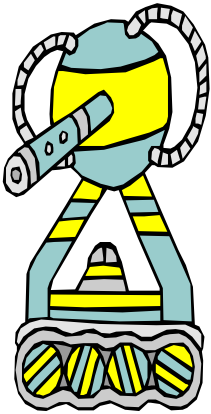


## The war of the family law worlds: the invasion of applicable law

David Hodson



*No one would have believed in the last years of the first decade of the 21st century that the English family law world was being watched keenly and closely by EU bureaucrats; that as family lawyers busied themselves about their Forms E and special procedures they were being scrutinised and studied. With infinite complacency, family lawyers went to and fro about their affairs, serene in their assurance of their vocation to undertake English law. Yet across the gulf of the English Channel, civil servants in Brussels regarded this jurisdiction applying its own law with envious eyes, and slowly and surely drew their plans against us. And then they came ....*



HG Wells lived in Surrey and set one of his greatest novels in the Surrey commuterland. He had the Martian war machines striding across Weybridge and Cobham, daring even to venture towards Staines and with the first invader landing in a pit adjoining Woking station. The success of the novel was setting the sublime innocence in which the residents of Surrey had gone about their daily work unaware of what was about to invade.

Family lawyers in Surrey are no different, faced with the invasion of applicable law to these shores from most of mainland Europe; invasion plans created and orchestrated in Brussels. Success of this invasion would bring about a change in English family law more dramatic than any change since family law left the ecclesiastical courts. It would transform the practice of lawyers and the courts and the content of the law. If it had not been for a government decision in November 2006, the invasion would have been complete by March 2008. But still in Brussels they plot and plan. Yet knowledge of these invasion plans is very limited. The infinite complacency remains.

England applies English law. It seems hardly necessary to say. English family lawyers consider English case law, English statutes and appear before English judges to analyse fairness and the best interests of children according to English law. Doesn't everyone do the same in their own country? Well no. Across the majority of Europe, family law jurisdictions operate what is variously known as applicable law, choice of law. Where the couple have a closer connection with another country, the courts and the lawyers apply the law of that country to decide the appropriate outcome. A French couple divorcing in Germany where they happened to be living would be divorced in accordance with the French law which would be applied to decide the financial outcome. This is so thoroughly ingrained within much of continental Europe that they cannot comprehend how England can be so serenely complacent as to apply only English law.

The European Union has a programme of harmonisation of family law running through until the year 2011. As the laws on how to decide which country's laws will be applied differ around Europe, Brussels decided that the choice of law rules should be harmonised. They produced a draft regulation, known as Rome III, which was intended to apply across Europe. Unfortunately it was also intended to apply to those countries, of which the United Kingdom and the Republic of Ireland are the largest and certainly the most vocal, which always apply their own law. So England would also have to apply the law of the country with which the couple had the closest connection, as defined in the draft regulation. It was produced in July 2006 with an intention of coming into force in March 2008. No longer would England apply just English law family law. It would apply the law of all other countries across Europe and, arguably, across the rest of the world. It would bring the United Kingdom into harmony with the rest of Europe, it was said.

No longer would our local district judges have to concern themselves with Miller fairness and shared residence orders. Now they would have to make orders which were fair according to Polish law or Portuguese law. The best interests of the children were according to Italian law or German law. Divorces would be granted by Spanish law or Romanian law.

It seems amazing that this did not reach the news media. After our society and our Parliament was riven apart in 1996 by the non fault divorce legislation, our courts would now have granted incredibly quick non fault divorce merely because the parties had an overseas connection. With certain sections of our society obsessed with conduct being raised at every opportunity, we would have had many cases decided principally by reference to conduct. The news media went about their daily business equally complacent.

If applicable law was introduced, it would take much longer to settle cases as it would be necessary thoroughly to investigate and understand what was the foreign law, with significantly increased costs, with lower settlement rates because of the uncertainty and unpredictability, and with dramatic examples of injustice as identical cases had totally different outcomes dependent on the law being applied. Surrey has many international families. All family lawyers would be dramatically affected.

Fortunately, a number of practitioners and judges were very aware of these plans being drawn up. We prepared our defences. The SFLA International Committee undertook a counter invasion by proposing dramatic changes to the jurisdiction provisions of Brussels II which if accepted would have removed altogether the need to introduce applicable law. It gained much support across the professions of Europe but not in Brussels itself. Our judges took every opportunity, including through some quite controversial judgments, to say that local courts should deal with local law issues including by transfer to the more applicable court. In terms, they made it clear that they were opposed to its introduction. Ultimately the UK government had an opt out, a privilege enjoyed by only one or two other countries across Europe. There was huge pressure from within government not to opt out, to be seen to be friendly and consensual with Brussels. Fortunately, through the reasons of subsidiarity and proportionality, surely the equivalent of HG Wells' defence mechanism for our planet of the common cold, the government declined to opt in. We were saved.

But for how long? Other proposed laws are setting off from Brussels and heading across Europe including to these islands. Some are utterly sensible and much needed such as simplification of reciprocal enforcement of orders abroad. But the Brussels bureaucrats have learned the lessons of the first invasion. Applicable law is now included in all reform proposals from Brussels; an insidious virus intended to infiltrate the English family law system. International families need the reforms of these cross-border enforcement laws. Yet England finds itself yet again having to stand firm against this invasion from Europe and now at some cost by not having the benefit of these reforms.

This is not fiction, a heavily dramatised radio play, a rock musical, a Hollywood blockbuster (strangely, though, not set in Esher). This affects the fundamentals of how we undertake our work in Surrey looking after the best interests of families, their children and others affected by family law. When the Martians landed, the people of Surrey went to look in their innocent complacency. Soon knowledge produced realisation of the threat and consequential defence. It is important for all family lawyers to know and understand a battle is going on across Europe which could affect the whole heart and soul of English family law.

This article can only be a summary. Please contact David Hodson for more information.

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