which the parties have the closest connection. Three Member States (Belgium, the Netherlands and Germany) include the possibility for the parties to choose the applicable law.

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<sup>5</sup> The (then draft) Protocol was examined by the Committee—see *The Future of Europe: National Parliaments and Subsidiarity—The Proposed Protocols* (11th Report, 2002-03, HL Paper 70).

<sup>6</sup> The opinions of national parliaments of other Member States, together with a summary of the opinions and the procedures followed in the national parliaments for reaching their conclusions on subsidiarity and proportionality, are available on the COSAC website: <http://www.cosac.eu/en/info/earlywarning/doc/>

<sup>7</sup> Justice 1 Committee. Report on the subsidiarity and proportionality of Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (J1/S2/06/34/1).

<sup>8</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. [2003] OJ L 338/1.

<sup>9</sup> Cyprus, Denmark, Finland, Ireland, and Sweden also take this approach.

9. Under the Regulation the primary rule would be that the parties could choose the applicable law in matters of divorce and legal separation<sup>10</sup> (Article 20a). That choice would be limited to countries with which the parties have a close connection by virtue of (a) their last common habitual residence provided one of them still resides there; (b) the nationality<sup>11</sup> of one of the spouses; (c) the law of the State of their previous habitual residence; or (d) the law of the forum.
10. In the absence of choice by the parties, the applicable law would be determined by reference to a list of connecting factors: (a) the parties' common habitual residence; or failing that, (b) their last common habitual residence if one party still resides there; or failing that, (c) the State of which both are nationals;<sup>12</sup> or failing that, (d) where the application is made (the forum).
11. This approach would be novel and require a substantial change in the laws of the large majority of, if not all, Member States. In those countries, such as the UK, which currently apply the *lex fori*, family courts and practitioners would have to adapt to ascertain and apply foreign law. The proposal contemplates some assistance for the judges coming via the European Judicial Network in civil and commercial matters (Article 20c). But practitioners have pointed out this would have shortcomings and be unlikely to relieve the parties of additional costs.<sup>13</sup>

### Jurisdiction

12. The Union already has harmonised rules of jurisdiction in matrimonial causes. They are set out in the so-called Brussels II Regulation.<sup>14</sup> Spouses can choose between several alternative grounds of jurisdiction. Once a court in one Member State is seised of a case courts in other Member States must decline jurisdiction, thus avoiding duplication and possible inconsistency of proceedings.
13. The main change to the jurisdiction rules being proposed is to give parties the possibility of choosing their court (Article 3a). The parties' choice would not, however, be wholly unrestricted. They must have a "substantial connection" with the Member State concerned: the Member State chosen must be one falling within the current list of possible jurisdictions in Brussels II, the place of the parties' last common habitual residence for a minimum period of three years, or the Member State of nationality of one of the parties.
14. The Commission sees this change, particularly the ability to take divorce proceedings in the courts of a Member State of which one spouse is a national, as improving access to court for spouses of different nationalities.<sup>15</sup>

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<sup>10</sup> The Regulation would not apply to annulment of marriage (nullity proceedings).

<sup>11</sup> Or "domicile" in the case of the UK and Ireland.

<sup>12</sup> Or have their "domicile" in the case of the UK and Ireland.

<sup>13</sup> See the submission of family law practitioners: Resolution (p 30). The Law Society of Scotland identified potential public policy issues (p 20).

<sup>14</sup> Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility for children of both spouses, repealing Regulation (EC) No 1347/2000. [2003] OJ L 338/1. The revised Brussels II Regulation came into effect on 1 March 2005.

<sup>15</sup> Commission Explanatory Memorandum, at p 8.

### Practical need

15. As mentioned, the Regulation, if adopted in its present form, would require most, if not all, Member States to change their laws. In the case of the UK the change would be substantial and there could be additional costs to be borne by the parties. We were therefore concerned to identify the extent of problems, if any, that would be addressed by the Regulation and whether the solutions being proposed were the most efficient way of dealing with them.

### The Commission's case

16. The Commission argues that the growing mobility of individuals within the EU has led to an increasing number of international couples.<sup>16</sup> The Commission states: “In view of the high divorce rate in the European Union, applicable law and jurisdiction in matrimonial matters concern a significant number of citizens each year”.<sup>17</sup>
17. In respect of the principles of subsidiarity and proportionality, the Commission argues that its proposal, which is restricted to “international divorces” and to rules on international jurisdiction and applicable law, would have no effect on national substantive divorce rules and would increase legal certainty and reinforce the principle of mutual recognition and trust in judicial decisions given in other Member States and the free movement of citizens. Without action at EU level (there are no other international instruments to which Member States could subscribe) certain problems (rush to court, insufficient legal certainty and party autonomy) would remain. The Commission argues that a large and growing number of EU citizens are affected directly or indirectly by international divorces and that no Member State acting alone would be able to solve the problems identified by the Commission. The Commission further contends that failure to take action would significantly damage the legitimate interests of EU citizens, the lack of harmonised rules leading to distress and high costs in international divorce proceedings. Finally, the Commission argues that the proposal would meet the EU obligation to safeguard and ensure protection of citizens’ fundamental rights, in particular not to be discriminated against on grounds of nationality and to be able to obtain an effective remedy under the law.<sup>18</sup>

### Impact Assessment under attack

18. The Commission’s Impact Assessment seeks to demonstrate a practical need for the Regulation. The number of “international divorces”<sup>19</sup> is estimated to be some 170,000 each year, about 16 per cent of all divorces granted within the EU. The Commission’s figures have been criticised. Only 13 Member States could provide the information requested and in five cases not for the full period of time (four years) requested. Significantly only one large Member State (Germany) responded. The UK was unable to do so because

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<sup>16</sup> Spouses of different nationalities, spouses who live in different Member States or who live in a Member State in which one or both of them are not nationals.

<sup>17</sup> Explanatory Memorandum, p 2.

<sup>18</sup> Impact Assessment, pp 28–9.

<sup>19</sup> Defined as divorces between a national of a Member State and (a) a citizen of another Member State; (b) a citizen of a non-EU State; (c) a citizen of double nationality (d) a non-national of unknown origin (including both EU citizen and non-EU citizens). “International divorces” also includes divorces between two non-nationals (of the same or different nationality) who divorce in a Member State.

it does not keep the sort of statistics requested by the Commission. Whether it is safe to extrapolate for the whole Union on the basis of the Commission's study has been questioned. Practitioners expressed concern that the responses from certain smaller Member States with high numbers of foreign residents (such as Luxembourg and Belgium) may have skewed the statistics.<sup>20</sup> How, in the apparent absence of statistical data from any large Member State save Germany, the Commission can state that “the rates of international marriages and divorces do not vary enormously amongst the larger EU countries”<sup>21</sup> is extraordinary.

19. Even if there are some 170,000 international divorces each year, doubts have been expressed as to whether this is sufficient to justify the action being proposed: what the Commission's statistics do not reveal is the number or percentage of cases where the question of applicable law has been a problem.

### **Rush to court**

20. The current rules do not prevent what the Commission terms the “rush to court”. One spouse may apply for divorce in one Member State (out of the number listed in Brussels II) to prevent the courts of another Member State from acquiring jurisdiction and to ensure the application of applicable law and other rules (for example, rules of evidence and procedure) thought to be more favourable to the applicant. The Commission, as the DCA noted, does not present any evidence as to the scale of the problem.
21. The Commission contends that the introduction of harmonised applicable law rules would greatly reduce the risk of “rush to court”, since all courts within the Union would apply the law designated on the basis of common rules. Practitioners disagree. The new Regulation would continue to present parties with the opportunity to start proceedings in a variety of jurisdictions. Practitioners considered that Brussels II had intensified the problem of rush to court<sup>22</sup> and frequently leads to the situation where one party does not speak the language of the proceedings and/or is unfamiliar with the legal system and had increased the problem. Rush to court would not be prevented under the new Regulation where there was no agreement between the parties on jurisdiction.<sup>23</sup>
22. Further, as the Commission acknowledges, the rules of financial provision ancillary to divorce (maintenance and division of property) may play an important role in determining a party's choice of forum. As mentioned, this is the subject of a Green Paper published alongside Rome III.

### **Subsidiarity**

23. The essence of the principle of subsidiarity is that the Community should only act if the objectives of the proposed action cannot be sufficiently achieved by Member States and can, by reason of the scale or effects of the proposed action, be better achieved by the Community (Article 5 TEC).
24. Harmonisation of conflict of laws rules (private international law) is expressly contemplated by the Treaty (Article 65(b) TEC) as one means by which the

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<sup>20</sup> Resolution (p 31). See also the Law Society of England and Wales (p 16).

<sup>21</sup> Impact Assessment, p 13.

<sup>22</sup> Resolution (p 27), Law Society of Scotland (p 20).

<sup>23</sup> Resolution (p 30).

Community will establish an area of freedom, justice and security. There is already a substantial body of Community private international law, including jurisdictional and recognition rules relating to matrimonial causes and child custody. As the Commission states, no Member State acting alone would be able to solve the sorts of problems identified by the Commission. Harmonising jurisdictional and conflicts rules internationally is not something which can be achieved by an individual Member State, at least if it is to be done on the basis of reciprocity and mutual recognition. The appropriate level is the international, not the national, one. The Commission nevertheless is required to make the case for such action.

### Subsidiarity and *vires*

25. Subsidiarity is concerned with the *exercise* of powers not their *existence* (*vires*). If the Treaty does not give the Community the necessary power to act, no question of subsidiarity arises. As the evidence of DCA officials and other parties has revealed, the present proposal raises both *vires* and subsidiarity questions.
26. The Commission's draft Regulation refers to Article 61(c) and 67(1) TEC. Article 61(c) enables the Council to adopt "measures in the field of judicial cooperation in civil matters as provided for in Article 65". Article 65 provides: "Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as is necessary for the proper functioning of the internal market, shall include ... (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction". Article 67 deals with voting requirements.
27. A number of parties, including at least three other parliaments,<sup>24</sup> have queried the "necessity" of the present proposal. The limitations of the Commission's statistical analysis on which it argues the case for legislative action gives rise to both *vires* and subsidiarity concerns. As regards the former, it is doubtful whether the limitations of the Commission's study and the substantial variations in the figures justify the conclusions drawn for the whole Union and whether the test of necessity in Article 65 has been met.
28. A second concern is that the rules in Rome III could apply to cases which may have little connection with the Internal Market. Our witnesses referred specifically to the residual jurisdiction rule in Article 7.<sup>25</sup> This provision could fill a gap in a few Member States' laws and therefore improve access to justice in the Union in a most general sense but appears to relate to cases involving persons who have little connection with the internal market or the free movement of persons (Q 5).

### Subsidiarity—justification for action at Union level

29. The criticisms of the Commission's statistical analysis are also relevant when considering whether the Commission has substantiated its reasons for Community legislation by reference to quantitative indicators. The limitations of the study and the substantial variations in the figures would not seem to justify the conclusions drawn for the whole Union. The statistics are

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<sup>24</sup> The Czech, Dutch and Scottish Parliaments.

<sup>25</sup> See the submission of Professor Briggs (p 15), and the oral evidence of Professor Beaumont (QQ 5, 41).

not a safe basis on which to act. We agree with the Scottish Parliament that further qualitative research should have been conducted. The requirements of the Protocol are not met in this regard.

### **Subsidiarity and proportionality**

30. Proportionality requires the form of Community action to be as simple as possible and to leave as much scope for national decision-making as possible. The Impact Assessment annexed to the draft Regulation sets out and evaluates a number of options. This has also met with criticism from practitioners, particularly as to the conclusions drawn by the Commission on the practicalities and costs of implementing the Commission's preferred options. The large majority of, if not all, Member States would be required to change their laws substantially. There may also be substantial costs in ascertaining, and difficulties in applying, foreign law. We are concerned that the Commission may not appreciate the full implications of its proposal and query whether the objective might be achieved by simpler, possibly less prescriptive, means.
31. It has been suggested that if the jurisdictional rules (Brussels II) were to be improved then it would not be necessary to harmonise applicable law rules. We are impressed by the arguments raised by academics and legal practitioners in this respect and the latter's concern that the Impact Assessment does not adequately address this issue.
32. The Committee makes this Report for the information of the House.

## APPENDIX 1: SUB-COMMITTEE E (LAW AND INSTITUTIONS)

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The members of the Sub-Committee which conducted this inquiry were:

Lord Borrie  
Lord Brown of Eaton-under-Heywood (Chairman)  
Lord Clinton-Davis  
Lord Grabiner  
Lord Henley  
Lord Lester of Herne Hill  
Lord Lucas  
Lord Mance (co-opted for this inquiry)  
Lord Neill of Bladen  
Lord Norton of Louth  
Lord Tyler

*A full list of Members' interests can be found in the Register of Lords Interests:  
<http://www.publications.parliament.uk/pa/ld/ldreg.htm>*

*Lord Lester of Herne Hill has drawn particular attention to the following interests relevant to this inquiry:*

Self-employed practising member of the English Bar, specialising in constitutional and administrative law, employment, media, commercial and European law.

Co-editor of Butterworths Human Rights Law and Practice as well as being a contributor.

## APPENDIX 2: LIST OF WITNESSES

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The following witnesses gave evidence. Those marked \* gave oral evidence.

- \* Mr Paul Ahearn, Head of International Civil and Family Law, Department for Constitutional Affairs
- \* Professor Paul Beaumont, Expert Adviser to the Department for Constitutional Affairs and the Scottish Executive  
Professor Adrian Briggs, University of Oxford
- \* Mr Stephen Gocke, Legal Group, Department for Constitutional Affairs  
Mr David Hodson  
The Law Society of England and Wales  
The Law Society of Scotland  
Panorama Legal Services  
Resolution

## APPENDIX 3: REPORTS

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### Recent Reports from the Select Committee

The Further Enlargement of the EU: threat or opportunity? (53rd Report, Session 2005–06, HL Paper 273)

Annual Report 2006 (46th Report, Session 2005–06, HL Paper 261)

The Brussels European Union Council and the Priorities of the Finnish Presidency (44th Report, Session 2005–06, HL Paper 229)

EU Legislation—Public Awareness of the Scrutiny Role of the House of Lords (32nd Report, Session 2005–06, HL Paper 179)

Ensuring Effective Regulation in the EU: Follow-up Report (31st Report, Session 2005–06, HL Paper 157)

Annual Report 2005 (25th Report, Session 2005–06, HL Paper 123)

The Work of the European Ombudsman (22nd Report, Session 2005–06, HL Paper 117)

Scrutiny of Subsidiarity: Follow up Report (15th Report, Session 2005–06, HL Paper 66)

### Recent Reports from Sub-Committee E

The Criminal Law Competence of the European Community (42nd Report, Session 2005–06, HL Paper 227)

European Arrest Warrant—Recent Developments (30th Report, Session 2005–06, HL Paper 156)

Human rights protection in Europe: the Fundamental Rights Agency (29th Report, Session 2005–06, HL Paper 155)

European Small Claims Procedure (23rd Report, Session 2005–06, HL Paper 118)

Human Rights Proofing EU Legislation (16th Report, Session 2005–06, HL Paper 67)

Evidence from the EP Legal Affairs Committee on European Contract Law, Rome II and Better Regulation (8th Report, Session 2005–06, HL Paper 25)

The Constitutional Treaty: Role of the ECJ: Primacy of Union Law—Government Response and Correspondence (3rd Report, Session 2005–06, HL Paper 15)

European Contract Law—the way forward? (12th Report, Session 2004–05, HL Paper 95)

The Hague Programme: a five year agenda for EU Justice and Home Affairs (10th Report, Session 2004–05, HL Paper 84)—*Joint Report with Sub-Committee F (Home Affairs)*

# Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION  
(SUB-COMMITTEE E)

WEDNESDAY 18 OCTOBER 2006

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Present	Brown of Eaton-under-Heywood, L (Chairman) Clinton-Davis, L	Lucas, L Neill of Bladen, L Norton of Louth, L
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Mance, L

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## Examination of Witnesses

Witnesses: MR PAUL AHEARN, Head of International Civil and Family Law, DCA, PROFESSOR PAUL BEAUMONT, Expert Adviser to the DCA and the Scottish Executive, and MR STEPHEN GOCKE, Legal Group, DCA, examined.

**Q1 Chairman:** May I, on behalf of the Committee, welcome the three of you, we are very grateful to you for coming. I know Professor Beaumont certainly and perhaps others know how our Committee proceeds. As you know, the inquiry is live, we are on air so to speak, and you will get a copy of the transcript and have an opportunity to correct, revise or add to it if that would be helpful at a later stage, but in the meantime it is available on the web. Mr Ahearn, you lead and would like indeed to make an introductory statement, which we would welcome.

*Mr Ahearn:* Absolutely. I will briefly introduce my colleagues: Professor Paul Beaumont is a Professor of Law at Aberdeen University and we were lucky enough to have him as our expert adviser between ourselves in DCA and the Scottish Executive. He has come here, I am pleased to say, to help the Committee through this maze of complex affairs.

**Q2 Chairman:** We are very grateful too that he has come along to assist us.

*Mr Ahearn:* Stephen Gocke is a senior lawyer within the DCA and I am in charge of the international civil and family law team within the DCA. The timing of this is less than ideal as a final decision on whether to opt in has to be made by next Friday and in many respects we honestly do not have a collective Government decision at the moment. We are going to try and be as helpful as we can, but I hope the Committee members will understand that on some questions we may seem a little “civil servicey” for want of a better word. We are going to try and help you, but we really cannot get drawn into any Government conclusions that might be made. I would also like to say that necessarily the Committee members will be asking us to criticise things today and to be helpful we need to be

forthright and criticise where criticism is necessary but balance it where we can. I hope no inference will be drawn as to whether that means we think there is a conclusion because honestly there is none available today.

**Chairman:** We understand the difficulties and it is perhaps a rather sensitive moment in the conclusion of all this. You have been provided with a list of the possible proposed questions and perhaps we could go straight to those and focus on those areas on which you can no doubt help us. The first, of course, is the question of need, and in a sense of course this links with the next group of questions on *vires*, subsidiarity and proportionality.

*The Committee suspended from 4.28 pm to 4.36 pm for a division in the House.*

**Q3 Chairman:** Would you like to continue Mr Ahearn?

*Mr Ahearn:* It is certainly true that the impact assessment that accompanied the proposal raises as many questions as it answers. To take first of all the political mandate, it does stem from Vienna and was repeated again in the Hague programme and whilst there was a request from the Council, the description of it as a strong political mandate for a legislative instrument may be a step too far; there was certainly a request to study the issue. The impact assessment has come forward, and it has been pointed out in some of the evidence to the Committee that I have seen from Resolution and particularly from the Law Society that it is much weaker because an incomplete number of Member States have come forward, they are smaller States and in some ways they are atypical States—many of the States who have come forward here have external borders to the EU. From the UK’s perspective, hard evidence, both quantitative and

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qualitative on any problems that emerge from the lack of common applicable law rules is few and far between, but we are trying to work with the profession to try and quantify this a bit more. One of the questions raised by the impact assessment is both its statistical base and the leap it makes, for want of a better word, between the number of marriages and the number of divorces; there is an assumption, included in some projections, that there is a dispute about applicable law in as many of those numbers and that that is the scale of the problem. Whether that is true I could not say; but I would say intuitively we have no evidence to support that.

**Q4 Chairman:** Let alone how many actually raise point of law problems. Mr Ahearn, you are softly spoken and it is quite a large room, so I wonder if I could ask you to speak up. The short answer to the last question raised under the group of questions in paragraph 1 is no—“Has the Commission any evidence as to how many international divorces ...” I mean, nobody, presumably, has any clear evidence as to how many real problems arise under existing law.

*Mr Ahearn:* Not that I am aware of, but it would be a question for the Commission rather than the UK Government.

**Q5 Chairman:** It is not for the impact assessment to suggest that; very well. Shall we then move to the linked issues of *vires*, subsidiarity and proportionality, first *vires*; this either does or does not come under Article 65; is there perhaps a question as to whether there is a sufficiently serious obstacle to the proper functioning of the internal market here? The Dutch think there is, they take a *vires* point as I read their contribution to our inquiry; do you have concerns on that score?

*Mr Ahearn:* I will ask Paul Beaumont to join in here. There are different issues, there is the *vires*, the subsidiarity and the proportionality and the appropriate use of the Treaty. There is a lot within the proposal and I think some aspects of it may be more debatable; the residual jurisdiction ground is one of the more stark examples of where some of the examples might be more clear-cut. However, certainly from the other parliaments that I have seen from COSAC there is no common view amongst those and some of the other parliaments have ticked the box that all the tests and the Treaty base are being used adequately. I do not know if there is anything you want to add, Paul.

*Professor Beaumont:* Thank you very much, My Lord Chairman. The Treaty base, as you well know, requires any instrument to be necessary for the proper functioning of the internal market and, as you say, the Dutch Parliament has indicated that they are not convinced that the measure is necessary

for the proper functioning of the internal market. The arguments probably turn on a number of issues; one is the scope of the instrument. As you know, although this is not clear from all of the evidence you have received, it is certainly the intention of the Commission—and it makes this clear in the explanatory memorandum—that this instrument will apply regardless of which law is applicable, so it might apply when the law applicable is from a non-EU state. Therefore, there is an issue of *vires*, as to whether it is really necessary for the proper functioning of the internal market to apply a foreign law on divorce from outside the Community when the connection with the Community is quite slim, and some of the jurisdiction grounds have quite a slim connection with the Community. In quite a number of cases only one party is connected with the Community and it is also possible that quite a lot of the issues surrounding the marriage might not be connected with the Community. You could therefore have a situation where non-EU law is being applied under this instrument and it is certainly arguable as to whether that is necessary for the proper functioning of the internal market. There is also, as Paul Ahearn has indicated, a particular problem with the residual jurisdiction rule in Article 7 because again that relates to cases where there is very little connection with the European Community, so we are dealing with cases involving essentially defendants from outside the Community and again the argument is, is there enough connection with the internal market to justify the Community regulating these residual cases.

**Q6 Chairman:** These are the outsiders of whom Professor Briggs speaks and says it is a very bad thing indeed, is that right?

*Professor Beaumont:* Professor Briggs refers to a number of things as being bad so I am not sure what you are referring to.

**Q7 Chairman:** I had in mind Article 7, which is what you are referring to.

*Professor Beaumont:* I am referring to Article 7, yes.

**Chairman:** That is what is in his second paragraph. Lord Neill.

**Q8 Lord Neill of Bladen:** Sitting in this Committee we come across quite commonly this justification for a measure being put forward because it is needed for the proper functioning of the internal market, and I have to say, certainly in my own case, a certain scepticism has built up over the years as to the rather free use of that language. I wonder, just looking at commercial common-sense, whether it could conceivably be said that this set of rules is actually needed—which is a verb—for the proper functioning of the internal market; there is

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something wrong at the moment with the internal market which is going to be put right by this proposal. It seems fanciful, but perhaps I have got it wrong.

*Professor Beaumont:* One thing I could say is that the Commission takes the view that this test has to be construed in a non-literal way. They take the view that the test should be construed as facilitating the proper functioning of the internal market and they think that the Council has a large margin of manoeuvre in interpreting the Treaty. This is the consistent line that they express, that necessary is not to be construed too literally. It is on that basis that they then will argue that the provisions I have described, the more marginal provisions within this proposal, can be within the Council's discretion included within the Treaty base, and they would have some support from the way the European Court of Justice approaches these matters. If you look at Opinion 1/03, for example, you will see that the Court says that things that are not strictly within the Treaty but are ancillary to the main purpose of the Treaty come within Community competence, and the Court of Justice construes the notion of conferred powers in that very broad way. If the core of it is conferred, then other aspects can be drawn in, simply because the core is conferred. That is the line taken by the European Court of Justice and therefore the Commission feels it is mandated to adopt a similar line, and that is why we are in the position we are in.

**Lord Neill of Bladen:** Thank you.

**Q9 Chairman:** Broadly, the view would have to be taken that people who were married to someone of a different state would be readier to move around for employment and other reasons within the Union if there was a greater approximation of divorce and other such laws. Is that the broad approach the Commission take?

*Professor Beaumont:* That would be the broad approach to justify the core of the proposal, yes. It would facilitate the free movement of persons within the Community, and it is important of course that the Committee is aware that already under Brussels IIB free movement is facilitated by the fact that a judgment given in any of the Community countries will be recognised and enforced in the other countries, so there already is quite a lot of law to ensure free movement of persons in this field. The issue is whether it is really necessary for the proper functioning of the internal market to take another step and harmonise applicable law rules.

**Q10 Lord Mance:** Following up in relation to Article 7 and the question of need, presumably that must be identified, if at all, by reference to the two factual criteria. We are dealing here with spouses

who are not habitually resident in a Member State and do not have a common nationality of a particular Member State but the draft says that if they had a common previous residence in a Member State for three years, or if one of them has the nationality of a Member State or in the case of the UK and Ireland domicile, that suffices. The question that perhaps one asks is why should that be a sufficient trigger and how does that relate to the internal market and create a need? By definition they are no longer habitually resident in a Member State and the only connections suggested are some past event or nationality and domicile.

*Professor Beaumont:* You make a very good point. The Commission attempts to defend it, I think, on the basis that there is a risk of a denial of justice.

**Q11 Lord Mance:** Yes, I was just reading the rest of the section.

*Professor Beaumont:* If national law chose not to have any residual jurisdiction—and there are two countries at least, Belgium and the Netherlands, if I remember correctly that do not have any residual jurisdiction—the Commission seems to be implying that there is a risk, at least in Belgium and the Netherlands, that people connected with those countries by nationality might not be able to find a suitable jurisdiction to bring their divorce action outside the Community, and therefore there is some sort of residual duty on the Community to provide their own nationals with somewhere to get a divorce. No evidence is presented by the Commission that there is any state in the world that does not allow their own domiciliaries or habitual residents to be sued there. I see no evidence to suggest that there is a potential lacuna for which Article 7 really is needed; the Commission have given no evidence to support their argument and I cannot imagine a scenario where a defendant cannot be sued in the State of that person's residence or domicile. I am struggling, therefore, to see the defence for the Commission on that point. There is another argument that they consistently make and that is that the recognition and enforcement of judgments would not be guaranteed if you went to a State outside the Community, so if you could only sue in a State outside the Community there is no guarantee that the judgment of that State would be recognised within Europe because Brussels IIB only applies to recognition and enforcement of judgments from within the Community. If you see the ultimate objective, therefore, as ensuring that you get an enforceable judgment within the Community that is the strongest argument the Commission have for saying you must have some kind of default jurisdiction within the Community, even when there is very little connection with the Community. However, that is seeing it from one end

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of the telescope, that the most important issue is getting an enforceable judgment, it leaves out the question of whether it is an appropriate forum for the issue to be resolved.

**Q12 Chairman:** Presumably all these various tests of *vires*, subsidiarity and proportionality need to be met in relation to all the various provisions that are being introduced in the regulations, you do not just take a global view and say yes or no, as a whole does it satisfy these tests, or do you?

*Professor Beaumont:* Again, for reasons I mentioned earlier the Commission would tend to take the view that you look at the instrument as a whole rather than looking at individual points, and they would argue that as long as the core of the instrument is within *vires* or as long as the core of the instrument meets the subsidiarity or proportionality test then they can sweep in other matters that might not, on a strict reading, meet those tests. On legal basis I have quoted a decision of the Court of Justice earlier this year, Opinion 1/03, which would support them on that. On subsidiarity and proportionality I am not aware, but there may be case law of the Court which would support them because up to now the Court of Justice has tended to deal with the subsidiarity issue purely on a procedural basis and has not engaged in the analysis of the merits; so as long as the law-makers can demonstrate that they gave due consideration to subsidiarity and proportionality the Court will not—up to now at least—question the substantive decision that the law-makers took on the point. There is very little prospect as things stand, therefore, of the Court of Justice striking down a measure on the grounds that it breaches the principle of subsidiarity unless it is apparent from the record that the law-makers—the Commission, the Council and the Parliament—took no account of the issue. The Commission always feels quite comfortable that, as long as it mentions it, it is unlikely to find itself in a situation where the matter will be struck down by the Court of Justice.

**Q13 Chairman:** That is perhaps one thing but, as you know, we have been charged by reference to COSAC to reach our own view here on subsidiarity and proportionality, and merely to say that the proposal may be immune from an eventual adverse decision from the European Court of Justice is not quite the same thing. Has Government formed any view here on these important questions of proportionality and subsidiarity?

*Professor Beaumont:* The Government is still deciding that in terms of the question of the opt-in so we cannot give you a view on that. What I would say, of course, is that it is for Parliament under this procedure to make its own mind up about subsidiarity, I am simply telling you why the

Commission might feel it is able to take a fairly expansive view of its competence and not be unduly concerned about the risk of judicial review.

**Q14 Chairman:** You are almost saying that the Court actually is not discharging its proper function of deciding whether in fact the matter meets the requirements.

*Professor Beaumont:* What I am saying is that the Court has taken the view up to now that this is essentially a political question, not a legal question, and it restricts its review, as your Lordships would do in a judicial review case in a sense, to not so much the merits but the procedure, whether there was a procedural impropriety. There is, therefore, a self-imposed restriction that the Court has on this analysis of subsidiarity, but of course there is relatively little case law on it. I am not saying the Court would not, in some future case, take a different position, but I am saying that up until now the Commission might feel relatively comfortable that as long as the political decision-makers have taken a view the Court is unlikely to overturn that view.

**Chairman:** Unsurprisingly, Lord Neill has a question at this point.

**Q15 Lord Neill of Bladen:** It is really just asking about subsidiarity. One of the things that emerged from the draft constitution—which was not adopted and is in a state of limbo at the moment as we know—was that it did focus attention very strongly on the need for subsidiarity to be taken seriously, and indeed since the convention agreement has been halted, there have been discussions, certainly in Parliament, that that is a bit of the constitution on which we should perhaps experiment and take forward to see how we could operate on this very short timescale of six months, taking a look at a piece of legislation and getting a view out of the two Houses here as to whether it did or not satisfy subsidiarity. In other words, what I am putting to you is has the climate not somewhat changed? It may be true and I am not challenging you, that the European Court of Justice has never yet struck down a case on the grounds of subsidiarity, but there is a fairly widespread feeling that the principle is meant to mean something and it is about time a new look was taken.

*Professor Beaumont:* The history here, as you know, is that the principle of subsidiarity was introduced into the Treaty through amendment, it was not there originally, and the Treaty of Amsterdam in particular was strengthened by a protocol on subsidiarity. My reading, frankly, of the Constitution is that it is less strong than the Treaty of Amsterdam protocol and actually reduces the theoretically strong legal test in the protocol. What

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it does introduce, which was not in the protocol, is parliamentary scrutiny, but the parliamentary scrutiny, as you know, does not prevent the Commission from bringing forward its proposal, it simply requires the Commission to reconsider its proposal and it requires a very large proportion of parliaments to actually show concern before the Commission even has the duty to reconsider, so I would be sceptical about whether the climate has changed very much and, given that the constitution is not in force, I would be even more sceptical about that.

**Chairman:** Just for the record, Parliament has to react within six weeks rather than six months.

**Q16 Lord Neill of Bladen:** I apologise, I was in error on that.

**Mr Ahearn:** If I could just add one point about the proposal on the table, I said in the preamble—and Article 7 we have discussed at some length—that there are different aspects where perhaps the argument is more stark. When we are looking at the opt-in decision what we need to look at is in negotiation could we, where we have subsidiarity concerns, get it back and reduce those concerns if there are any. The view you are being asked to take from COSAC is how has the Commission done as a whole here; I just wanted to make that slight distinction.

**Q17 Chairman:** Thank you very much. As you know, Professor Briggs thinks that if you improve the jurisdictional rules then you do not need to harmonise the conflict-of-law rules. What is the Government's feeling about that?

**Mr Ahearn:** I certainly agree that there are alternative proposals; I am afraid this is one of those questions that I was floating at the beginning, which is going to be quite difficult for us to answer. I should have thought it is a valid opinion from a professor of law at Oxford; on the conclusion or does the Government agree we will have to watch this space, but certainly in the consultation and response to the Green Paper we did make clear that there were alternative approaches. One of the points that we did not pick up earlier about the impact assessment, perhaps, is worth pointing out, that in the original Green Paper there was a proposal for a transfer of jurisdiction rule, but when the impact assessment was produced there was no assessment of that and it was not without favour from the consultation responses that I saw. Our stakeholders, as you will have seen from the responses from Resolution and the Law Society, and I attended the public hearing with the Commission last December, and they were arguing quite strongly for a hierarchy of jurisdictional laws in preference to any other proposal. There were alternatives, therefore, and

Professor Briggs has expressed an opinion that he believes the alternatives are better.

**Professor Beaumont:** There is one other point, perhaps, to add to that, and that is that the impact assessment does not prove that there is a problem that needs to be solved; there is no real evidence from the impact assessment that there is a rush to the courts. Of course, there is some anecdotal evidence that there is a rush to the court and certainly the UK has always been concerned about the strict *lis pendens* rule in Brussels IIB, i.e. the rule that the party getting into the court first will get to choose the court, but one of the regrettable features of the impact assessment is that it does not really adduce any evidence that there is a problem of rushing to the court in different jurisdictions, and since Brussels IIB was passed relatively recently, certainly one would have been expecting more evidence to be presented to justify such quick amendments to the rules of jurisdiction.

**Q18 Chairman:** Brussels IIB was 1 March last year.

**Professor Beaumont:** It came into effect, yes.

**Q19 Lord Mance:** May I just ask a question on that; there is anecdotal evidence, certainly I have heard some suggestions and one reads sometimes in high profile cases of speculation as to where people will seek to start proceedings, but is it not true that that does not relate to any subject matter of this particular draft, in other words it does not relate to the question of divorce at all, it really relates to the question of property, which is the subject of the other draft. It may be there is a tacit assumption that once you have selected the choice of law in respect of divorce then you will also select it in relation to property matters, but in form those are presented as quite different questions and it does not seem to me that they necessarily do follow.

**Professor Beaumont:** Absolutely, thank you for that, that is the point. The harmonisation of choice of law rules on divorce only goes to the issue of grounds for divorce and in fact it is in relatively few cases that those have been contested, it is usually property issues or children's custody or access that is contested and these are issues not covered by this proposal.

**Q20 Chairman:** We will come back to this in question 14. Can we now just look at the proposal in outline, first under the head of applicable law the main changes, but just before you respond the Government's explanatory memorandum at page 3, under the heading of "Applicable Law" in the third paragraph says that "the Commission's main proposal is to apply the law of common habitual residence of the spouses ..." and so forth. Is that right? I thought that the main change proposed in

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respect of applicable law was to give some party autonomy, some choice, albeit subject to restrictions.

*Professor Beaumont:* My Lord, you can look at it either way. They are both big changes and clearly when the present situation in the UK and a number of other countries is that we never apply foreign law, then either of these changes is big. Giving parties the right to choose the law applicable is a big thing but in the default situation where parties have not chosen the law, to make the primary rule the law of the spouses' common habitual residence rather than the *lex fori* is also a big change.

**Q21 Chairman:** I see, and they are intended to be two large changes.

*Professor Beaumont:* Yes, but from the point of view of the Commission bear in mind that if you are looking at it from a European-wide perspective I would agree that the big change is party autonomy because only in three countries at the moment is there party autonomy, the Commission is being quite bold in suggesting something that only exists in three States for 25 States, whereas the common habitual residence or something like it—actually it is not usually common habitual residence, it is usually common nationality—a rule like that is in the majority of States. Even then, as I say, common habitual residence would only be the rule in a small minority of States at the moment, so on both grounds the Commission is proposing a quite radical change to the current law, whether you are in the UK or almost any of the other Member States.

**Q22 Chairman:** Those are the main changes, that is the answer to question 5. Question 6, we and the Scots apply *lex fori*; is that something that has caused any concern to Government down the years?

*Professor Beaumont:* The matter was looked into many years ago by the Law Commissions and they recommended that *lex fori* should apply. Really since then, as far as I am aware, there has been no internal suggestion of reform because the Law Commissions were quite clear in their recommendation of the status quo.

**Q23 Chairman:** If one applies one's own law it is cheaper, more certain, clearer, you do not have to get into elements of foreign law and all the rest of it. Are these perceived by Government as significant advantages; presumably they would be.

*Mr Ahearn:* Absolutely, My Lord Chairman. The response from the Government with respect to the original Green Paper was short, pithy and a wholesome reading in support of the *lex fori* principle, for those very reasons that you set out there, not only for the parties concerned. We would add possible delay on there as well.

**Q24 Chairman:** What does the government think about the possibility of the parties choosing the law?

*Mr Ahearn:* I caveat again that we have not come to a conclusion on any of this but I think it would come as no surprise that the government would accept it and support in principle that consenting adults can choose to resolve their disputes in the best way they can. There are however issues in this field, particularly about the validity and timing of that choice, to make sure the choice is not being exercised under coercion.

**Q25 Chairman:** Just assume that the parties choose to apply the law of the state but still work on the basis of fault. Would the government be happy with that, reintroducing divorce into our family law courts on the basis of fault?

*Mr Ahearn:* This is where I begin to stray into some territory where it is quite difficult for me to sit on the fence because there is no concluded view on that. The issue is the importation of any foreign law. There is perhaps a political point of principle as to whether it is ever acceptable, in any circumstances, to import a foreign law. As I recall certainly in the history of domestic divorce legislation, it is classed as being subject to a free vote procedure in the Commons and left as a matter of conscience. It is a very sensitive issue. Equally, the argument advocated by the Commission is if you have two properly consenting adults, so the primary issue I am trying to draw out here, in the draft as is, is are they freely consenting adults. Once we have gone past that, then we have an issue of policy and principle for ministers and indeed for this Committee as to whether it is appropriate to apply foreign laws which are widely divergent from our own. We hinted earlier about the disaggregation of the grounds of divorce from what you could call substantive divorce law, when courts are asked to consider issues about granting divorce where the child's best interests will be a factor in determining that. It is tricky and complex. The importation of laws from the other 24 Member States and their importation of ours will raise significant issues. You will have seen that Ireland has already announced that it has withdrawn. It is not opting into this proposal.

**Q26 Chairman:** Because it would lead to it granting divorce too readily, or could do in certain cases?

*Mr Ahearn:* I have no inward track apart from *The Irish Times*, to be honest, which I know you have seen. That was the way it was presented in *The Irish Times*. The problems of importing different laws had led the Irish Government to conclude that it should not opt into this proposal.

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**Q27 Chairman:** Even if it is agreed that the law of some foreign state should apply, it does not follow that it is agreed what that law is, so you then might have a conflict of expert evidence, with all the time and expense that that involves, on top of it.

*Mr Ahearn:* Yes. There is, the Commission would point out if they were here today, a public policy exception, although it does not apply throughout all these cases. There are issues about where the public policy exception could possibly bite.

**Q28 Lord Mance:** The Lord Chairman referred to the situation of a choice of law of a country where there was fault only divorce, unless there was mutual consent. There is a country according to the table, Malta, where divorce is not allowed at all. If you marry a Maltese and you agree, it may be that you would have resided for ten years in the United Kingdom but you still could not get a divorce, subject to the public policy point, I suppose.

*Mr Ahearn:* I guess, in theory, under the autonomy rules you could come to an agreement to use the *lex fori*.

**Q29 Lord Mance:** Supposing the other party to the marriage did not wish to?

*Mr Ahearn:* That is probably germane to the party autonomy as well. If you enter an agreement unwittingly to use Maltese law, perhaps you did not know that that meant you could never get divorced.

**Lord Neill of Bladen:** Has any thought been given to the practicality of getting consent? We are talking about a situation where the parties have fallen apart, very often over a period of years, and there is great bitterness. You may have inequality in financial power. The husband, let us say, earns the money and he has very good lawyers at his beck and call. He proposes to the wife, "My proposal is that this divorce should be conducted according to the law of X", any country you like to name within the Community. The wife is immediately faced with a situation in which, to deal with that, she has to find out what the law of that country is and whether she is going to lose out on it. It does seem to me a very difficult procedure to work, this whole notion of getting consent to a foreign law in a divorce situation.

**Q30 Chairman:** This relates equally to the new Article 20a 2, an agreement designating the applicable law should be expressed in writing and signed by both parties at the latest time the court is seized. There is a comparable provision under 3a, under the head of jurisdiction. In each case the Law Society points out respectively in paragraphs 12 and 17 the problems and they seek safeguards because there may well be inequality, undue pressure and coercion, so what about some independent legal advice for financial disclosure? That is the general

area Lord Neill is anxious to probe, as indeed is the Committee as a whole.

*Professor Beaumont:* The Commission's proposal only has safeguards at the moment in relation to formal validity, as in Article 20a, paragraph two: "An agreement designating the applicable law shall be expressed in writing and be signed by both spouses." They have added to the usual choice of law requirement this requirement of signing. Certainly we would have concerns, whether we opt in or not, about doing something about substantive validity issues because we take the point that in family law matters there is a much greater risk than in commercial law matters of exploitation of one of the parties. We would certainly be arguing for some meaningful safeguards to ensure that the substantive validity of the measure is tested in an appropriate way. That is a gap in the Commission's proposal.

**Q31 Lord Mance:** Is it not true though that both in relation to jurisdiction and in relation to choice of law there is no particular reason why the agreement should not be made prior to the inception of matrimony? Prenuptial agreements are common in some European countries and they are likely to become, I suspect, more common in the United Kingdom.

*Professor Beaumont:* Under the proposal these agreements could take place at any time as long as they are before the court is seized of the proceeding. It could be anti-nuptial or post-nuptial. There are people however in the UK, I am sure you know, who have concerns about whether we should be enforcing antenuptial agreements. That is a policy question that different people take a different view on. My own personal view is that party autonomy is, in principle, a good thing if you have adequate safeguards to protect weaker parties. The difficulty would be in drafting something suitable to achieve protection for weaker parties. One can address the fact that there is a gap. It is more difficult in this type of measure because you cannot harmonise the substantive validity rules across 25 states. The most you can probably do is create an applicable law rule on substantive validity and you would have the choice between the law of the country designated in the agreement or the law of the forum. That will not necessarily achieve all the safeguards that you might want in policy terms. There are some technical difficulties in solving the problem and I am sure that is one of the reasons why the Commission has not made the proposal.

**Q32 Chairman:** That could be fertile ground for some satellite litigation. You could then have lots of cases on whether it was a valid agreement and by whose law was it decided that it was a valid agreement. Can we go back to the head of applicable

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law? This is a point on Article 20c which provides for use of the European judicial network to determine foreign law. As you know, Professor Briggs is bitterly hostile to that. “Something extremely dangerous is being slipped in here”, he says. Do you see it at all in the same way?

*Mr Ahearn:* It depends. It is either a rather non-consequential provision or it is the deeply worrying one that Professor Briggs is interpreting. I do not know if you are familiar with the European Judicial Network. It is “legal” in a proper sense and it is a gathering of all Member States and, in a nutshell, is an information sharing system with coordinators in government in each of the 25 Member States. What this is saying is if you need to investigate the relevant law then you can use the European Judicial Network.

**Q33 Chairman:** It would save all the hassle of competing experts and all the rest of it?

*Mr Ahearn:* That is the link that Professor Briggs has made. It is changing the system where the law would not be pleaded and argued and judgment reached upon it. This would require our judges to investigate the law and apply it, rather similar to a code based system.

*Professor Beaumont:* However, I do not think that is the Commission’s intention. We have not heard anything to indicate that that is the Commission’s intention. The “may” used here is deliberate. “The court may make use of the European Judicial Network”. They will only be able to make use of it if, under their own procedures, it is valid to make use of it. As things stand in the United Kingdom I cannot see how they could make use of it because that is not the way in which we prove foreign law. If the Commission was intending to harmonise proof of foreign law rules, they would have to do something much more radical than say that the court may make use of, and I am sure the Commission realises it is not harmonising proof of foreign law; it is merely saying that in those countries where it would be competent to do so they could make use of the information from the European Judicial Network.

*Mr Ahearn:* In summary, we think it is more benign or innocent than Professor Briggs’s assessment.

*Mr Gocke:* It would be left to national law to decide how to prove it.

**Q34 Lord Neill of Bladen:** Surely if you were going to transpose this into English law you would have to reproduce the effect of Article 20c, would you not?

*Professor Beaumont:* We cannot transpose it. It is a regulation.

**Q35 Lord Neill of Bladen:** You can restate it.

*Professor Beaumont:* No, you cannot. That is contrary to Community law. It is not allowed. Regulations are applicable as they stand and these words will apply.

Of course they will be interpreted by the Court of Justice but even I would not suggest the Court of Justice would read into this that the English courts would be obliged to make use of the European Judicial Network.

**Q36 Lord Neill of Bladen:** That makes my position even clearer. It applies directly to applicable law and this provision is straight into English law.

*Professor Beaumont:* Yes, but it is a discretionary provision. The court may make use of the European Judicial Network. There is no obligation on courts to use it.

**Q37 Chairman:** With regard to jurisdiction, so far as applicable law is concerned, that is being introduced into Brussels II because it is not there already. As far as jurisdiction is concerned, it is amending what is already in Brussels II. What are the main changes?

*Professor Beaumont:* The main changes in relation to residual jurisdiction?

**Q38 Chairman:** It introduces the possibility of a choice as to which shall be the competent court, which I do not think is present in Brussels II as it exists, or am I wrong?

*Mr Gocke:* That is absolutely right. It introduces a choice in certain circumstances but also changes the residual ground, so it is taking it away from the national law to decide and it will be determined in accordance with the cascade in Article 7.

**Q39 Chairman:** In a way, those mirror the two changes that are being introduced in the applicable law as we discussed earlier. (a) gives an element of choice; (b) changes the residual provision. Is that right?

*Mr Gocke:* Yes.

**Q40 Chairman:** I am trying to look at it, at this stage, very broadly indeed.

*Professor Beaumont:* With applicable law you are starting from zero, whereas in jurisdiction you already have a whole series of rules. You are right. There are two significant changes. One is the party autonomy rule; the other is changing residual jurisdiction from a matter of national competence to a matter of Community competence and creating a Community rule.

**Q41 Chairman:** Looking at the residual jurisdiction, Article 7, we have already referred to what Professor Briggs says, that it would be unacceptable because it deals with what he calls “outsiders”. Is there anything you want to add to what you said earlier about that aspect of the proposal, a residual jurisdiction?

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*Professor Beaumont:* It is clearly at the heart of the treaty base argument. There is also a policy question beyond that, leaving aside the treaty base. The policy question is this: some states think it is inappropriate to have what some people would regard as exorbitant grounds of jurisdiction. I mentioned there are two European states that have no residual grounds and that is because those states have made a policy choice that they should not be having very wide grounds of jurisdiction. They should have relatively narrow grounds of jurisdiction because, if you have very broad grounds, you are arguably taking the case away from the appropriate forum. Once you deal with the competence question, there is then a policy question: what should be the appropriate rule? There is a very good argument at one end for saying there should be no residual jurisdiction because these are exorbitant fora; these are not fora for your own people so why are they any good for people outside the Community? The other end of the argument would be what the Commission argue, which is you want to avoid some risk of denial of justice, so you should have some residual rule, but it is controversial in policy terms whether you should have a rule and, if so, what that rule should be.

**Q42 Chairman:** Coming to the questions on party autonomy, as we have seen, both limbs of this proposal, the changes to jurisdiction and the introduction of applicable law, involve the possibility of choice by the warring spouses. In general terms, is that a good thing? In so far as it involves imposing by agreement applicable law on the court, we have already considered how there might be down sides to that, requiring the court to apply substantive divorce laws that it does not want to, like fault based divorce. Generally, is it a good idea?

*Mr Ahearn:* Without getting drawn into whether there is a view on it, one aspect of it is that we need to make sure the validity of the choice is adequate. Then I suppose there is a second question which is the wider one as to whether it is ever right to apply a foreign law in a UK court. Those are two policy questions. I cannot answer those for you on the government's behalf today. It brings you back to the fact that if the parties have chosen is there an alternative choice, which maybe the transfer of jurisdiction may have brought them back to in the first place. There are different ways to approach it. I cannot answer on the government's behalf as to whether there is a conclusion on either of those, apart from the very broad policy on party autonomy, which would be supporting the principle that consenting adults should be able to conclude their disputes in the best way for them and to make sure that vulnerable parties are protected.

**Q43 Chairman:** To make sure that they really are consenting?

*Mr Ahearn:* Absolutely.

*Professor Beaumont:* You could separate the choice of court choice from the choice of law choice. If we were looking at an instrument amending Brussels II that just dealt with jurisdiction, it would raise all sorts of different policy questions. We are already party to an instrument that deals with jurisdiction. Therefore, in principle, we do not have a problem with people having choice of jurisdiction because that is what Brussels II gives. It gives people the choice to go to different fora. We cannot guarantee from a public policy point of view that all people with a connection with the UK will end up getting divorced in the UK because if they have connections with other states in Europe under Brussels II they could use those choices to take their action there. We cannot guarantee to all the people living in the UK that Scots law, English law and Irish law will apply because at the moment they can go elsewhere if they have a connection with other fora. It is not a big extension to then say you should be able to choose a foreign court since already a plaintiff can unilaterally go to a foreign court where there is a sufficient connection. The issue would be whether those connections of choice of court are appropriate connections. There could be a free choice or a limited choice. They have given a limited choice here. The other issue would be whether that is a fair choice, whether there has been any coercion or undue influence. From a policy point of view, it is not a great stretch to allow people to choose jurisdiction when you have already, under Brussels II, given people a selection of jurisdictions to suit them.

**Q44 Chairman:** This question is about the sufficiency of the safeguards in the sub Articles, the ones that allow both parties to sign a written agreement either with regard to jurisdiction or with regard to applicable law. We have been round that course often enough so unless anyone has anything to add on that, we can move on to question 13, which reflects Resolution's suggestion that the choice of court and applicable law should always be the *lex fori* and that avoids the problem of having to apply a foreign law.

*Professor Beaumont:* It is a relatively neat solution in the sense that, if you are going to allow choice of court, usually it makes sense to choose the law to go with the court. Otherwise, you create extra costs relating to proof of foreign law. If you have gone to the trouble of choosing the court, it would seem on the whole sensible to link that with the choice of law. If one was going down this road, that makes a lot of sense, but it is not what the Commission is currently proposing.

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**Chairman:** It does not enable you to say at the moment whether that is going to lead to an opt in or an opt out.

**Q45 Lord Mance:** I can see an argument if one is considering agreements of a prenuptial nature for saying that it may be difficult to know which court is convenient at that stage or to choose the court; but the one thing that you are clear about is that you know which law you would like to apply. It may be that, if one accepted Article 20a by itself and not Article 20b, that would not be so big an inroad into the principle that we apply the *lex fori* and it would not be so inconvenient and difficult to apply, because normally where one had an agreement on the law one would assume that there was perhaps less likelihood of dispute about what the law was. That might not be the case but the number of cases where there was a dispute would be small because the number of cases where there would be any such agreement would be small.

**Professor Beaumont:** The problem with antenuptial agreements is that, whilst the parties may well have thought it was appropriate pre the marriage to apply a particular law, is that necessarily still going to be appropriate 15, 20 or even 30 years later? If you can only renege on the agreement by consent, there may be a problem with that. It may be perfectly appropriate just before you get married for those two people but 25 or 30 years later it is only appropriate for one of the two and the other person is still bound by it because of the agreement. It does raise some policy questions, even in what might seem the more straightforward cases. There are arguments both ways. It is good to have the legal certainty so that the couple know what the legal regime is, but it does not allow much flexibility for change of circumstances that can happen over a long period in a marriage, where people may remove themselves completely from the legal system that they had chosen before they were married and have very little connection with it for most of their married life. Unless they consent to change it, they are still bound by it. If at the crucial moment the marriage breaks down and one party realises that they are now under a system that does not suit them, that can have negative consequences.

**Q46 Chairman:** At the outset of this discussion, you pointed out that there really are not any statistics to indicate that there is a problem of rushing to court, but presumably in some cases logic and common sense dictate that there will be. How best to solve the problem? Is this a good rule or, as the Law Society suggests, might it not be better to harmonise the conflict of law with regard to financial provisions, which are probably going to be uppermost in

everybody's minds? That of course is currently the subject of the Green Paper.

**Mr Ahearn:** There are two issues. Would it stop the rush to court? I shall not delay consideration of this by querying what the evidence of "rush to court" is. We are struggling to find a rush to court. That of course is a theoretical issue. The question is: does harmonisation of applicable law rules stop that? You can argue it either way, I am afraid. I am a civil servant. I cannot see that *de facto* harmonised rules of court would stop a rush to court, particularly if you take the limp question from the Law Society that people are rushing to court for different issues. What the Law Society is saying is that it is the division of property and maintenance thereafter the act of divorce that is what is leading the ground support. Does harmonisation of applicable rules on grounds for divorce prevent a rush to court? I have not seen any evidence that it does. I am not saying that it does not. It would stop any dispute between conflicting rules. I think our own experience suggests that the rush to court is about crucial issues. The ones we are talking about in the context of rushing to court are people who are having rows and disputes about which laws are applicable to the grounds of their divorce. Taking the Law Society's second point about the matrimonial property regimes, that is a different issue. We have to assess this on its own merits. You know the Green Paper is coming forward and you can see the government's thinking on that.

**Q47 Chairman:** Resolution are very clear in their view. We have pushed you as far as you are prepared to go on the current thinking of government. Is the ball still high in the air and nobody knows which side it is going to fall?

**Mr Ahearn:** I have no collective decision. The question I was asked was about the relative merits of opting in as opposed to opting out. All the Committee Members will be aware of the general policy on the opt in and equally aware that we have been consulting stakeholders, taking as many views as we can. I am sure that this Committee will determine its own view on whether the government should or should not opt into this proposal. As I said at the outset, it is quite tricky timing. If you do not mind, I will defer on what the government has concluded but reassure you we and our ministers have given it very careful consideration.

**Q48 Lord Lucas:** Nonetheless, could you educate me on the merits of opting in, in these sorts of circumstances? What could be gained by opting in?

**Mr Ahearn:** The government's general policy on the opt in is established in its opt in protocol. It is only by participating in the negotiations that we can hope to influence. There were some issues discussed

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earlier about the proper application of the treaty base. If we do not opt in, there is no argument to be had. Equally, this is subject to the unanimity process. The UK would have some influence around the table. This is but one proposal. You are aware that the government stepped away from participating in the negotiations on maintenance but may opt in later. The government wants to be at the heart of the civil justice agenda in Europe so that it can influence the shape of that agenda. The general policy is that we opt in unless there are very strong reasons not to do so.

**Q49 Chairman:** Is that an entirely complete answer with regard to the merits of opting in or not opting in, because Rome I surely is a very good illustration of not opting in and yet being very much at the negotiating table, influencing the development of the proposal and, for the very reason that one has not opted in but can yet do so, having arguably a stronger position because of other Member States' concern that you should ultimately subscribe to this proposal.

*Professor Beaumont:* There is a difference in Rome I which is worth bearing in mind. The Rome I dossier is a qualified majority voting dossier. The considerations the government has to go through are slightly different in that, in Rome I, if we had opted into the negotiations, there was a risk that we would be out-voted and then bound. If you do not opt in, as we did not, by entering into the negotiations then you have a choice to decide at the end of the process whether you like what has been decided by the others. You try to, as you suggest, influence what the others will do by saying, "These are the terms on which we might come in." If you are in a unanimity dossier, which this is, it is a different kind of leverage. At the end, the question is whether, if you opt in, you negotiate and at a certain point, if you are not happy with what the proposal is on the table at that stage, the others may go ahead without you and you are not bound by it. There is a different opt in dynamic in relation to a qualified majority dossier and unanimity.

**Q50 Lord Clinton-Davis:** Do you discuss these issues with other governments and civil servants?

*Professor Beaumont:* The only other government that has the option to opt in is Ireland. All the other governments do not have this option because they do not have the protocol. Denmark cannot join in because of its protocol. The 22 other Member States are obliged to participate. It is only Ireland and the UK that have the discretion.

**Q51 Chairman:** Ireland are opting out, I think.

*Professor Beaumont:* They have chosen not to opt in.

**Q52 Lord Mance:** In a sense, does unanimity make more difficult dissent and influence once we opt in? Could you clarify the position? If you are the sole dissenter and you are the United Kingdom, does that upset the whole apple cart or can they go ahead without you?

*Professor Beaumont:* After a period of time they can go ahead without us. The government always has to think about whether it is a benefit to enter into something which you can finally agree to, in which case yes, you get involved. On other occasions you might ask the question: are you going to be seen as obstructive by getting involved and then just delaying the process. These are the kinds of thoughts that are considered.

**Chairman:** These are the political dimensions really to the problem.

**Q53 Lord Lucas:** What arguments are being put forward as to the benefits we would gain from going anywhere down this road? What benefits do we see for ourselves? I can understand that we might see that we will not be regarded as stand offish in the Commission but that is really a pretty thin argument for legislation. Do we see that, if we went down this road, we would ourselves gain some benefits for the United Kingdom?

*Mr Ahearn:* To put to one side the point about the general benefits of playing a full and active part in the European Union, the brief put forward to the Committee by the Law Society tried to dwell on the positive sides of the proposal itself. We have discussed whether there are aspects in the proposal that might benefit UK citizens. One of the issues the government needs to determine is, if this whole proposal is not perfect at the moment, what would an acceptable outcome be. What would our negotiating brief look like? Is that deliverable? If the core of the proposal causes you difficulties, there is one decision you might come to on the opt in. We talked earlier about adding validity clauses on party autonomy. Is that deliverable in a unanimity dossier? That is a different consideration. It is a balanced decision but, as far as the benefits from the individual proposal rather than general European policy, the Law Society brief is—

**Q54 Lord Lucas:** I was not asking the Law Society; I was asking you.

*Mr Ahearn:* The possible benefits from it are as added by the Commission. If we accept that harmonisation of conflict of law rules prevents a rush to court, those are the issues. We need to make an assessment of those and that is why I was saying at the beginning that is the consideration the government is giving at the moment, as to the weight you apply to the benefits as opposed to any potential risks.

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*Professor Beaumont:* In principle you could say that in many areas of law we take the view that there is something slightly inadequate about always applying our own law in international cases. From a private, international law point of view, we always start with considering what is the appropriate law to determine the particular case. It is not always obvious that the law of the forum is the appropriate law to determine every single case. There are perfectly respectable arguments in principle for saying that foreign law should apply to at least some cases that might come before the courts in the United Kingdom relating to divorce. The main problems relate to our processes. I wrote in 1990 in the second edition of *Private International Law* that there were arguments in principle in favour of applying foreign law in certain cases to divorce; but pointing out that unless we solved some of the procedural difficulties that we have in both Scotland and England in proof of foreign law those arguments had to be weighed against the difficulties of greater costs to parties. That is the delicate balance. There is an issue in principle. If there is a preponderance of foreign issues and the English/Scottish connection is slight but we have jurisdiction—and that can happen—you might say in principle foreign law should apply. The down side is that that creates a lot of extra costs in litigation and there are some policy concerns as well in certain cases. One of the difficulties in this proposal is, because of its universal application, you can bring in laws from outside the European Union where there might be a degree of difficulty for our courts feeling comfortable in applying those laws. The only choice might be to say that they are contrary to public policy, but judges naturally have a reluctance to declare a particular foreign system of law contrary to our public policy so it is a no win situation. If you declare it contrary to public policy people will object. If you do not do so people will object. There is also this issue of principle that would tend to say that not every case that comes before our courts has a preponderant connection with our own country. Therefore, in principle at least, it is not unreasonable to suggest that the foreign law might apply in some of those cases. That is really the difficulty.

**Q55 Chairman:** All those comments apply really to that part of this proposal which for the first time introduces the possibility of approximation of applicable law, agreement on applicable law, but on the amendment of Brussels II with regard to jurisdiction would it not be right to say that most of our respondents, people we have

consulted, have less difficulty on that part of the case than they do on applicable law?

*Professor Beaumont:* I do not know about that.

**Q56 Chairman:** Professor Briggs would be the exception because he is bitterly opposed to the whole thing.

*Professor Beaumont:* I am not sure that there is broad consensus at all in the UK on either choice of court in divorce or this provision on residual jurisdiction. Those are the only two issues on the table on jurisdiction. I think both of them are controversial. The whole proposal has a degree of controversy and it would be wrong to say anything else. Part of the reason for that is we have just agreed the jurisdiction rules and they have only just come into effect.

**Chairman:** We are only 18 months on.

**Lord Lucas:** Sometimes sitting in this Committee is like watching a malignant but very slow cancer spread. You know where it is and it just creeps on.

**Q57 Lord Mance:** Looking at the matter from a slightly more pan-European view, a number of countries apply foreign law according to annex two. We may not find too much sympathy with submissions that our procedure makes it difficult to do so. It would be interesting to know whether those countries have any difficulties themselves in ascertaining what the law of Panama is, if it happens to be the common nationality of the parties now resident in Europe, or the law of any other country you can think of. It may be that it is not a common problem but it would at least be interesting to see some research relating to that.

*Professor Beaumont:* It would indeed be interesting to see such research and it is not really there in the impact assessment. We know that the procedures do make a difference because if you are dealing with a judge led system the judge can make the choice as to how he or she will find out what the foreign law is. The judge can then, for example, ask the Max Plank Institute to give a detailed statement of what the law is. The Max Plank Institute has the resources to do a pretty decent job on finding out what the law is in most countries in the world. It has experts on the private law of countries from all over the world. At least in Germany, it is a relatively simple matter. In other countries, because they do not have that excellent resource at their disposal, I imagine it may be done by a less than perfect analysis of the foreign law. We all know, those of us involved in private international law, that it is one of the problems of applying foreign law. We think in principle it is a good thing but we are also all aware that often mistakes are made in the application of foreign law. That is one of the

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difficulties of our system. Being constructive, one could argue that one of the things that, in an ideal world, should be improved is the system of proof of foreign law. If we had a better system of proof of foreign law, we could have the principled approach working without great cost to the parties and without the defects that currently exist. I do not think that is just a British problem. At least in a number of European jurisdictions, I would have scepticism about whether, in individual cases, they got the element of foreign law correct.

**Lord Mance:** I think some research was done on it once by an American professor. He looked at 50 cases and ascertained that, in his view, foreign law had been incorrectly applied in well over 50 per cent. I think it was about two-thirds.

**Chairman:** Unless there are any more questions or unless any of the witnesses would like to add to what they have already told us, perhaps we can bring this to a close. Can I simply put on record again the Committee's thanks to you all for the great assistance you have provided to us? Thank you very much indeed.

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**Letter from Lord Grenfell, Chairman of the European Union Committee, to the Rt Hon Baroness Ashton of Upholland, Parliamentary Under Secretary of State, Department for Constitutional Affairs**

The proposed Rome III Regulation was examined by Sub-Committee E (Law and Institutions) at its meetings on 18 October and 1 November. At the first meeting the Committee had the benefit of hearing from your officials and also Professor Paul Beaumont, Special Adviser in your Department and in the Scottish Executive. It was very helpful to have them explain the detail of Rome III and to indicate those issues to which the Government were giving further consideration. As you are aware, the timing of the meeting was not perfect in that the Government were in the final stages of reaching their decision on whether to opt in to the proposal. We have now learned that the UK has not opted in. We nevertheless hope that the following will be of assistance to the Government.

As you may know, in addition to our usual scrutiny we have been specifically requested by COSAC to consider whether Rome III complies with the principles of subsidiarity and proportionality. This is an exercise in which all national Parliaments have been invited to participate. We are in the process of reporting our conclusions to COSAC but would like to take this opportunity to write to you directly setting out our views which we hope will be helpful to the Government as the negotiations on Rome III proceed.

Although the COSAC exercise is directed at subsidiarity and proportionality, it is necessary first to consider the question of *vires*. If the Treaty does not give the Community the necessary power to act, no question of subsidiarity arises. As the evidence of your officials and special adviser and of other parties has revealed, the present proposal raises both *vires* and subsidiarity questions.

The Commission's draft Regulation refers to Article 61(c), which in turn refers to Article 65. Article 65, you will recall, provides:

“Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as is necessary for the proper functioning of the internal market, shall include . . . (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction”.

Accordingly measures under Article 61, which can include harmonising conflicts rules, must relate to matters having cross-border implications and be necessary for the proper functioning of the internal market. We note that the Czech, Dutch and Scottish Parliaments have queried the “necessity” of the present proposal, as have other interested parties. Professor Beaumont told the Committee that neither the Commission nor the Court of Justice in fact attaches much weight to the wording of Article 65. This gives us concern. We believe that the Commission should indeed make out a case for legislative action demonstrating clearly the relationship with the internal market. In this context, and also in relation to the application of the principle of subsidiarity, we are impressed by the criticisms made by interested parties of the statistical analysis set out in the Commission's Impact Assessment on which the Commission bases its case for legislative action. We think they make a good point.

Further, even if a case can be made for a measure harmonising conflict rules within the Union it is necessary to look critically at each and every provision of the proposal to ensure that the measure is necessary for the proper functioning of the internal market. For example, Article 7, which provides a residual jurisdiction rule which could fill a gap in a few Member States' laws, appears to relate to persons who have little connection with the internal market or the free movement of persons.

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As regards the application of the principle of subsidiarity, our starting point is that harmonisation of conflict of laws rules is expressly contemplated by the Treaty as one means by which the Community will establish an area of freedom, justice and security. There is already a substantial body of Community private international law, including jurisdictional and recognition rules relating to matrimonial causes and child custody. As the Commission states, no Member State acting alone is able to solve the sorts of problems described by the Commission. Harmonising jurisdictional and conflicts rules internationally is not something which can be achieved by an individual Member State, at least if it is to be done on the basis of reciprocity and mutual recognition. The appropriate level is the international, not the national one.

Nevertheless, in order to ensure compliance with the principle of subsidiarity, the Commission is required to make the case for legislative action. The criticisms of the Commission's statistical analysis (mentioned above) are also relevant when considering whether the Commission has substantiated its reasons for Community legislation. The limitations of the study and the substantial variations in the figures raise doubts as to whether the conclusions which the Commission seeks to draw for the whole Union are justified. We question whether the statistics provide a safe basis on which to act and we agree with the Scottish Parliament that further qualitative research should have been conducted.

Under the principle of proportionality the form of Community action should be as simple as possible and also leave as much scope for national decision-making as possible. In this context the Impact Assessment sets out and evaluates a number of options. However, we note that this aspect of the Assessment has also met with criticism from practitioners, particularly as to the conclusions drawn by the Commission on the practicalities and costs of implementing the Commission's preferred options. It is, we believe, significant that the large majority of, if not all, Member States would be required to change their laws substantially. There may also be substantial costs in ascertaining, and difficulties in applying, foreign law. We question whether the Commission appreciates the full implications of its proposal and whether the objective might be achieved by simpler, possibly less prescriptive means.

It has been suggested that if the jurisdictional rules (Brussels II) were to be improved then it would not be necessary to harmonise applicable law rules. We are impressed by the arguments raised by academics and legal practitioners in this respect and the latter's concern that the Impact Assessment does not adequately address this issue. We conclude that there are doubts whether the proposal is of a proportionate response in the circumstances.

Finally, we have considered the potential effect of Rome III on the so-called 'rush to court', the risk of which would, in the Commission's view, be greatly reduced by the introduction of harmonised applicable law rules. Again, there is a lack of information as to the scale of the problem: such evidence as there is appears to be anecdotal. We are, however, impressed by the views of practitioners that the new Regulation would continue to present parties with a variety of jurisdictions and that rush to court would not be prevented where there was no agreement between the parties on jurisdiction. Further, Professor Beaumont confirmed our understanding that rush to court may be driven by property (maintenance and division of property) and child custody/access considerations rather than the substantive law divorce to be applied. As you are aware the Commission's Green Paper on conflict of laws in matters concerning matrimonial property regimes is subject to separate scrutiny by the Committee.

*2 November 2006*

# Written Evidence

## Letter from Professor Adrian Briggs, University of Oxford

Thank you for your invitation to comment on this proposal from the Commission. I think it is a mainly dreadful thing.

1. As to the question of whether any legislation is justified, this can only be proposed on the basis that any divergence between the laws of member states serves as an impediment to the functioning of the internal market. There are, no doubt, some who actually believe this. But it is ludicrous to suggest that the current practice of states to apply their own *lex fori* to issues of divorce is impeding the functioning of the internal market. If it were sufficient justification to claim that proposed legislation would provide a “clear and comprehensive” legislative statement of the law, then there would be a basis for this proposal. But in terms of Article 65, the explanation is that any remaining divergence in this area impedes the free movement of persons. This simply will not do.
2. It has been decided that jurisdiction to dissolve marriage is a proper matter for legislation by Regulation. We now have a system in which only courts with a proper or sufficient, and clear, connection to the marriage have jurisdiction to dissolve it. Fair enough. The relatively minor adjustment in the form proposed as Article 3a is unimportant. But the larger alteration proposed to Article 7 is, to my mind, not acceptable. The existing formulation for residual jurisdiction is in substance a transposition of Article 4 of the judgments Regulation: that where the individuals party to the marriage fall outside the direct scope of the direct jurisdictional legislation, each court applies its own law to determine jurisdiction. I see not the slightest reason to alter this. The free movement of persons who are not, and who are not married to a person who is, habitually resident in a Member State, and who are not common nationals/domiciliaries of a Member State, are “outsiders” so far as the jurisdictional scheme of the Regulation is concerned. They are not persons with whom free movement is really a material issue. Jurisdiction to divorce these people, or not, cannot be seen as a part of the free movement scheme. This aspect of the proposal is for legislation appears to have the sole purpose of removing national legal autonomy, and is a very bad thing indeed.
3. If jurisdiction is properly defined and confined, as Reg 2201/2003 suggests it has been, then choice of law can be left as it was. The Regulation was made on the footing that each member state applied its own choice of law rule and (for all I know) that the choice of law rule for many or most member states was to apply the *lex fori*. I can see that if there were a common choice of law rule, there would be less or little need to regulate jurisdiction. But it is unconvincing to assert that, now that jurisdiction has been straightened out, choice of law must be subject to the same treatment.
4. And even if the argument were, contrary to my views, in general admissible, in the area of divorce it simply is not right for an English court to be permitted or required to apply the substantive divorce law of another Member State. Social standards in relation to family law are far too diverse (and in some respects, odd) for a court to apply foreign divorce law. To take one example, the possibility that the applicable law requires proof of “fault” to justify divorce will take English law back to a more primitive and judgmental state, from which it is mercifully now freed. Procedures for admitting evidence of and proving facts and matters not part of the English judicial process will have to be devised or re-devised. It will be wholly unsatisfactory; and as the boundaries of the EU get wider, the domestic divorce or non-divorce laws which an English court may be called on to apply will increase in number.
5. In addition, it will strike some as peculiar that though we are prepared to apply the divorce law of Malta or Poland, we are not prepared to apply the law of other states, or (even) the religious law of those who have lived in this country for a long time. Other choice of law Conventions (Rome) or proposed Regulations, (Rome I, Rome II) say that the law of a state shall be applied whether or not it is the law of a Member State: why is this one different? But above all, I do not believe that this is an area of debate into which we need to allow ourselves to be drawn. The application of English law, and only of English law, will keep all these difficulties and dangers at bay. The choice of law provisions are dreadful, even if they could be seen as justifiable by reference to Art 65, which they cannot be.
6. Finally, the proposed Article 20c is a radical and dangerous proposal. We still take the view that evidence of foreign law is a matter of fact, to be adduced and proved by the parties and found as a fact, on the evidence, by the judge. As far as I know, the proposed Article 20c will alter that, for the first time, and will pave the way to the argument that wherever the law of a Member State is concerned, the judge may (or must) go and find about it for himself. This will be the thin end of a very big wedge indeed. No doubt it sticks in the throats of

some to be told that as far as litigation before an English court is concerned, French and Latvian laws are foreign, and need to be proved by the parties. No doubt some (frequently those writing in civilian jurisdictions) are appalled by this fundamental rule of English private international law, especially as it treats the law of a Member State as, in this respect, just as foreign as the law of a non-Member State. The proposed Article 20c seems to be designed to attack that proposition; and in this respect it is Bad. No doubt this is also the reason why there is no express saving for national legal rules regulating evidence and procedure, a provision which is usually included in the first Article of any Convention or Regulation which makes provision for choice of law. Something extremely dangerous is being slipped in here.

I hope these views may be of some small use to the Sub-Committee.

3 August 2006

### **Memorandum by The Law Society of England and Wales**

#### **INTRODUCTION AND GENERAL REMARKS**

1. The Law Society (“the Society”) regulates and represents solicitors in England and Wales. This response is from the representation arm of the Law Society which represents the views and interests of solicitors in commenting on proposals for better law and law making procedures in both the domestic and European arenas.
2. The Society welcomes this opportunity to submit comments on the new draft Regulation—“Rome III”. The Family Law Committee has been actively involved in developments in the European family law area, particularly on the question of divorce. The Society responded to the Green Paper on jurisdiction and applicable law in divorce matters in August 2005 and was represented at the European Commission public hearing in December 2005. Representation, both formal and informal, has been made at domestic level and the Family Law Committee is represented in the stakeholder group on applicable law recently established by the Department for Constitutional Affairs.
3. The Society can support a number of aspects of the proposed Regulation particularly as regards the introduction of party autonomy. However this support is subject to a number of reservations as we have some concerns. This response seeks to address the questions put forward by Sub-Committee E and offers a number of general remarks in relation to both jurisdiction and applicable law. It is noted that the deadline for the United Kingdom to signal its intention to be bound by this Regulation is 26 October 2006.

#### **PROPORTIONALITY AND SUBSIDIARITY**

4. The Society can accept that there is a need for this Regulation in relation to improving rules on jurisdiction. We support the initiative to remedy the question of rush to court in divorce proceedings. We agree that the current rules are complex and can cause confusion both for litigants and lawyers alike. The current situation is unsatisfactory in part because of the “first in time wins” rules. It leads to “forum shopping” when the parties seek to find the jurisdiction more favourable in financial terms to them and then “race” to file petitions first. This also limits the possibility for any mediation process or allow for the possibility of a period of reflection.
5. Given that the draft Regulation is dealing with divorce proceedings where there is an international or “cross-border” element to a case we do consider that the subsidiarity test is met.
6. It is harder to be convinced as to the question of proportionality relating to the introduction of applicable law rules in domestic procedure. In presenting the draft Regulation and accompanying Impact Assessment, the European Commission argues that “increasing mobility of citizens within the European Union has resulted in an increasing number of ‘international’ marriages”. It goes on to state that “In the event that an ‘international’ couple decide to divorce, several laws may be invoked”. “In view of the high number of divorces within the European Union, applicable law and international jurisdiction in divorce matters affect a considerable number of citizens”. Statistics are provided to that effect in the Annex to the proposal.
7. However the impact assessment is incomplete given that it only deals with 13 Member States. Moreover, where no data is available for international divorces the data for international marriages is referred to and reference made to those who are “potentially affected”. This is not a satisfactory approach. Whether the number of divorces that will actually be affected and the number of citizens who are disadvantaged by current procedure justifies a wholesale revision of English applicable law rules is a question that must be discussed fully at domestic level.

8. In addition, we are not convinced that the European Commission is tackling the real problem. Forum shopping in relation to international divorce proceedings is not done on the basis of substantive grounds for divorce but rather in relation to the financial settlement following the divorce. The Society has argued that the primary question is that of the relationship between the divorce and the financial settlement. Therefore it is more important to harmonise the conflict of law rules in relation to applicable law relating to financial matters on divorce, since it is that, rather than the divorce which has caused the greatest concern to litigants and lawyers.

9. We are therefore concerned that in presenting this legislation the European Commission has chosen not to take into account the arguments that were strongly expressed by a number of stakeholders (at Green Paper stage and the public hearing) that financial matters are those that actually influence the choice of forum and thus should be dealt with first.

10. Whilst we note that the Green Paper on division of matrimonial property assets has since been published this is at a significantly earlier stage in the legislative process and will not impact on the debates and negotiations in relation to this draft “Rome III” Regulation. There is a danger that the draft Regulation on divorce will be dealt with in isolation from the future instrument designed to deal with applicable law and jurisdiction on (some) financial matters. This is unsatisfactory and does not sit well with the European Union’s Better Law Making or Better Regulation agenda.

#### JURISDICTION

11. The draft Regulation revises the jurisdiction rules as set out in the Brussels II *bis* Regulation (2201/2003) by introducing a new article that provides for choice of the parties in proceedings relating to divorce and legal separation. This is to be welcomed and the Society is supportive of the proposals relating to party autonomy in this regard.

12. This is a beneficial development provided there are satisfactory safeguards in place to protect one spouse against undue pressure and coercion from the other. Agreements on jurisdiction may well produce a very unfair outcome, on one interpretation, if the financial matters are then dealt with in that jurisdiction. An agreement to confer jurisdiction on a Member State which has minimal post marital maintenance and weak disclosure will in fact produce an unsatisfactory outcome to the person seeking maintenance and reliant on the court knowing of all the financial resources. It is imperative therefore that a provision on the requirement for independent legal advice and full financial disclosure is written into the text.

13. It is disappointing that no transfer provision has been introduced into the draft Regulation. This is something that was presented in the Green Paper and at the public hearing. If as a consequence of the choice of jurisdiction at the time the agreement was entered into, there is now a much more suitable jurisdiction with a manifestly closer connection then the power of transfer ought to prevail if one party seeks it and the court agrees. This would negate the need to introduce foreign law into the proceedings and would overcome a number of the issues. If the United Kingdom were to opt-in to the Regulation we would welcome any proposal to introduce a transfer mechanism into the text.

#### APPLICABLE LAW

14. The question of applicable law is a highly controversial one in England and Wales and there does not appear to be a consensus on this amongst family law practitioners, government or judiciary!

15. Broadly speaking the Society maintains a preference for *lex fori* in matters of divorce. We consider that the development of any EU regime in relation to divorce should be based on simplicity, efficacy and legal certainty. In the development of an EU divorce regime, each Member State will demand simplicity and legal certainty in such a system, for reasons of internal economics ie the cost of courts, experts, civil servants and judges. Litigants will also demand simplicity and certainty in order that they are able to understand the system that they use. The prospect of a litigant in person having to deal with foreign law throws up a number of questions as to access to justice and fair trial rights and this is something that must be considered. The implications for publicly funded cases must also be addressed.

16. We suggest that the only system which would provide a combination of simplicity and certainty is that of *lex fori*. It is a default system but it has several advantages. These are well rehearsed and therefore not elaborated on here. We note that the European Commission has endeavoured to seek a compromise between the Member States with a preference for nationality as the determining factor and those who stand by their adherence to *lex fori*. The introduction of default rules on applicable law on the basis of habitual residence does seem to provide that in the majority of cases the law of the forum will be applied. This approach is

welcomed and may significantly reduce the scale of the change that is currently feared domestically as regards the introduction of foreign law.

17. The Law Society's Family Law Committee is supportive of the proposals relating to party autonomy and choice of law and believes this would be a beneficial development. The principle arguments in favour of allowing a couple to choose applicable law are that it allows parties autonomy in their private lives and dispenses with the need for the courts to decide questions of applicable law. Again we would reiterate the need for independent legal advice and full financial disclosure to protect one spouse against undue pressure, coercion and misrepresentation from the other. This needs to be written into the text.

18. On the draft Regulation a position that the Society could be prepared to accept would be the introduction of party autonomy regarding choice of law rules, Article 20a of the draft Regulation, but not, at this stage, the introduction of default rules on applicable law in the absence of choice, Article 20b of the Regulation. This may be an untenable position on the broader European stage and in the context of the draft Regulation as a whole but it is something that could be considered.

19. The issue of applicable law is one that will challenge the family law establishment in England and Wales for months and years to come. It is one that won't go away and the Law Society is fully committed to finding a solution to this issue. One that will minimise any wholesale overhaul on the administration of justice but that will ensure access to justice for all parties concerned. This would be an opportune time to examine the issues at hand.

#### OPT-IN DECISION

20. Were the United Kingdom to opt-in to the Regulation the Law Society Family Law Committee considers that this would bring a number of advantages. We consider that the rules on party autonomy would be a significant, beneficial development. We also note that as drafted the Regulation leads predominantly to the application of *lex fori*. We would urge though that if the United Kingdom were to opt-in to the draft Regulation then a number of items would need to be introduced into the negotiations. The question of ensuring equity between the parties as regards choice of law and jurisdiction as well as the issue of a procedure to transfer would have to be introduced into the debate.

21. A full regulatory impact assessment on the implications for the system of family law and procedure in England and Wales as regards the introduction of foreign law should be undertaken. A number of things should be taken into account. The implications for courts in terms of costs both in terms of length of procedure, translation and interpretation etc. The implication on the legal aid budget as regards an increase in the cost of legal advice and assistance for public funded cases. The implications for the parties concerned and with due regard for the litigant in person. The question of how the foreign law would be introduced and then determined—whether through independent experts for both parties or through a court-appointed expert. The implications for the judiciary in terms of a new approach. The implications for the legal profession. It has been argued that advising on foreign law would result in a huge rise in the insurance premiums and this is something that must be examined. A full comparison with other jurisdictions and indeed the current practice in those divisions of the High Court who routinely apply foreign law to cases litigated in England and Wales must be undertaken.

22. The Law Society notes that this draft Regulation is subject to the unanimity procedure. Were the United Kingdom to opt-in to this Regulation it (as with other Member States) would assume a powerful negotiating-mandate as regards the national veto. If it was felt that it was not sustainable politically to support the final version of the text and it was considered that the provisions of the text would have a detrimental effect on the system of family law and procedure in England and Wales then the United Kingdom could exercise the right of the veto and withdraw from the proposal. Under the Protocol to the Treaty of Amsterdam the other Member States could continue their negotiations without the United Kingdom (or Ireland where relevant) and work towards harmonised conflict of law rules themselves.

23. It is noted that a withdrawal at this stage will have significant political implications but it may be politically advantageous to opt-in at the beginning and then re-consider the position as the debate progresses. There are a number of benefits in the draft proposal, not least party autonomy, and this could be an opportunity to take part in the shaping of such provisions and to have an equal not marginalised voice in the negotiations.

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## Memorandum by The Law Society of Scotland

### INTRODUCTION

The Family Law Sub-Committee of the Law Society of Scotland (“the Committee”) welcomes the opportunity to comment on Commission of the European Communities European Commission proposal for amending regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (“Rome III”).

### GENERAL COMMENT

The proposed new articles do not recognise the implications for Member States in which there are different systems of law prevailing in different territorial areas. So far as the United Kingdom is concerned individuals may be habitually resident, or domiciled, in Scotland, England, Wales or Northern Ireland. This is recognised for some purposes in Article 66 of the existing Regulation. Further consideration requires to be given to how the proposed new articles would apply to a State such as the United Kingdom.

### ARTICLE 3A

The proposal is for a limited extension of jurisdiction, to include possible proceedings in the place of the spouses’ last common habitual residence for a minimum period of three years or the place where one of the spouses is a national (or in the case of the United Kingdom or Ireland the place one is domiciled).

There are close connecting factors, which mean that the place chosen is logical for the spouses.

Given the connecting factors, dealing with a divorce on this basis should not cause insuperable problems for the court. We have experience of divorce where both parties are resident elsewhere, but where there is jurisdiction based on domicile. There are practical problems, but we have managed to address these in the past.

Some clarification may be required in relation to (b). Does it mean the last place that the couple lived for three or more years, or the place they last lived together provided the residence there lasted for a minimum period of three years? Would the residence have to be during the marriage? Does the qualifying period have to be continuous?

#### *Example 1:*

If a couple live in France for three and a half years, and then Spain for two years, may France have jurisdiction under (b)? If yes, then the three year qualifying period could be years ago, and that may cause a problem. The longer the period, the more tenuous the connection.

#### *Example 2:*

Where a couple were both at school in Scotland, and then married, spending periods of up to two years in a number of European countries, could Scotland have jurisdiction?

#### *Example 3:*

Suppose a couple lived in Italy for two years, then spent six months in Germany, before returning to Italy for two years, could they prorogate jurisdiction in Italy?

If the EU Commission mean “The place the spouses last lived together as husband and wife, provided they resided there for a continuous period of at least three years” then this should be expressed in the Regulation.

The requirement for a written agreement prior to the seising of the court is an important safeguard against “inadvertent” prorogation. Without this provision prorogation could occur simply because the defender failed to state an objection when lodging defences. This would be undesirable in a family action.

### ARTICLE 7

The current article provides for cases not covered by the jurisdiction rules in the Regulation, by allowing member states to determine jurisdiction. The Scottish rule in such cases is to assume jurisdiction when either of the parties is domiciled in Scotland on the date the action is begun. The new article contains two residual bases for jurisdiction. One is the same as current Scots law for cases in Scotland, ie jurisdiction on the basis of the domicile of one of the parties. The change will, to this extent, simply mean that the basis for residual jurisdiction is in the Regulation, rather than domestic law.

There is the alternative of a common habitual residence for at least three years. The condition based on three years' residence may need to be clarified (see above). Provided the meaning is clear, and the three year period recent, this should not present a difficulty.

Given the comprehensive rules of jurisdiction that would need to be introduced by these provisions, Article 6 would be unnecessary.

#### ARTICLES 20A AND 20B

There has been strong support for continued application of the *lex fori* in Scotland. Problems of expense, delay and complexity have been identified and discussed.

On one view a prorogation provision means that parties "volunteer" for expense, delay and complexity, in the event that they chose a law other than the *lex fori*. However, judicial time is at a premium. It would be unfortunate were parties permitted to take up disproportionate amounts of court time, because one or other had chosen a law unfamiliar to the court.

Further, the provision as drafted is entirely open as to the law to be applied. There is no constraint limiting the law to that of a member state. Could a Scottish court be required to apply the Muslim Family Law Ordinance of Pakistan or forms of "personal" law which can apply in certain circumstances. While the solution may be to resort to the public policy provisions of the proposed Article 20e, this could cause significant political repercussions.

The enforced choice of law rules are likely to cause difficulty, for the reasons already canvassed. It means that:

- where parties are domiciled in Scotland, but habitually resident in Portugal, a Scottish court would have to apply Portuguese law.
- if a Scottish woman married a man from Portugal, lived with him in Portugal, but when the marriage broke down she returned home, leaving him in Portugal, she could start proceedings in Glasgow sheriff court six months after her return, but the sheriff would have to apply Portuguese law. This general situation will not be uncommon.
- application of the *lex forum* will be the exception rather than the rule in an international divorce.

The current experience of the "rush to court" arises from the *lis pendens* provisions of Article 19. Most of the concern arises from the different rules as to financial provision rather than the divorce itself. Harmonisation of law in relation to financial provision is the subject of further discussions, which promise to be of extraordinary complexity.

There is more to divorce than choice of law rules. Parties are likely to "rush" to secure a local court, to secure a more favourable procedure or to allow representation by a particular lawyer. If choice of law rules are introduced parties may "rush" to ensure that they secure a court applying its own law, or not applying its own law (whichever best suits their purposes). It is not just a question of what law is applied, but a question of how that law is applied.

So far as Scotland is concerned, forcing the court to apply an unfamiliar law will increase uncertainty, rather than reduce it.

#### SUMMARY

From the Scottish perspective, if change could be confined to policy options 5 and 6 (limited prorogation, and revision of rule on residual jurisdiction), that would be satisfactory, subject to recognition of the different systems of law prevailing in different parts of the United Kingdom. The proposals on conflict of law would cause considerable problems.

November 2006

#### Letter from David Hodson, Panorama Legal Services

Julia Bateman of the Law Society, with whom I have been working closely on the above, has just sent me your letter to her of 20 July inviting views before 6 October on the draft regulation. I am a member of the international committee of the SFLA, now known as resolution, and was one of the primary authors of our response to the Green Paper in 2005 on this subject. The organisation has throughout opposed applicable law, specifically opposing any narrow introduction such as when the parties agree on the choice of law itself, on the basis that it would be the thin end of the wedge to the subsequent introduction of applicable law in family law proceedings. In case you have not seen it, I attach the international committee's response of last

September. We felt that it set out our position clearly yet we put forward counter proposals of a hierarchy of jurisdiction to overcome many of the identified problems, especially the rush to court. From September onwards, including the public meeting in Brussels in December, we felt that this concept of hierarchy of jurisdiction was gathering considerable support by practitioners across Europe.

We were therefore very disappointed at the draft regulation. The organisation, representing 5,000 family law specialist solicitors, opposes the introduction of applicable law. We do so because of our clients and notwithstanding that the introduction of applicable law would create considerable work for us as a profession. We believe that it would be a detrimental step for the resolution of family law proceedings, the cost effectiveness of the resolution, the timetable, the ease of settlement including ADR and the other reasons set out in our response to the green paper.

I have been relatively closely involved with the DCA over these past few months and they indicated that they would welcome some response on the impact on the profession. This was not in fact the approach subsequently adopted by resolution which has prepared another paper regarding opposition to applicable law. I have in fact prepared my own paper which I attach on what I consider to be the likely impact. I have sent this already to the DCA.

In response to the three questions in your letter of 20 July, I do not regard myself as competent adequately to deal with the second. As to the first, I do not regard there being a need for this draft regulation. There is certainly a need to overcome the great injustices of the first to issue principal. The so-called race to court which does happen in reality and dramatically in a not insignificant number of cases. It creates much injustice, unfairness and is contrary to so many basic issues of family law resolution. However the answer is not the imposition of applicable law on a jurisdiction such as England and Wales, and by extension the United Kingdom, which in family law has throughout operated on local law and has a very different legal and cultural regime. Moreover very many of our international cases are with jurisdictions which similarly operate local law. I do not believe that there is the need for the regulation as drafted. Indeed, the more we are told by Brussels and others that the draft regulation will mean that the vast majority of cases operate according to local law, the more one questions the need for the regulation and especially the colossal reconstruction of our family law system that it will require.

In relation to the third question, I am firmly of the opinion that the United Kingdom should not opt in. This is set out in the international committee paper and in my personal paper.

5 October 2006

### **Memorandum by David Hodson**

#### **INTRODUCTION**

*This paper sets out some possible impacts and implications for English family law solicitors of the introduction of applicable law, as proposed in Rome III and including its reference in the Green Paper on matrimonial regimes, and indirectly the impact on clients, the users of the family law system.*

The Rome III draft regulation, as well as the Green Paper on matrimonial regimes, anticipates the introduction in English family law of choice of law, so-called applicable law. This personal note does not cover objections in principle of applicable law; this was set in the resolution/SFLA response to the Applicable Law Green Paper of which I was a primary author. We also put forward what we considered to be constructive alternative proposals, primarily a hierarchy of jurisdiction. The draft regulation seems to ignore our response and the Annex dismisses a hierarchy of jurisdiction in a pre-emptory fashion.

This paper is intended to help our UK government understand some of the implications for professional practice, with indirect impact on clients. By reason of a difference of approach on the resolution international committee, the official paper being prepared is directed at the general issues of applicable law. I take the view that the most distinctive assistance family law solicitors can give our government, at this stage of the Brussels law reform process, is to speak from our experience. I believe this paper does so. I have been disappointed that as a consequence of the difference of approach, it has not been possible to take formal soundings on this issue across the country via local groups of the resolution.

Many of the comments in this paper are equally pertinent to the matrimonial regime Green Paper which at heart is referable to applicable law.

I set out my experience in the appendix (*not printed in this report*). I believe I can speak with a reasonable knowledge of the practice of most specialists and many relatively generalist solicitors, of those working in large city practices, those in specialist practices and those in so-called high street law firms. I believe I have a

reasonable knowledge of family law practice in a number of countries abroad. I have been practising in international family law for very many years.

Where I make references to the English family law solicitors profession, I do not thereby intend to be judgemental in any way to the equivalent professions in other European Union countries nor to make any criticisms of them. Having said this, I happen to think that the combination of qualities of the profession make it the best in Europe, probably in the world, for the culture and society which it serves.

I have categorised the impact of applicable law on the family law solicitors profession in the following fashion:

- Conscientious.
- Contentious.
- Caring about justice.
- Collegiate.
- Costly.
- Conciliatory.
- Commonwealth connected.

#### CONSCIENTIOUS

English family law solicitors investigate a case thoroughly and in considerable detail in the representation of clients. Whilst at times some may say a Rolls Royce service is provided when more basic transport may suffice, the fact is that in very many cases, across the costs and social spectrum, clients receive exceptionally good, conscientious service from English family law solicitors.

Solicitors expect to know exactly what is the law pertinent to the case and the issues, including nuances of the law which may help their client to obtain a better settlement and/or answer claims by the other side. A lot of homework is undertaken, including at training conferences and reading case reports and journals, on decided past relevant cases which may inform the exercise of judicial discretion and/or terms of negotiated settlements.

Even if English family law solicitors were dealing with a more statutory based regime under applicable law, the level, detail and conscientiousness of investigation would still apply. A superficial and broad brush approach of understanding what is the law in just a few sentences, perhaps from a web site, will not be acceptable or sufficient. Most, including many judges, are unlikely to believe the law can be thus summarised reliably. The impact of investigating the relevant foreign applicable law will therefore be higher costs, delays and contentious polarisation. The chair of the resolution international committee has put the cost on a basic case as £5,000, and much more where there is more detailed investigation including the attendance of expert witnesses in England. Cases and settlements will be delayed as the foreign law is considered, perhaps with joint reports and perhaps with findings by the court at special preliminary hearings. The possible disagreements on the topic will be a source of potential polarisation between the parties and take away from the search for fair solutions. It risks being backward looking when the whole ethos of family law resolution is forward looking.

I do not suggest other European family lawyers are not conscientious but the difference of approach between a statutory regime and a discretionary based case law influenced regime results in a significantly different approach of preparation. This English style of approach will continue into the way of handling cases under applicable law.

#### CONTENTIOUS

Despite all of the many changes over the past couple of decades, English family law once it reaches the courts is at heart still an accusatorial system. There may be a “search for fair solutions” (the original SFLA code) but this is against a backdrop of a contentious court based regime. Court management and judicially guided inquisition eg joint experts, works in a limited fashion. Essentially in finance work it is still two champions fighting on behalf of their clients. The Law Society has over the years been at great pains to point out many issues of conflicts of interest and the impossibility of acting for both parties etc. Each party in court puts their separate claims, submissions and undertakes individual investigations into the evidence with the judge deciding between the two.

So the additional element of foreign law is believed by many of us as highly likely to lead at court to significantly increased contentiousness and opportunities for litigation. It will be a new area, an uncertain area, and therefore an area able to be exploited to improve the negotiating position and power balance for the client. Anything less will fail in the ultimate duty of representation of the client. Joint reports on foreign law will be argued over. The difference between what is procedural and substantive will be ripe for litigation. Many, very

quick and very clear Court of Appeal decisions will be needed, perhaps with substantial practice guides, if there will not otherwise be floods of litigation; not so much on interpretation of the draft regulation but on interpretation of foreign law. This will not be so susceptible to higher court rulings. The potential for regional variations, already a problem identified for many years by the SFLA (and now as resolution) on domestic law, will be significantly increased.

As a consequence of the accusatorial system, very little direct investigation is undertaken by the judge. It is for the lawyers, albeit case managed. Therefore the time and costs will be undertaken by the lawyers with the direct impact on delays and higher costs for clients.

## COLLEGIATE

Family law is more highly specialised and organised and trained in England than any other similar profession across Europe. Nothing approaches resolution/SFLA in terms of its history, size, management, education of members and involvement in reform. Many practitioners in England are specialists, although there are still a good number of “dabblers”. Specialists in a collegiate environment and profession have a greater opportunity to be consistently trained and well informed. Training will be similar to the introduction of the Children Act when many of us attended two day conferences. There are vastly more family law solicitors in 2007 requiring training than there were in 1991 with the Children Act. I anticipate fees of at least £750, probably £1,000, per delegate of such courses. This would be simply the practical implications of the introduction of applicable law. Perhaps half of resolution members may attend, along with a number of non-resolution members, so there would be direct costs of £3 million or more (together with the far greater cost of time out of the office), together with the cost of training barristers and judges. CAB workers, non-lawyer mediators and others would need some training.

The cost of training may be prohibitive to legal aid practitioners and some general private practitioners with the risk that the introduction of applicable law is not fully absorbed and understood. This would make resolving some cases even more difficult. Some clients would lose out badly. It may result in a two tier level of quality of representation. This is irrespective of the impact of the present Carter proposals.

There will be many new court forms as divorce and financial provision forms follow foreign law.

There may need to be specialist judges dealing with applicable law cases and perhaps a recognised specialisation for solicitors and barristers.

I anticipate that in geographical areas where there are concentrations of particular nationalities, there will be seminars run by local resolution groups and commercial training seminar providers on the law of those countries.

It is abundantly obvious that the Annex seriously minimises the training and other practical consequences for England and Wales. Perhaps it has seriously underestimated the collegiate, conscientious and committed approach of so many family law solicitors in this jurisdiction.

There has already been discussion of premium charging rates applying in applicable law cases. In part as some consider that there is higher risk. In part it will cover the training costs. As a collegiate profession, any increase in charging rates for particular sorts of cases is likely to occur across the country.

One especial feature of the collegiate spirit in England amongst family law solicitors is a frequent commitment to law reform which is contrary to solicitors personal best interests viz their costs and profitability. On countless occasions, the SFLA, now as resolution, has promoted reforms with direct consequences of loss of work and/or profits. We have done so out of concerns for the best interests of parties including potential parties in family law cases, the children affected, the wider family and of justice. Applicable law is another classic scenario. Undoubtedly applicable law will produce considerably more work for us as a profession. More profits per case. More requirements for specialists so higher rates. Less people able to act in person. Cases will last longer. Settlements will be later, more complex and outcomes more uncertain. (More work for us lecturers and writers!) Yet despite this and knowing this, my discussions with solicitors is an opposition to applicable law as it is perceived to be the contrary to the best interests of clients, settlements of cases, cost efficient resolutions, consistency of justice and the resolution code. English family law solicitors oppose applicable law contrary to their own personal best interests. This should be acknowledged and should have weight in the considerations of government.

### COSTLY

English family law solicitors are some of the most expensive across Europe, comparing qualification and locality and other like for like factors. (There are commercial factors: it is not sheer greed!) They are also some of the quickest. So not only will the costs be higher by the extra burden of considering applicable law, the costs will increase more rapidly in a case. Some jurisdictions in Europe are known as remarkably slow. Therefore even where the charging rates may not be too dissimilar, the sheer amount of work undertaken on a case, and the number of fee earners undertaking it, mean that the costs will be much more in England.

### CONCILIATORY

As a consequence of the approach of resolution/SFLA, its code of practice, the Law Society protocol and the culture within English family law, there are very high settlement rates in England of family law cases. However settlements invariably occur after disclosure and knowledge of the facts. This will include knowledge of the relevant applicable law. Delays in ascertaining the foreign law will directly delay settlements.

The prevalent culture of practice in England is that very many cases settle without the issue of specific proceedings. So a judge may have no involvement other than finally approving a settlement. It will be essential to have a mechanism so parties in mediation or other ADR or negotiation through lawyers before the issue of proceedings are able quickly, yet cheaply and efficiently, to understand the precise relevant applicable law. This mechanism does not exist and amongst some ADR professionals, it may be slow to arrive.

Applicable law is likely to encourage more parties to the earlier issue of proceedings rather than pre litigation negotiations; contrary to ADR initiatives.

Many aspects of the introduction of applicable law will work against the English conciliatory settlement culture, or at least materially delay settlements, adding to the costs of getting to a settlement and making the ascertaining of reasonable outcome of a settlement much more uncertain. This is dealt with further in the conclusion.

### CARING

The English family law solicitors profession has been distinctive in campaigning against unfairnesses and injustices, in specific cases and in relation to particular aspects of the law. As a result of the discretionary system, there is perhaps a greater day by day reflection by lawyers on concepts of what is fair, reasonable and just than under a statutory matrimonial financial regime. Many family law solicitors entered the particular branch of the profession with personal agendas related to issues of fairness and justice.

A consequence is that the profession will not accept perceived injustice through operation of applicable law. It will be most stark in two cases on similar facts being dealt with back to back in a court's lists by a particular local court, one using domestic law and the other using foreign law, but with very different outcomes. Feelings will rise, professionally, when a very deserving party in an applicable law case does badly, as perceived by English notions of justice such as found in *White*, the Children Act, the resolution code and Law Society protocol.

Examples in financial cases may be reliance on conduct, binding agreements not independently advised, automatic disregards of inheritances or pre marital assets in circumstances of needs, a lack of alimony powers alternatively the imposition of term orders, a lack of investigation powers, a lack of interim provision. Examples on divorce include parties divorcing within the first year of marriage, parties prevented from finally divorcing without a financial order, parties first having to obtain a judicial separation order then wait several years of separation, parties citing substantial conduct (unreasonable behaviour) for use in financial claims, and many other issues which will directly affect public perceptions of divorce and marriage. There are many scenarios where there will be perceptions of real injustice of outcome or opportunity of representation of particular arguments. The starkness of two similar cases, heard consecutively with dramatically different outcomes, will highlight the injustice and unfairness.

Yet the conscientiousness and inherent basic honesty of the majority of the profession will not allow cheating. It is said that some jurisdictions, in the application of applicable law, will fudge the outcome to produce one that is acceptable in the local forum. No doubt this will also happen at times in England but I believe it is unlikely to happen often.

Instead family law solicitors, increasingly media conscious, will give publicity to these unfairness and unjust cases; two cases where on identical circumstances there are very different outcomes because of different laws. The caring elements within the family law solicitor's profession, keenly conscious of issues of justice and fairness, will simply not allow perceived injustice operating through other laws, especially in the stark contrast

between identical cases. Campaigning organisations, supported by lawyers, will highlight the “new” divorce laws, contrary to Parliamentary debated laws, available to just a few, foreign law, parties and not available domestically.

In as far as this is likely to result in condemnation of the laws of particular jurisdictions, it will make it prone to the more xenophobic media publicity and Internet communications. This is not good for European family law generally.

#### COMMONWEALTH CONNECTED

Whilst in the international cases already being conducted by resolution members across the country there are inevitably very many cases involving another European Union country, there are also an exceedingly high number of cases involving non European Union countries. Many concern countries which have had historic links with the United Kingdom: These are most obviously America and Canada, Australia, New Zealand and South Africa, the Asian subcontinent, other parts of Africa and the Caribbean. There are close links with many of these countries; personal, professional and commercial. Yet all or almost all of these countries have no concept of applicable law in family law, rarely have orthodox matrimonial regimes and often have similar discretionary based systems to England. Many share case law developments such as *White*. Whilst these countries recognise of course that England has now strong connections with Europe, the historic and ongoing strong connections are still highly valued because of the common approaches, common law systems, and many demographic links.

Generally, we do not have any significant number of cases with non EU countries which have strong historic links with other EU countries. There are relatively few South American or Latin America or north Africa cases.

There are many cases with the Middle East and with other Islamic orientated states yet these jurisdictions operate systems of law different again from the EU model of applicable law and matrimonial financial regimes.

The resolution international committee represents lawyers at large London practices through specialist and general practices to provincial practices. Overall we estimate that approximately 66 per cent, perhaps as much as 75 per cent, of international cases, namely family law cases with any international element, involve a non EU country. To embrace wholesale the distinctive trends of Europe alone will directly disadvantage, probably prejudice, those cases, those clients and those families with connections with non-European Union countries. It will create much greater difficulties in forum cases with non-European Union countries. It will add of course to the costs and uncertainties of lawyers in non-European Union countries considering forum issues with England. Our family law solicitors profession and our government should not now be turning its back on lawyers, clients and cases involving these non-European Union countries.

#### CONCLUSION

There are about 5,000 members of the resolution. It is believed that there are at least 10,000 solicitors, inclusive of this 5,000, undertaking some family law. Some undertake exclusively children work or domestic violence work so much less affected by Rome III. Nevertheless a great majority undertake divorce and finance work. I believe there are substantially more family lawyers in England and Wales than any other European union jurisdiction. The introduction of applicable law will dramatically affect considerably more lawyers in this jurisdiction than elsewhere. This is not to plead a special case but equally the Annex appears to ignore this impact.

The SFLA/resolution is the largest and most accomplished body of specialist family lawyers in the world, outside the US and perhaps even inclusive of the US! It is outward looking and embraces positive reforms, domestically and internationally. The resolution has had an international committee since approximately 1991. I was a founder member. We support our members in their work in international cases. We have seen the volume of such cases increase dramatically over the past 15 years. We have seen international cases extend out from the larger specialist metropolitan practices to all practices across the country. We give guidance on good practice, consistent with our ethos and approach set out in the resolution code. We are not slow to condemn laws, domestic and international, which we perceive as contrary to that code and contrary to the best interests of resolution of family law disputes and of the interests of children and the wider family. We have been vociferous in condemning the hugely negative, anti-family and anti-conciliatory aspects of first to issue principle in Brussels II. We continue to do so.

I do not seek to suggest that a special case on applicable law should be made for the English family law solicitors profession and our clients. But on what I have read, I am satisfied that there has not been sufficient awareness of the utterly fundamental and deep-seated changes and disadvantages to the whole ethos and

approach to family law issues that will arise from the introduction of applicable law and of financial matrimonial regimes.

The SFLA/resolution code has been in existence for almost 25 years. It has undoubtedly been one of the predominant transforming features of family law across the globe during this period. Many changes in many countries can be traced back to the mind set re-orientation and cultural shifts explicit and implicit in the Code. The approach and ethos of the Code, now embodied and amplified in the Law Society protocol, is consistently embraced by clients and the wider family. It has been supported and endorsed by successive governments. It is the bedrock upon which most families law solicitors practice and which attracts many into our profession. It informs practice in ADR. It encourages a multi disciplinary, holistic, settlement orientated approach. Through the manner of undertaking the work, it has a positive impact on this generation and through children of families, on the next generation.

There is a real worry that, perhaps akin to Brussels II, the introduction of applicable law will in a number of cases and for a number of people as well as for lawyers and judges go against the whole direction, impetus and good work of the SFLA Code, nationally and internationally. I urge the government to opt out of Rome III for this additional reason.

Instead, it is my belief based on what is now happening between family lawyer organisations across Europe that the greater closeness of lawyers between countries and shared approaches to family law, spurred on by the ever increasing number of international European family law cases, will relatively quickly create an intrinsic harmonisation of approach. This will be an approach to the manner of undertaking the work, to resolving cases and searching for fair and best solutions for international families.

I have confidence in this happening. It is happening already as newly forming national family lawyer organisations are set up across Europe and create their own codes of practice, often based on the resolution code. The UK government should be equally comfortable with placing confidence in this process occurring.

The UK government is fortunate in having an organisation such as resolution/SFLA within its jurisdiction and should allow it, in conjunction with the FLBA, Law Society and other ADR and law organisations, to continue to extend its good influence through international cases and international co-working across Europe and the rest of the world. Applicable law will set back this process dramatically and significantly. The losers would then be clients of this generation and the next, in this country, the European Union and the rest of the world.

Longer term, a shared conciliatory, constructive, settlement orientated approach will be of a hugely greater value to international families in Europe and across the rest of the world than choice of law. This is the choice of the UK government based on the impact on the English family law solicitors profession and their clients.

*4 October 2006*

### **Memorandum by Resolution**

#### **WHO WE ARE**

Resolution (formerly known as the Solicitors Family Law Association of England and Wales) is the primary organisation of family lawyers in England and Wales. We have approximately 5,000 practising solicitors as members, who act for a wide variety of clients, arising principally from relationship breakdown. Many of our members are also mediators and/or collaborative lawyers and we have a number of affiliate members including judges and academics. We practise according to a Code of Practice which promotes a constructive and non-confrontational approach and (where possible) non-court-based resolution of family disputes, prioritising the interests of children. This response has been prepared by Resolution's International Committee which has been in existence for over ten years and assists our members in understanding international issues and recommending good practice in cases which have international implications. We have a considerable number of cases with an international dimension, and such issues are now commonplace for all specialist family lawyers and for many general practitioners. As an organisation of specialist practitioners, we have closely seen the impact of EU law on our English and foreign clients and on their family. We estimate that approximately a half of our international cases concern Europe with the other half being primarily the United States and the former Commonwealth countries. We bear the latter in mind in the preparation of this response. Further details of Resolution can be found on our website: [www.resolution.org.uk](http://www.resolution.org.uk).

## INTRODUCTION

In our response to the Green Paper<sup>1</sup> we made clear that we did not think that the proposals would achieve the stated aims of legal certainty, predictability, party autonomy, preventing the rush to court and ensuring access to court. Although the explanatory memorandum mentions concerns on the issue of courts applying foreign law and that the consultation had been “taken into account”, it does not seem that this has made any real difference to the thinking behind the proposal. The memorandum also claims that there was no need for external expertise. However, the entire proposal shows a lack of understanding of the common law position and it is our understanding that there is no full-time member of staff with a common-law background within the EU Commission. We strongly suggest that common law expertise is required for this and future proposals.

## THE AIMS

The Proposal has not been improved since the Green Paper. Brussels II introduced what was essentially a continental system on jurisdiction for the whole of the EU and created a great deal of uncertainty about the outcome and intensified the problem of the race to court. The Proposal fails to create legal certainty and in addition introduces a new major problem of courts applying the law of countries with entirely different legal systems.

### *Legal certainty and predictability*

Although the proposals may create some certainty in jurisdiction and the applicable law for those couples who make very detailed marital agreements, which are then still applicable (see below), in the majority of international cases, there is no more certainty than there is now. We do not share the view that because all courts will apply the same law, the outcomes are the same. We take this view for the following reasons:

1. *Substantive v Procedural Law*: In some countries there is a strict distinction between substantive law (which would be subject to the new provisions) and procedural law (which would not). Often these are neatly split into a civil code and a procedural code. By contrast, there is no such clear distinction in English law, probably to some extent because there has been no necessity for it because English family courts have never applied foreign law in divorce. This is likely to be similar in other countries which apply *lex fori*. There will therefore be huge discrepancies from case to case (whether a foreign court applies English law or an English court applies foreign law) when a judge decides which parts of the foreign law is substantive (and is applied) and which is procedural (and is not applied). In the field of divorce the question will for example arise whether the requirement to prove one of five facts in section 1 of the Matrimonial Causes Act 1973 is substantive or procedural.

#### Example 1:

David (a German man) and Joanna (an English woman) live in England. David starts a relationship with another woman and returns to live in his native Germany. He starts a divorce there based on his German nationality and his habitual residence for six months. The court will apply English law under Art. 20b(b). The only reason why the marriage has irretrievably broken down is that he has decided so and formed a new relationship. Joanna has behaved implacably and would like to try to save the marriage. David was advised that he could not start a divorce in England based on his own adultery and that he would not be able to prove any of the facts under section 1 of the Matrimonial Causes Act 1973. In particular as the applicant he could not base the divorce on his own adultery. The German judge finds that the requirements to prove one of the five facts under section 1 are procedural and that because of David’s new relationship the marriage is over and grants a divorce.

2. *Case Law*: English law on divorce (how to prove irretrievable breakdown) as well as the financial consequences (under part 2 of the Matrimonial Causes Act 1973) is based on discretion. This is, however, not entirely unfettered and judgments of superior courts lay down guidance on how the law is to be applied. The law has been in a state of change through case law for some years. It is not clear to what extent foreign courts will take account of case law. On a basic level, for example, the laws of a country may provide that spouse maintenance is determined by what is fair, taking into account both parties needs and incomes. The way that one country may apply this is to apply a strict mathematical formula that higher courts have laid down by way of guidelines over the years (such as the “Düsseldorfer Tabelle” in Germany). Other countries may look at case law and use maintenance to provide for the sharing of future income and for compensation for the loss of

<sup>1</sup> which can be found at: [http://ec.europa.eu/justice\\_home/news/consulting\\_public/divorce\\_matters/contributions/contribution\\_icr\\_en.pdf](http://ec.europa.eu/justice_home/news/consulting_public/divorce_matters/contributions/contribution_icr_en.pdf)

a career (*Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24). The outcomes will be entirely different even if the court of a country applies the substantive law of another country, which on the face of it may say the same thing. Even in countries that have extensive collections of foreign law or institutes for private international law, it is likely that they get updated much later than the courts and lawyers in the home country. Therefore for a while after a change in law through a decision by a higher court, there is likely to be an imbalance between how different countries apply that law.

3. *Different Systems*: It may be easy for French lawyers to understand Dutch, Belgium or Italian law (as these are all based on the Code Napoleon), for German lawyers to understand Greek law (which was copied from German law in the 1970s) or for English lawyers to understand Irish law (which is based on English law)—and vice versa. However, we see how problematic it is to explain concepts of English law to lawyers from other jurisdictions. A clear example is the concept of trust, which is alien to continental jurisdictions. There is also likely to be ample material in, say, German university libraries on the laws of other European countries. However, this will not be the same for smaller EU countries where there may only be a handful of law faculties in the country and a lack of people speaking the language of the other relevant country. From experience we do not think that it is easy to apply foreign law and to ensure that the courts of other countries apply it correctly. Unfortunately, we are unable for duties of confidentiality to talk about our own cases, but we can provide examples that are based on our experiences. We also refer to the forthcoming analysis of our consultation of German judges and practitioners.

Example 2:

Catherine married Heinz in 1975 and they brought up two children living in Munich, Germany. Catherine is English and Heinz is German. In 1995 the marriage broke down and Catherine returned to England and started a divorce there. The judge found that as this was basically a “German case” the financial aspects should be decided by a German judge. Nevertheless, as both parties agreed that the marriage had irretrievably broken down, he granted the divorce. Neither side told the judge that the German court would apply English law to the maintenance because the divorce had been granted under English law. After seven years the court in Munich had still not decided on the level of maintenance because despite several expert reports from the Max-Planck-Institute, it was unable to decide on what English law provided. Both parties costs had risen dramatically as a result of making submissions on foreign law. Catherine had lived on the mercy of relatives for all these years.

The fact that the EU Green paper on matrimonial property regimes does not take account of the English system of financial provision also shows how difficult it is for continental lawyers to understand the English system. We refer to our reply to the Green Paper on applicable law on divorce (see above), which shows how the assumptions are riddled with mistakes. Equally the lack of understanding amongst English lawyers of the concept of a matrimonial property regime makes us doubt that English lawyers and judges would be able to apply foreign law correctly and easily without full training in the other legal system. We have not been able to find many examples of foreign courts applying English law. This may partly be due to the “hidden renvoi” practised by some courts, eg in Germany: If the conflict rules point towards English law (eg because of joint nationality), the court then applies *lex fori*, ie German law. Conversely, even English judges find it hard to deal with foreign law. In *F v F* (Ancillary Relief: Substantial Assets) [1995] 2 FLR 45 the court did not put any weight on the pre-nuptial contract the couple made in Germany expressing that the German court would probably not uphold it either in those terms.

More recently in the case of *Minwalla v Minwalla* [2004] EWHC 2823, [2005] 1 FLR 771 Singer J found in a financial application on divorce that a Jersey trust was a “sham trust”. The issue of whether this was correct under Jersey law was later questioned (see Timothy Hanson and Mark Renouf: *Minwalla v Minwalla*: Straining the Limits of Comity, [2005] Fam Law 794). So although English law was familiar with the concept of trust, the definition of a sham trust in Jersey law seems slightly different. While these difficulties arise in related jurisdictions, the application of a law that is based on entirely different concepts must be even more difficult to get right.

It is therefore not correct to say that the proposal would simplify the law. In fact we believe it would make it more complicated.

For these reasons we do not support the approach, which is the approach of only a minority of EU countries, to allow freedom in the field of where a divorce can be started and then have rules as to which law is applied. We reiterate that we support a hierarchy of jurisdictions based on the closest connection with a country coupled with *lex fori*, which would achieve the aims stated.

The problems with applying foreign law are of course far greater if that law is of a non-EU country.

**Example 3:**

Gemma and James are British Citizens and English domiciled. They live and work as expatriates in a Middle-Eastern country, say Saudi Arabia. Gemma is a nurse and James works for an oil company. They have a two year old son, Jake. They own a house in London, which is rented out. They have assets in Jersey as well as inherited property in England. English courts would have jurisdiction, but according to Art. 20b(a) the law of Saudi Arabia would apply to their divorce. The English courts would then have to examine what provisions substantive Saudi law makes for the divorce of Christians (if any). The fact that this may be difficult would not be a reason to use English law. Only if after ascertaining the Saudi provisions the English court found that they were against public policy could they use English law instead (Art. 20e).

Of course the parties could choose English law by consent, but only before the start of the divorce. If one of them is desperate for a divorce and the other one wants to negotiate a financially better outcome for himself or herself, agreement to English law on divorce could be used as a bargaining tool. The English courts would regard this as entirely inappropriate, but would be powerless to do anything about it.

*Party autonomy*

Although parties can choose the law that should apply for the divorce, they are free to choose a different country for jurisdiction (or none at all as is common in marriage contracts in Germany for example). In practice this means that the chosen law may not be the one that is applied by the courts at the time of divorce.

**Example 4**

Ulla and Bjorn live in Sweden. Ulla's parents moved there from Denmark before she was born and although she has lived in Sweden all her life, she retains Danish nationality. Bjorn is Swedish, but was born in Finland as part of the Swedish minority there. He has a Finnish passport. They marry after the birth of their second child. Bjorn is in his early 40s and a successful company director. He has a property portfolio in Sweden worth €3 million including the family home worth €500,000. Six months after the wedding, Bjorn is offered a position in London with a salary of £100,000 per year, a guaranteed bonus in his first year of £500,000 and living expenses. He moves there and the intention is that he will return every weekend. Ulla will continue to live in Sweden as she has a job there and the children have good quality nurseries. As it turns out Bjorn does not manage to come back home every weekend and soon Ulla meets another man and forms a relationship.

When Ulla and Bjorn married they made a marriage agreement choosing separation of assets, Swedish jurisdiction and Swedish law to apply to their marriage.

If either of them now started a divorce in Sweden, the agreement would be binding because:

- the choice of jurisdiction is valid by virtue of the fact that Sweden was their last joint residence and Ulla still resides there (Art. 3a together with Art. 3).
- the choice of law would be valid because Sweden was their last common habitual residence and Ulla still lives there (Art. 20a(1)(a)).

However, Ulla is advised that under Swedish law maintenance for her is limited and the choice of separation of assets means she will share none of the assets and will need to move out of the family home. She therefore wants to avoid Swedish law from applying and quickly moves to England. She then starts a divorce there based on Bjorn's residence under Art. 3.

- The choice of jurisdiction would no longer be binding because none of the factors of Art. 3 or Art. 3a(1) would apply. There is uncertainty in Art. 3a(1)(b) because although each of Bjorn and Ulla have lived in Sweden for several decades, they have only been married for two years at the time of the divorce and it is not clear whether the requirement relates to joint continuing residence, cumulative periods or even sole cumulative periods for each spouse including periods before the wedding. Logic would dictate that it refers to joint continuous residence, but this is entirely unclear. In any event, this sentence should be redrafted to clarify what is meant.
- The choice of law would not apply because none of the factors of Art. 20a(1) apply.

Accordingly under Art. 20b, the English courts would apply English law either under Art. 20b(a) or 20b(d). The outcome in financial terms would be so entirely different from what was agreed between the parties (substantial long-term maintenance and substantial asset-sharing) that there is no question of legal certainty. It is important that the agreement about jurisdiction and applicable law remains binding provided the conditions about the connection are fulfilled at the time the agreement is made (see below).

*Ensuring Access to Court*

We take the view that this aim is overstated. This is of course connected to jurisdiction, not to the applicable law. Under the current provisions in Brussels II and under the proposal each party would have the possibility of starting a divorce in a variety of jurisdictions. From our experience this can frequently lead to the court proceedings being in a country where one partner does not speak the language and with which they are not familiar.

*Example 5:*

Walter, a German man, and Jane, an English woman, meet in Germany where Jane has lived for many years. Walter is German. They marry. It is the second marriage for each of them. They make a marriage agreement that provides that German law should apply to all aspects of the marriage including the property regime. Jane moves to England and starts a divorce there six months later based on her domicile and habitual residence under Art. 3. Although Jane speaks fluent German, Walter speaks no English, has never lived in England and is entirely unfamiliar with English court procedure and law.

This problem would only be taken care of if the couple could choose a court at the beginning of the marriage (or at any time while it persists) and this would be binding irrespective of where the couple lived at the time the divorce proceedings are started. The connecting factors in Art. 3a and Art. 20a should relate to the time the agreement is made and not to the time the divorce starts.

We also suggest that parties can only choose one country for both the jurisdiction and the law. If they have only made a choice on one or the other, there should be a deeming provision about the missing choice. This would ensure the courts in the country best equipped to deal with the chosen law will deal with it.

It is simply not correct to state that the Proposal would not result in an additional financial burden on EU citizens or public authorities. In fact from our experience as practitioners costs for parties would increase where foreign law is to be applied and this would be out of all proportion to the value of the case for most cases. With increased time in court, the financial burden on the court system would also increase.

In England questions of foreign law are questions of fact that the court will find by way of submissions from experts. Even if the parties agree on a single joint expert, we estimate that the costs for the expert evidence in a simple case would be in the region of £1,000 for an initial report and £5,000 or more for a more complicated case. If the case does then not settle and the experts have to attend court for a final hearing, the costs will be far greater. On a rough estimate the costs of a case would increase by about 50 per cent overall. The law will need to be ascertained at an early stage in the case so that settlement negotiations can take place on the basis of what that law would provide. If there are costs of translating foreign law or an expert report, this would further add to the costs of the case and in some cases the costs could be double of what they would be if English law would have been applied. For those parties who are paying privately for their legal fees, this burden can in some cases be disproportionate to the overall case. For those who are relying on public funding (legal aid), the costs to the public would increase likewise. While the costs English solicitors and barristers can get paid in legal aid cases is limited and far less than they can get in private cases, the costs of the foreign lawyer experts will be the same as in private cases and therefore the increase in costs is likely to be even more disproportionate, especially as legal aid cases are often of low value.

In effect this prevents reasonable access to court because the legal fees are so prohibitive. We are told by judges from other countries that they often simply tell the parties to choose the local law. In countries where the court ascertains the foreign law, this may work. In England where the lawyers for both parties need to advise them on the issue, they could not advise their client what is in their client's best interest without first knowing the foreign law.

English solicitors and barristers are likely to face a hike in insurance premiums, which are already some of the highest in Europe, if they started advising on foreign law. The possibility to be negligent is far greater. We understand from practitioners in other jurisdictions that some simply decline to take on international cases for this reason. In effect this means that access to justice is prevented. This goal is therefore not achieved.

*Preventing the "rush to court"*

We take the view that this aim would only have been achieved to a limited extent, namely in so far as couples make agreements on jurisdiction and these are still binding (because the jurisdictions still falls into one of the factors in Art. 3a(1)). It will not prevent the rush to court in all those cases where there is no agreement. In fact as seen in Example 4 above, it would also not apply in all cases where there is an agreement. In other cases (Example 5 above) a party may still choose a jurisdiction for tactical reasons and the outcomes could remain

quite different depending on the jurisdiction (Example 1 above). As now, the court has no power to intervene even if it is obvious that a particular jurisdiction has only been chosen for tactical reasons.

#### IMPACT ASSESSMENT

We take the view that the Impact Assessment misses the point in more than one instance. It seems that the statistics about “international marriage” is greatly flawed by the fact that some of the largest EU countries were unable to supply data and some smaller ones (Luxembourg, Estonia, Belgium, Cyprus) who have specific locations and therefore a high number of foreign nationals living in their countries have skewed the statistics.

The main failure of the Impact Assessment is that there are no costings for the various options other than the option 2 (Increased Co-operation). We take the view for the reasons set out above that the proposals would dramatically increase the costs for the parties and therefore also the legal aid schemes (in common law jurisdictions), and the courts (in those jurisdictions where the court has to ascertain the foreign law). At the very least providing the budgets of the German and Dutch institutes that are referred to could have given an indication of the costs.

The benefit and disadvantage analysis of the harmonisation of conflict of law rules is simplistic. We do not believe that it simplifies the law, but that it makes it more complicated and therefore decreases legal certainty. The Impact Assessment refers to the fact that practitioners have submitted that the application of foreign law will increase costs, but no further analysis has been made. It is grossly understated to say that “training on the new legislation would be needed”. Even basic awareness training on the new Regulation would be at least require a two-day course. Assuming that about half of family solicitors in England and Wales (estimated at 10,000) trained at the usual cost of a minimum of £500, this would cost the profession £2.5 million. This does not take into account training for barristers, judges and court staff; nor would this include training on the specific law of specific countries. Under the English system an adviser and advocate has to advise on the law and cannot rely on the court to find out what the law is. Therefore either a lawyer would need to qualify in the other country (which is extremely rare) or they would need to bring in experts to do this for them. Foreign lawyer experts are expensive. Dual-qualified solicitors and barristers are likely to face very high professional indemnity insurance rates, which makes this unattractive for lawyers to do. For the reasons set out and from what colleagues from other countries have told us we expect that a large number of practitioners will simply refuse to take on international cases and access to justice will decrease not increase.

We also note that of 24 countries with divorce 13 apply first of all the law of the common nationality (Austria, Belgium, the Czech Republic, Germany, Greece, Italy, Hungary, Luxembourg, the Netherlands, Poland, Portugal, Slovenia and Spain), 9 use *lex fori* (Cyprus, Denmark, Finland, France, Ireland, Latvia, Sweden and the United Kingdom) and only two countries apply the law of the common domicile or residence (Estonia and Lithuania). What is proposed is a regime that links to the common habitual residence in the first place, which will be a major change for all but two EU countries. This would mean that the many cases in which courts of the countries who use the common nationality in the first place and currently apply foreign law would in most cases no longer do so (eg for Turkish nationals in Germany). The current experience with applying foreign law is of course mainly in cases of such large immigrant communities for which there is ample literature and translated texts. Under the proposals this will change and the foreign law that will need to be applied and ascertained will be from more diverse countries and therefore more difficult to ascertain. We also do not share the view that it is realistic to think that smaller EU countries could sustain institutes like the Max-Planck-Institute in Hamburg, let alone have libraries with the foreign statutes, cases and commentary, even in the original language. In our view the costs of the proposals will be enormous and entirely disproportionate in most family cases.

We also cannot agree with the analysis of the option of having a hierarchy of jurisdictions, which we advocate. The main criticism made of this option is that it is said to decrease “access to court”. If this is confined to the question of whether either spouse can issue a divorce application in the largest possible number of courts in Europe, than this is of course correct. “Access to court” or rather “access to justice” (which is similar to the fundamental right to an effective remedy) also includes that parties can:

- afford court proceedings;
- obtain legal advice from competent lawyers;
- understand the language of the court;
- can predict at least to some extent how the judge in question will interpret the law to be applied.

We take the view that a hierarchy of jurisdictions combined with *lex fori* (and special provisions for third countries) would achieve all these aims while the Proposal does not. We therefore do not share this criticism of the hierarchy of jurisdictions option.

The only other argument against a hierarchy of jurisdictions is that “most Member States are firmly against re-opening the discussions on the grounds of jurisdiction”. This is simply a self-serving argument. Making no law reform at all is better than making bad law. If the Commission proposes to legislate simply for part of the EU, this would also not achieve the aim.

We also note that while there were 8 options in the Green Paper, there are only 7 options in the Impact Assessment. Most importantly the options of introducing the possibility to transfer a case has been entirely omitted. This would have been in our view a good way to supplement the hierarchy of jurisdictions option for cases with third countries:

<i>Green Paper</i>	<i>Impact Assessment</i>
3.1 Status quo	5.1 Option 1: Status quo
	5.2 Option 2: Increased co-operation between Member States
3.2 Harmonising the conflict-of-law	5.3 Option 3: Harmonising conflict-rules of-law rules and introducing a limited possibility for the spouses to choose applicable law
3.3 Providing to spouses the possibility to choose the applicable law	
3.4 Revising the grounds of jurisdiction listed in Article 3 of Regulation No 2201/2003	5.4 Option 4: Revising the rules on jurisdiction in Article 3 of Council Regulation (EC) 2201/2003
3.5 Revising the rule on residual jurisdiction in Article 7 of Regulation No 2201/2003	5.5 Policy Option 5: Giving the spouses a limited possibility to choose the competent court (“prorogation”)
3.6 Providing to spouses the possibility to choose the competent court	5.6 Option 6: Revising the rule on residual jurisdiction in Article 7 of Council Regulation (EC) 2201/2003
3.7 Introducing the possibility to transfer a case	
3.8 Combining different solutions	

For these reasons we do not agree with the assessment in Table 6.1 on page 21 of the Impact Assessment and would instead have given the harmonisation option at most three stars for legal certainty, two or three for reducing the rush to court and two for access to court. By contrast we would have given the hierarchy option five stars for legal certainty, (combined with the prorogation option it would achieve five stars for party autonomy and flexibility), five stars to reduce the rush to court and three stars for access to court. This option would have therefore won overall.

For these reasons we do not think that the Impact Assessment is valid and should guide the decision making.

## THE PROVISIONS IN DETAIL

### *Article 3a—Prorogation*

As stated in our reply to the Green Paper, we welcome the introduction of party autonomy. However, we see the following problems:

1. Although it seems to be implicit, there is nothing that clearly says that the choice of the parties will trump the other possible jurisdictions. This must be made clear (see Example 4).
2. The connection with the country whose jurisdiction is chosen should relate to the time that the agreement is made, not the time of divorce. Again, this is not clear, but it seems that what is meant is the time of divorce. Example 4 above illustrates why this is not workable and can lead to uncertainty and a race to court by moving across Europe.
3. We do not think that couples should be allowed to choose the courts of one country and the law of another. There seems to be no need for this whatsoever and it would lead to an unnecessary burden on the courts.

4. It is not clear whether Art. 3a(1)(b) relates to residence after the wedding only, whether it should be uninterrupted or cumulative and whether residence by both spouses in another country (albeit not as a couple, see Example 4 above) would trump this.
5. We do not think that signed writing is sufficient safeguard against undue influence, duress and abuse of the provision. Some element of legal advice should come into this. The provisions for similar agreements vary from country to country. While in England the courts would demand independent legal advice from a specialist family lawyer for each party, in other countries a notary would advise both parties or the registrar at the wedding would fulfil this duty. We suggest therefore that the formalities should be left to each country. This is an area where there is no need for community legislation and each country in the EU could lodge details of how such agreement is made under its law. The law or jurisdiction and law chosen should determine the law that should govern the formalities. We do of course propose this on the basis that both law and jurisdiction chosen have to relate to the same country. A Directive may be necessary to ensure that those Member States that have no system of agreements between spouses introduce the necessary formalities.

It is our view of course that Art. 3 should be amended to provide for a hierarchy of jurisdictions.

#### *Article 6—Exclusive Nature of Jurisdiction*

We are not aware of any case in which someone has relied on this and it seems superfluous to us too.

#### *Article 7—Residual Jurisdiction*

The provisions would encompass the current residual provision under English domestic law and we welcome that the rules here are made uniform. However, again in this case, more than one EU country may have jurisdiction and it is not clear which would then take precedence. These fall-back provisions could sensibly be at the bottom of a list of a hierarchy of jurisdictions.

#### *Article 20a—Choice of Law by the Parties*

We welcome the introduction of party autonomy. However, we have a number of reservations, some similar or the same as mentioned in connection with Art. 3a above:

1. The connection with the country whose law is chosen should relate to the time that the agreement is made, not the time of divorce. The provisions in Art. 20a(1)(a) imply that the proposal contemplates that the law is chosen after the breakdown of the marriage. Example 4 above illustrates why this is not workable and can lead to uncertainty and a race to court by moving across Europe.
2. We do not think that couples should be allowed to choose the courts of one country and the law of another. There seems to be no need for this whatsoever and it would lead to an unnecessary burden on the courts.
3. As with Art. 3a(1)(b), is not clear whether Art. 20a(1)(c) relates to residence after the wedding only, whether it should be uninterrupted or cumulative and whether residence by both spouses in another country (albeit not as a couple, see Example 4 above) would trump this.
4. We do not think that signed writing is sufficient safeguard against undue influence, duress and abuse of the provision. We refer to our observations on Art. 3a for our views on the formalities.

#### *Article 20b—Applicable Law in the Absence of Choice by the Parties*

We note that the Proposal is for a hierarchy of laws. There seems no reason why the issue of law and jurisdiction cannot be combined and this hierarchy could not be applied to both. The list may need to be more extensive in that case though.

As to Art. 20b(c), we note that this could of course result in two countries having jurisdiction:

##### Example 6:

Giovanni and Antonetta are both Italian. They came to England after finishing school in Italy and went to university in England. Neither of them has any wish to return to live in Italy and they both regard England as their home for life. They are therefore both domiciled in England.

In this case both Italian law (common nationality) and English law (common domicile) would fall into the same step in the hierarchy and there is no rule on which should apply. This must be changed. As the concept of domicile relates to a closer connection with a country than that of nationality, the logical amendment would be to rank domicile before nationality.

If anything this simply again illustrates that those who drafted the Proposal do not fully understand the concept of domicile in English law. This again puts into doubt how foreign courts would be able to apply English law.

#### *Article 20c—Application of Foreign Law*

We do not think that the European Judicial Network would be an adequate way to ensure that all courts in the EU can correctly and adequately apply foreign law. In addition, the EJM would not cover the law of non-EU countries, nor would it in any way facilitate the access to correct legal advice for the parties. The judge in an English court does not give legal advice. It is for the advocates to present the law to the court (see above). This again shows the lack of understanding of English law by the authors of the proposal.

If it is only judges who find out about the law, this limits the way that parties are able to conduct negotiations before court proceedings start. It will therefore make alternative ways of dispute resolution including mediation, collaborative law and negotiations difficult or impossible. This would not be in the interests of families in Europe.

#### *Article 20d—Exclusion of Renvoi*

We welcome this provision to ensure simplicity.

#### *Article 20e—Public Policy*

There is no guidance what this could apply to. The memorandum says that the “exception must be exceptional”. This adds nothing at all. The following questions arise:

1. Should this ever apply in the EU context? This would probably not be appropriate.
2. If the provisions of Art. 20b provide for the law of a country in which for example only men could divorce women but not vice versa, we could envisage the court to find that this is discriminatory and against the fundamental right not to be discriminated on grounds of sex and therefore domestic law should be applied instead as this breach of human rights would be a breach of public policy. However, what about a case in which the applicable law is Maltese law under which neither party can divorce? This must be clarified if any future EU Regulations is not going to cause more problems than it purports to solve.

#### CONCLUSION

For the reasons stated, we recommend that the UK does not opt into the proposed regulation.

Although harmonisation of conflict rules is desirable the whole approach taken is simply wrong. We have repeatedly stated how the goals could be achieved, but the approach via a hierarchy of jurisdictions has simply been ignored. The UK should continue to try to negotiate along these lines and we hope that the current rushed proposals can be shelved in favour of a more considered approach that will work for the whole of the EU.