Response to Green Paper

on Conflict of Laws in Matters Concerning

Matrimonial Property Regimes, Including the

Question of Jurisdiction and Mutual Recognition

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 half of our international cases concern Europe with the other half being primarily the United States and the 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.

Introduction

We were shocked about the obvious fundamental lack of understanding of English law by those who drafted the Working Document for the

Commission. It is in almost all aspects simply entirely wrong. We are not going to analyse this in detail. Suffice it to say that Irish law is for all intents and purposes in this area the same as English law, while Scots law is different. Nevertheless, the answers for Ireland and England differ considerably and the summaries in the tables annexed to the Working Document sometimes have categories for England, Ireland and Scotland and sometimes for "Great Britain" and Ireland. There seems no consistency in the comparison. If the EU is serious about including common law jurisdictions in the legislative programme, it must commit the budget and the personnel to have the necessary expertise in this area. Having seen the blunders in the Working Document about English law, we have no confidence that the laws of other countries have been accurately summarised. If even the EU Commission who has spent money on a study is unable to get the basic understanding of English law right, it leaves us no hope that it would be possible for courts throughout the EU (and beyond) to apply English law correctly.

The concept of "matrimonial property regime" does not exist as such in English internal law, at least not in English family law. Until the 19th century a woman's property became her husband's property on marriage in most European legal regimes. When this changed, the continental jurisdictions dealt with the ownership of property during the marriage and on termination of the marriage (whether through death or divorce) in the same way by introducing a concept of property regime. The simplest form is "community of property", where both spouses' property becomes joint property on marriage and is then divided equally when the marriage terminates. Since this did not always reflect the wishes of the parties, the alternative property regime of "separation of assets" was an option that in most jurisdictions can be elected by the parties. Some countries still have these two concepts. Others have refined the law and several (e.g. Germany, the Nordic counties) now have "property regimes" that keep the property during a marriage either separate or communal, but allow a redistributive exercise on divorce and death (not necessarily in the same way). Since the concept of "property regime" already existed, it was convenient to stick with it and label what is essentially a redistributive exercise as a property regime (e.g. "Zugewinngemeinschaft" in Germany).

In England the development was different. The concept that a woman's property automatically transferred to the husband on marriage, was immediately replaced in 1883 by nothing happening to property on marriage at all. In effect therefore this is the same as a "separation of assets". However, over the years statutory provision was made for financial provision of one spouse out of the assets and/or income of the other on divorce, nullity and judicial separation (now in Part 2 of the Matrimonial Causes Act 1973) and death (now in the Inheritance

(Provision for Family and Dependants) Act 1975). Both systems are discretionary.

While until recently the provision on divorce was heavily guided by the needs of the applicant (or "reasonable requirements" *Duxbury v Duxbury* [1987] 1 FLR 7) this was changed by the House of Lords' decision in *White v White* [2000] 2 FLR 981 and *Miller v Miller and McFarlane v McFarlane* [2006] UKHL 24. Even before these decisions the court did not distinguish between provision by way of periodical payments, lump sum or property transfer. So for example a court would order that a house be bought for the wife and the husband pay her a lump sum so that she could live from the invested sum. If there were not sufficient assets, the court might order periodical payments that would allow the applicant to pay monthly mortgage instalments for a home. The situation now is that not only capital is shared "fairly", which in many cases can mean equally, but that future income is also shared, in appropriate cases with high income, over and above any needs of the applicant.

The conceptual difference is, however, that there is no entitlement to part of the other's estate (or to the joint estate: there is none) that arises out of the fact that the couple are married. The entitlement arises from the court order, which is only made if and when one spouse or former spouse makes an application to the court ancillary to a divorce or after death.

In the Green Paper "matrimonial property regime" is defined on page 2 as:

> "Matrimonial property rights of the spouses. Matrimonial property regimes are the sets of legal rules relating to the spouses' financial relationships resulting from their marriage, both with each other and with third parties, in particular their creditors."

However, question 1 then explicitly asks whether the definition should exclude or include certain areas. What is not clear at all is whether the intention of the proposed legislation is to encompass

(a) <u>all</u> property aspects between spouses or

(b) only those that are traditionally understood to be matrimonial property regimes in continental jurisdictions.

If the former, the Commission needs to address their mind as to whether and how the concept can apply to English law; if the latter, the application to English law on divorce would be limited. On a domestic level it would not apply at all; for certain international divorces English courts would possibly have to apply foreign property regimes. However, if the court retains its discretionary jurisdiction under the Matrimonial Causes Act

1973 in those cases, a division of the property according to a foreign property regime would be as irrelevant as questions of implied or constructive trust in relation to properties of divorcing English spouses (*see Fielding v Fielding* [1977] 1 WLR 1146).

We have had the benefit of reading the response by the Bar Council of England and Wales. While we concur with almost all of what is said on behalf of the Bar, we are not at all confident that the concept of "matrimonial property regime" excludes English provision for spouses after divorce. The very eloquent argument made by Timothy Scott QC on behalf of the bar was rejected at first instance by Wilson J in *C v C (Variation of post-nuptial settlement)* at [37]-[41] ([2003] EWHC 742 (Fam), [2004] 2 FLR 1; upheld on appeal on a slightly different reasoning, reported as *Charalambous v Charalambous* [2004] EWCA Civ 1030, [2004] 2 FLR 1093). Whilst this case may turn on its facts, at the very least until a higher court rules precisely on the issue the question should be regarded as open. Therefore we do not share the confidence of the Bar Council that whatever the EU does, will have no impact on English family law. In any event the argument does not apply on the distribution of an estate on death.

Before examining the intricacies of matrimonial property, one should not forget two other aspects of law that interlink with this area and that are quite different in the English legal system from continental systems:

1. Trusts

2. Inheritance

Both areas are complex and their examination goes far beyond the purpose of this response. However, a brief examination is important:

<u>Trusts</u>

In English internal law there is always (at least in theory) a distinction between the legal (let's say, paper-) ownership of property (e.g. who is registered at the land registry) and the beneficial ownership, i.e. the people who are entitled to the sale proceeds and/or the use of the property. In continental jurisdictions similar concepts are found when an estate is administered after a death, maybe by one or two people who are registered as owners for the benefit of a group of heirs. The unique feature in English law is that a trust can be established by deed, but can also be implied. This enables general law to deal with a matrimonial situation, where, for instance, a husband owns the family home and his creditors are coming after it. The wife may in certain circumstance be able to establish a beneficial interest in the property and thereby defeat (part of) the creditors' claim. Therefore the concept of trust deals with a

number of aspects that in other systems are dealt with through the matrimonial property regime. There can therefore be a conflict between the two and in our view it is not possible to deal with mutual recognition of one without the other.

Example 1

Sybille and Loic are French domiciled. They love Cornwall and buy a holiday cottage there. The purchase price comes from joint savings, but the house is bought in Sybille's name because Loic is unable to travel to England to sign the papers. Although they plan to regularise the ownership by transferring the property into joint names later, they do not get round to it. Under English internal law Loic may own an equal beneficial interest in the property. Therefore, if for example Loic has debts in England, his creditors could sue him and enforce the judgment against the house and eventually force a sale. By contrast, if Sybille had debts in England, Loic could prevent the creditors from getting all of the sale proceeds by arguing that he has a beneficial interest in half of them. This is, in any event, irrespective of the fact that they are married and the situation would be the same if they were cohabitants. If the law looked at property regimes and treated the property as being held under the French regime, it is possible that a creditor of either spouse could get the entire sale proceeds. If French law treated the house as being held under a purported English separation of assets regime, it may be that only Sybille's creditors could enforce against the house (and against all of it) while Loic's creditors would not be able to. On a divorce in England the question of who owns what shares beneficially would not usually arise because the court could redistribute them anyway under the discretion under the Matrimonial Causes Act 1973 taking into account all circumstances of the case including income, assets, needs etc. of the parties.

Most matrimonial homes are owned jointly by the spouses in a version of a trust (a joint tenancy) under which on the first death the home becomes the sole property of the survivor irrespective of the intestacy rules of any testamentary provision.

Inheritance

The main principle in English law is testamentary freedom. Anyone can leave his estate to whoever they like, be it a charity or a person. Children have no right to a part of their parent's estate, nor even do spouses to a part of the other spouse's estate (or other relatives for that matter). However, if no adequate provision has been made, spouses and civil partners (and dependant children and certain other people who were maintained by the deceased) can make a claim against the estate under the Inheritance (Provision for Family and Dependants) Act 1975 provided

that the deceased died domiciled (as defined under English law) in England. In a purely domestic English situation there is no automatic dissolution of a matrimonial property regime on the death of the first spouse to die because there is no such regime. Problems would arise if the law that applied to the death and the law which applied to the property regime were not the same.

Example 2

Jürgen and Sigrid are German domiciled. They have one son, Kai, who is 12. They move to England because Jürgen works for BMW and is sent to work as a manager at the Mini factory. When they married, neither had any assets and all assets were acquired during the marriage from income. They sold the house in Germany and invested all the assets in Jürgen's name in bank accounts and share portfolios held in England. A year after the move, Jürgen dies in a car crash. He has left a will leaving all his assets to his secretary, Tracy.

If Jürgen had died before the move to England and therefore only domestic German law applied, Sigrid would have received the following under German law, namely ½ of his estate under the dissolution of the marital property regime plus 1/8 of the remainder as her compulsory share, i.e. 9/16 of the estate. Kai (irrespective of his age) would have received ½ of ¾ of the remainder, i.e. 3/16 of the estate. Together they would have therefore received between them 12/16 or ¾. Tracy would have received the rest, i.e. ¼.

If however Jürgen died domiciled in England (under the English definition of domicile), Jürgen's will leaving everything to Tracy would be been essentially valid. However, Sigrid and Kai could apply for provision and might well receive all of the estate, depending on the size of the estate and their needs.

If EU law provided that the spouse's matrimonial property regime changed to an English regime and this was to be said to be a separation of assets, but Jürgen's estate remained to be distributed under German law (because he remained domiciled there), there would be no provision for Sigrid under a dissolution of the property regime. She would receive 1/8 of Jürgen's estate and Kai would receive 3/8, so together they would receive ½ instead of ¾. Tracy would receive the other ½.

Whether Sigrid and Kai would be able to apply for provision from Jürgen's estate, would depend upon Jürgen's domicile, unless the connecting factor for succession were also changed to that of habitual residence in a separate legislative move.

This shows that making provision only for the conflict rules for matrimonial property regimes without at the same time making rules for succession that tie in with those, would not work and probably lead to more injustice than it is likely to remedy. In our view therefore provisions for conflict rules on matrimonial property regimes should not be made unless provisions for rules on succession are made at the same time and the two areas integrated.

The two options on definition

If the definition of "matrimonial property regime" is confined to what it is traditionally meant by it in continental jurisdictions((b) above), similar anomalies and injustices could arise on divorce.

> *Example 3*
>
> *Louisa and Mitch are English domiciled. All assets were acquired from income during the marriage and are held in Mitch's name. During 30 years of marriage Louisa has brought up 4 children and not worked. Now in their mid-50s, they moved to Germany as Mitch was made redundant and found a job there. They sell the house in England and buy a property in Germany in Mitch's name. Mitch starts a relationship at work that is inappropriate and he is not taken on after the probationary period. Louisa thus finds out about his affair and wants a divorce.*
>
> *If their matrimonial property regime is supposed to be English and this is seen as a separation of assets, Louisa would receive nothing. She would also in practice not receive maintenance and come out of the marriage entirely penniless.*
>
> *If by contrast they had divorced in England before the move, it would not have mattered that all the property was registered in Mitch's name and Louisa would have received provision, probably around half of the overall assets.*

This shows that if the definition of matrimonial property regime was restricted to its traditional meaning, it would leave the main way of financial provision in English law outside the EU conflict rules altogether. There was maybe a time when this could all be regarded as a type of maintenance (*Van den Boogaard v Laumen* [1997] 2 FLR 399 and see above), but this is no longer the case. In any event, further problems could be encountered because the UK has not opted into the maintenance regulation.

In the reverse case where a couple divorce in England who have a foreign matrimonial property regime, this would be of little consequence because the English financial provision under the Matrimonial Causes Act 1973 has unrestricted powers to override the strict property law ownership.

If by contrast the definition encompassed English financial provision, this would have the advantage of not leaving a gap. However, the problems would then arise that English courts would have to apply foreign law on matrimonial property regimes to dissolve them and that foreign courts would have to apply English law on financial provision.

We see great problems in the application of foreign law from entirely different legal systems. We have set these out in our Response to the Commission's Proposals on Rome III previously, which is annexed to this Response. Our observations on the failures of the Working Document underline this view.

Recognition and Enforcement

It is generally desirable to have certainty that an order made in one country would be enforced in another country. This avoids situations where the applicant for a divorce needs to choose a forum with which the couple only have a tenuous connections, simply because the main asset is located there (e.g. a pension, a house). It would also to some extent prevent one party on a divorce from being able to defeat the other party's claim or rights in practice by taking funds or property out of the jurisdiction in anticipation of the divorce or before a judgement can be enforced. However, the Green Paper assumes the need for conflict rules that provide that the order (or distribution) made in one country does not clash with the an order that has been made or could be made in the country asked to enforce it. For the reasons set out in this Response, we take the view that the thinking in this area is based on sketchy information and has not matured. Anther approach for the interim may therefore be to provide rules that allow the courts of another country to enforce the orders made in other EU countries provided that they do not go entirely against their own concepts of fairness etc. This would at the very least help in situations where say an English couple have a holiday home in Southern Europe, which the English court orders to be sold as part of the divorce settlement.

Scope

There are other financial aspects of a marriage that have not been mentioned at all, either in the Green Paper or in other proposals in this area, most notably pensions. For a large number of couples the pension

(usually the husband's) is the main assets, or the main asset after the home and sharing or offsetting the pension is a regular feature of financial orders made on divorce in England. If only the actual assets are taken into account and pensions are excluded, this would lead to gross unfairness to the party who has no or little pension provision. It would also mean that certain pension provision (those that take the form of life insurance investments) would fall into the rules, while others would fall entirely outside. The main problem we see is that pensions are inextricably linked to the social welfare state provisions in each Member State and the provisions for pension sharing differ so widely that it is at least at this stage impossible to say what provision should be made in this area. That does not mean it can be ignored. In our view it means that legislation for just the property regime on its own is premature and should not be made at this stage.

There are also issues that arise in relation to third countries, i.e. non-EU countries. While it may be appropriate in general to say that there is sufficient comity between the EU Member States, we do not think that it would be acceptable to apply the law of every country in the world, some of which are blatantly discriminatory. Nor would it be appropriate to allow any country in the world to take the lead and assume jurisdiction. Further consultation in this area is necessary before any of the measures the EU is contemplating could move further.

The Questions

Question 1:

(a) Should certain personal aspects of the marriage settlement not covered by the instruments referred to above or only the property consequences of the marriage bond be included in the future instrument? If so, which ones and why?

(b) Should the future instrument apply to the property consequences of that bond arising while the parties are still living together or only when they separate or the marriage bond is dissolved?

We refer to our introduction above. In theory it would be desirable to have EU law covering all aspects of family law including divorce and all financial consequences. However, there are severe problems in connection with:

- English law working entirely differently and not really recognising the concept of "matrimonial property regime" in a divorce context;
- the interlink with trust law and the law on succession;

- the near impossibility we see in practice of foreign courts correctly applying English law and the other way round;
- the UK having opted out of the measures on maintenance and Rome III.

On balance therefore we take the view that unless all these issues were to have been addressed, neither of the definitions we set out above would work for England.

Question 2:

(a) What connecting factors should be used to determine the law applicable to matrimonial property regimes? And what should be the order of priority where there are several such factors (the spouse's first habitual residence of the spouses, their nationality, etc.? Other connecting factors?)

For the reasons set out we do not think the ideas put forward in the Green Paper could work. For the ideas to work at all, it would need to be based on the principles we have set out in response to the Green Paper on Rome III and the Response to the draft of Rome III (annexed), i.e. that the country with the closest connection to the couple is found first and then that the courts of that country apply the law of that country. This would cut out the problems of applying foreign law. It would also cut out the problem of applying one law to the divorce, a second law to the maintenance claim and a third law to the division of the assets. This is vital because in English law there is no real distinction between the last two areas.

(b) If the future instrument applies to all the property consequences of the marriage bond, should the same criteria be envisaged both for the lifetime of the bond and for the time of its dissolution?

For the reasons set out we do not think the ideas put forward in the Green Paper could work. The answer to this question would depend on the criteria. It would be preferable for simplicity in general, but it is not a necessity. Further thought is necessary.

Question 3:

Should the same connecting factors be used for all aspects of the situation covered by the applicable law or could different factors be used for different aspects ("depeçage")? If so, what situations should be taken into account?

For the reasons set out we do not think the ideas put forward in the Green Paper could work. We see problems with English law recognising primary foreign property regimes, i.e. those governing the way property is held during the subsistence of the marriage for all aspects.

Example 4

A French domiciled man sells a house in England. Presently, the buyer will acquire good title if the French owner has signed the transfer. If England were to recognise the French primary matrimonial property regime, the owner may not acquire good title unless the Frenchman's wife joins the sale. There is no way the Englishman could find out whether the seller was married or not and it would generally be unacceptable in England for transactions by foreigners here to jeopardise third party buyers (or sellers). By contrast if a French couple buy a property in England they would instruct a lawyer to carry out the conveyancing and can then obtain advice on how to own the particular property to coincide with their wishes.

There is no reason in principle, however, why that property should not be governed by the French secondary property regime, i.e. that applicable on divorce and death and dealt with by the French divorce court in case the marriage breaks down and the divorce takes place in the French courts.

Question 4:

Should the automatic change of the law applicable to the matrimonial property regime be allowed in the event of changes in certain connecting factors, such as the spouses' habitual residence?

If so, can such change have retroactive effect?

If the Commission did go back to the drawing board and tried to work out a system as set out in response to questions 1 and 2 above, this would be preferable because only in this way would it be possible to have the property regime be governed by the law with which the couple has the closest connection.

Question 5:

(a) Should there be the possibility for the spouses of choosing the law applicable to their matrimonial property regime? If so, what connecting factors can be taken into account to allow this choice?

In general we support choice. However, as in our Response to Rome III, the couple should only be able to choose the same law for all aspects of their marriage and the courts of that country would then also have jurisdiction to deal with the divorce and all other aspects following from it. More thinking s needed to see how this could tie in with the law on succession.

(b) Should a multiple choice be allowed whereby some assets would be governed by one law and others by another law?

This could be possible for property during the persistence of the marriage, but not on breakdown on divorce or on annulment. In particular, it may be sensible if immovable property during the persistence of the marriage can be subject to a local primary regime (see the answer to question 3 above). It would not be desirable to have more than one secondary regime, so that the divorce court would have to grapple with different property regimes for different assets, or even courts or authorities in different countries would have to deal with the various assets, increasing costs and possibly leading to results that are contradictory, or leave an inequitable distribution of the marital assets.

(c) Should it be possible to make or change this choice at any time, before and throughout the marriage or only at a specific time (at the time of dissolution of the marriage bond)?

It would make sense to enable couples to change this choice if they have formed a closer connection with another country, or before they move to another country if they do not want their marriage to be governed by the law of that country (e.g. a couple of doctors who go and work in Africa for a humanitarian organisation).

(d) In this case, in the event of a change of applicable law, must the change have retroactive effect?

It would produce unfair results if the change had retroactive effects. The issue is, however, not relevant to the question of the secondary regime on divorce. As many other questions, this question itself is too vague to be able to be answered clearly.

Question 6:

Should the formal requirements for the agreement be harmonised?

For the reasons set out we do not think the ideas put forward in the Green Paper could work. Nor do we think that a consensus could be

reached on the formal requirements for agreement. Some countries have strong notarial systems, others may require such agreements to be done at a public office; English legal thinking would insist on independent legal advice for both parties. As in our response to Rome III we take the view that the agreement should meet the formal requirements of the law chosen. While there is an argument for saying it should be valid if it complies with the requirements of the place where it was made, this would enable an Englishman to take his bride-to-be to a notary of a country where they get married (say a beach location) and enter into an agreement to choose any law that would be favourable to him without the notary in practice having any experience of the law of that country. We would not support that position, in particular as English law is not governed by strict mathematical principles and anyone choosing it should be advised by solicitors with experience in English law. As there is no provision in English law for such agreements, a directive would need to require domestic legislation.

Question 7:

(a) In the event of dissolution of the regime by divorce and in the event of separation, should the court having jurisdiction in these matters under Regulation No 2201/2003 also have jurisdiction to rule on the liquidation of the matrimonial property?

(b) In the event of succession, should the court having jurisdiction in disputes regarding the succession also have jurisdiction to rule on the liquidation of the matrimonial property?

Whilst we do not think that the Commission's ideas would work at all, we clearly favour that one court deals with all aspects. We do not think it could practically work in any other way.

Question 8:

(a) If not, which rules of international jurisdiction should be adopted, in particular for property questions arising while the couple are still living together (e.g. donations between spouses, contracts between spouses)?

(b) Should there be a single general criterion or several alternative criteria as provided for by Regulation No 2201/2003 (e.g. habitual residence, common nationality)?

It is our view that the alternative criteria in Brussels II (Regulation 2201/2003) are a great mistake that lead to forum shopping and a

multitude of problems and injustices in our experience. There should be a hierarchy of jurisdictions as set out in our Response to Rome II annexed.

Question 9:

(a) Is it possible to provide for a single court to rule on all the types of assets, movable and immovable, even when they are located on the territory of several Member States?

(b) Where a third party is party to the dispute, should the rules of the ordinary law apply?

Whilst we do not think that the Commission's ideas would work at all, we take the view that this is imperative for the reasons set out elsewhere.

Question 10:

Is it possible to provide that the parties may choose the court? If so, how and on the basis of what rules?

Whilst we do not think that the Commission's ideas would work at all, we take the view that only the court whose law governs the property regime should have jurisdiction. Some provision may have to be made if this is a non-EU court.

Question 11:

Would it be useful to allow cases to be transferred from a court in one Member State to a court in another Member State in this respect? And if so, on what terms?

Whilst we do not think that the Commission's ideas would work at all, we would answer any similar question in a future consultation in the affirmative. There is precedent for this in Brussels II for matters concerning parental responsibility. This would be useful especially in cases where there is a mismatch between the court and the law it has to apply, for example because of a historic marriage agreement, a non-EU country or the like.

Example 5

Jean and Charlotte are doctors working for an NGO in an African country that used to be a French Colony and whose law is based on French law. Jean is French and Charlotte is English. They marry and live together in the African country. Let's assume that either through election or through a rule that provides that the property regime of binational couples is linked to habitual residence, the

property regime was governed by the law of the African country. They separate and return to their respective countries and Charlotte applies for divorce in England. Clearly the English courts would have difficulties dealing with the law of the French-African country. In this case it would be sensible to transfer the case to France so that the French courts could deal with it, who may not have any difficulty because the law of the African country is based on the same principles as French law.

In any such cases one court should only be able to stay the case or order a transfer if the court of the receiving state has indicated its willingness to hear the case.

Question 12:

Should there be rules governing the jurisdiction of non-judicial authorities? If so, should grounds of jurisdiction similar to those applicable to judicial authorities be applied? To that end, could the broad definition of the term "jurisdiction" in Article 2 of Regulation (EC) No 2201/2003 be taken as a starting point?

For the reasons set out above, the ideas put forward in the Green Paper will not work for England and Wales. Only the courts and authorities of the country whose law applies should have jurisdiction. If this was the rule, it would make any provision for allocation or competition between the courts of one country and the authorities of another country redundant.

Question 13:

Should the authority responsible for the liquidation and division of the property also be empowered to act when part of the property is located outside the territory in which it exercises its powers?

Yes, as long as it is governed by the same property regime. In our proposals this would always be the case on divorce. It may not be the case on personal bankruptcy and in that case the courts or authorities of the country whose law applies should deal with it (e.g. a situation as in Example 2 above)

Question 14:

If not, should there be a provision to the effect that certain formalities can be performed before the authorities of a Member State other than the one designated by the principal rule of conflict of jurisdiction?

No, because it would involve foreign law and the authorities would not be properly qualified to deal with it.

Question 15:

Should the future European instrument abolish the exequatur for judgments given within its scope? If not, what grounds for non-recognition of judgments should be provided for?

We do not think that at this stage it is possible to find a way to integrate all the other EU legislation in the field of family law as set out above. While the abolition of the exequatur is desirable in principle and would be one major advantage of sensible legislation in this area, this issue does therefore not arise at this stage.

Question 16:

Could there be a provision to the effect that judgments given in a Member State as regards the property consequences of the marriage should automatically be recognised so as to allow property registers to be updated without further procedures in the other Member States? Should Article 21(2) of Regulation (EC) No 2201/2003 be the inspiration for this?

While in theory this would be extremely sensible, it is premature at this stage to think about such a wide-ranging provision.

Question 17:

Should the same rules as to recognition and enforcement be applied to acts established by non-judicial authorities, such as marriage contracts, as to judgments?

If not, what rules should apply?

While in theory this would be extremely sensible, it is premature at this stage to think about such a wide-ranging provision. In any event a condition would need to be that they are recognised and acceptable under the law they are made and the couple have a connection with that country and chosen that law and jurisdiction.

Question 18:

How can the registration of matrimonial property regimes in the Union be improved? For example, should the adoption of a registration system in all the Member States be provided for?

And how should people interested in using this system be informed of it?

This issues shows what a complicated task it is to try to deal with the law in this area. Pure registration is not sensible because simply knowing that, say, Herr and Frau Piepenmüller have a "Zugewinngemeinschaft" is entirely meaningless to the vast majority of people outside Germany including most lawyers and officials.

The other problem is that most countries have a default regime and only those people choosing a different regime register it. So a register will be meaningless to anyone who does not know the default regimes of each country.

While in theory a central register would be a good idea, for these reasons it is unlikely to work in practice. There are also implications about data protection and privacy if every married couple in the EU was entered on a register that would need to be accessibly from anywhere in the EU.

Question 19:

(a) Should provision be made for specific conflict rules for the property consequences of registered partnerships?

(b) Should the law applicable to the property consequences of registered partnerships be the law of the place where the partnership was registered? Other laws?

(c) Should the designated law have to govern all matters at issue or should other criteria be used, such as the lex loci situationis?

Just under half of current EU Member States have regimes for same-sex or opposite sex registered partnership, including the vast majority of the old (pre-2004) Member States (except Ireland, Portugal, Austria, Italy and Greece) and some new Member States (Czech Republic and Slovenia). Nevertheless the regimes vary considerably. In some countries they fall into contract law while in others they are regarded as part of family law (see also Andrea Woelke, *Civil Partnership*, 2006, Law Society Publishing, Chapter 8). While mutual recognition would be desirable and make the lives of registered couples moving or travelling across the EU easier in many ways, the lack of consistency means that in our view it is not possible to simply follow the law on marriage in this area.

Therefore the only solution at this time would be to provide that the registered partnership is governed by the law of the country where the couple registered. That country should also have primary jurisdiction (i.e.

come on top of a hierarchy). A change should be possible either by re-registration (so that the last registration in time will determine the law) or by choice of the parties in a formal way. Separate consultation in this area will be necessary to get it right in any event.

Question 20:

Should there be rules of international jurisdiction to regulate the property consequences of registered partnerships?

If so, what rules? Exclusively the court of the place where the partnership was registered (having jurisdiction to dissolve it)? Or other criteria, such as the habitual residence of the defendant or of one of the partners within the jurisdiction, or the nationality of one or both partners?

As for divorce we advocate a hierarchy of jurisdictions. In the case of registered partnerships, it should start with (1) the choice of the parties, (2) the place of registration, to be followed by other connecting factors. Further consultation in this area would be required in any event.

Question 21:

By what rules should judgments given in a Member State as regards the property consequences of a registered partnership be recognised in all the Member States?

As with the property consequences of matrimonial property regimes, it would be in our view premature for the EU to legislate in this area for the reasons set out above.

Question 22:

(a) Should there be specific conflict rules for property relationships based on de facto unions (non-formalised cohabitation)?

(b) If so, what rules?

(c) If not, should there at least be specific rules for the effects of separation of such unions in relation to third parties (liability to third parties for the debts of such couples, rights that its members can exercise against a third party, e.g. life assurance?

(d) With regard to immovable property, should the lex loci situationis be applied exclusively?

Only a minority of countries recognise de facto unions in any way that could be described as similar to family law consequences so that financial claims can be made between the parties after separation. The provisions vary enormously. The only way we can see conflict rules working would be to provide that the place where the couple cohabited has exclusive jurisdiction to deal with any financial claims between them based on the cohabitation (as opposed to, say, property law or issues arising from a business partnership) and will do so using the its own law (*lex fori*).

Question 23:

Should there be specific rules on jurisdiction and the recognition of property relationships resulting from de facto unions?

See the answer to question 22.

Conclusion

As with the proposals for applicable law on divorce, the suggestions for conflict rules for matrimonial property regimes is premature and would not work in practice. Legislation in this area would do more harm than good and it would be better for the EU to step back and rethink than to legislate simply to comply with some arbitrary target.

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 proposals can be shelved in favour of a more considered approach that will work for the whole of the EU.

If legislation in this area was forthcoming nevertheless, we strongly advocate that the United Kingdom does not opt into this measure.

Whilst we take full responsibility for the final version of this Response, we are indebted to Richard Frimston of Russell-Cooke for his comment on an earlier version of the Response. If you have any queries in relation to this response or wish to discuss it further, please contact the Chairman of Resolution's International Committee:

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Comments on the Proposal for a Council Regulation on Applicable Law in Matrimonial Matters

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.

Introduction

In our response to the Green Paper[1] we made clear that we did not think that the proposals would achieve the stated aims of legal certainty,

[1] which can be found at: http://ec.europa.eu/justice_home/news/consulting_public/divorce_matters/contributions/contribution_icr_en.pdf

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 s.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 s.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 s.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 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 7 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, e.g. in Germany: If the conflict rules point towards English law (e.g. because of joint nationality), the court then applies lex fori, i.e. 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 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 €3m including the family home worth €500,000. 6 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 2 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).

<u>Ensuring Access to Court</u>

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. The 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% 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 £2.5m. 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, German, 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 (e.g. 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:

Green Paper	**Impact Assessment**
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 rules	5.3. Option 3: Harmonising conflict-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	5.6. Option 6: Revising the rule on residual jurisdiction in Article 7 of Council Regulation (EC) 2201/2003
3.6. Providing to spouses the possibility to choose the competent court	5.5. Policy Option 5: Giving the spouses a limited possibility to choose the competent court ("prorogation")
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 3 stars for legal certainty, 2 or 3 for reducing the rush to court and 2 for access to court. By contrast we would have given the hierarchy option 5 stars for legal certainty, (combined with the prorogation option it would achieve 5 stars for party autonomy and flexibility), 5 stars to reduce the rush to court and 3 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.

<u>Article 6 – Exclusive Nature of Jurisdiction</u>

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 EJN 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.

If you have any queries in relation to this response or wish to discuss it further, please contact the Chairman of Resolution's International Committee:

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