

Rome III applicable law: EU proposals scrapped

Filling the vacuum

David Hodson

It seems that the dramatic changes proposed by the EU in July 2006 to introduce applicable law in all family law cases, and originally to be in force from March 2008, have been shelved. They would have fundamentally changed English family law so that we no longer applied our own English law but the laws of many other countries. The opportunity should now be taken to review the jurisdictional basis of Brussels II including the race to issue

Introduction

Rome III is a draft Regulation proposed by the European Union in July 2006 intended to come into force across the European Union in March 2008. It required all European Union countries to adopt in divorce and ancillary financial matters not necessarily the law of the land, English law in England, but the law of the country with which the couple concerned in the family law proceedings had the closest connection. So a French couple living long-term in England would have their divorce and financial proceedings in England decided by an English judge and English lawyers applying French law. It would not be limited to European Union families. An Australian couple or a Nigerian couple getting divorced in England where they have presently jurisdiction might have Australian or Nigerian law applied. This presents colossal problems in practice with knowing what is the relevant foreign law and how it would be applied in the particular circumstances of the case and differentiating between the substantive law itself and the procedural law.

It has been reliably reported that the European Justice ministers have taken a decision in late spring that the draft legislation would be shelved by the European Union.

This is thoroughly to be welcomed. The proposed change would have had probably the greatest transformation on English family law for a century. It would greatly have added to the costs of resolving a case, added greatly to the delays of resolution and made it much more difficult to settle cases because of the uncertainty of what was the foreign law. Many family lawyers in England have been campaigning against the introduction of applicable law for several years. We are pleased at this development. Nevertheless, dramatic reforms are needed and should now be embraced by the European Union in the vacuum created by Rome III

Applicable law

The concept of conflicts of law, often called applicable law by shorthand, is applied in the majority of the European Union countries. The United Kingdom and the Republic of Ireland, with a couple of other small jurisdictions also on the geographical margins of Europe, are the only ones always applying in family law their local law, known as *lex fori*. Put simply, whatever the nationality, domicile or other connections the family before the family courts of England have with any other country, England will always apply English law. There are very minor modifications, for instance the case of *Otobo* has indicated that in particular circumstances the English court should take into account what might have happened if the proceedings had been abroad. However to all intents and purposes, England applies English law.

Across the majority of Europe, this concept of applying only local law is thoroughly deprecated as being unfair on the couple. It is the perception in these countries and by family lawyers in these countries that a couple should know that wherever they may live across Europe, their original domestic law will

be applied to their case. To this ends, these countries have a set of rules, often known as the conflict of laws, to determine which country's laws will be applied. So if a couple from another country are nationals of another country or have certain other connections with another country, the family courts will apply the law of that country. If the couple have elected for the law of a country to be applied, the courts of the country where the divorce etc is taking place will do so.

To English eyes this is very odd! It has never been part of the English legal culture. It seems to English eyes to produce real difficulties. For instance, these countries will often apply the substantive law of the country with which the couple have the closest connection but will apply their own procedural law to determine a dispute. Within England, substantive law and procedural law are very mixed with no major demarcation. The merging of the substantive law of another country and the procedural law of the courts of the country determining the issue can sometimes be very difficult and work considerable injustice. For example, is investigating disclosure substantive or procedural law? Some countries are exceptionally lax in their disclosure obligations and powers making the application of foreign substantive law pretty useless.

The greatest difficulty, so it seems to English eyes, has been knowing what is the law of the other country. Most of us struggle to understand what is the ever changing financial provision law of England and Wales! How could we possibly know what is the financial provision law of France, Latvia, Nigeria, Australia etc? To continental European lawyers, this is no problem. They either rely on relatively basic text books which have outlined in a very simple terms the relevant law or they have occasionally obtained an opinion from a lawyer in the other country or, more often now, they rely on web sites. The European Union has set up a very ambitious web site which seeks to explain in all of the main European Union languages the family law of the European Union countries. It is worth a visit. It has to be applauded and acknowledged for its ambition. However it is perforce very basic, especially for jurisdictions based primarily on case law rather than a code or statute. It cannot cover the many variations and situations which arise in individual cases. A student qualifying from the College of Law would have a better knowledge. Yet this is the basis on which judges across continental Europe understand the law to be applied in cases before them.

England is a very sophisticated family law jurisdiction, carrying with it the substantial burden that the costs are so high in reaching a resolution because our investigation and our analysis of the law is incredibly detailed and thorough. If England were to carry this detailed and sophisticated approach into understanding the law of the other jurisdiction, the costs would be hugely higher, with much delays in resolution and much greater uncertainty than already exists in reaching a settlement.

However continental Europe itself has a major problem. What should be the conflict of laws to determine in what circumstances the law of another country would be used? Should it be nationality, period of residence or other connecting factors? The various criteria used differs materially between the continental European countries adopting applicable law. This was causing much uncertainty. The European Union quite rightly decided that some harmony should be introduced to these conflicts of laws so that the same criteria was applied across Europe. Looking out from the United Kingdom, we applauded this intention. What arrived was very different.

Rome III

This draft Regulation arrived in July 2006. The intention was that it would be in force across Europe in March 2008. It was to harmonise the conflicts of laws utilised around Europe. It seemed very sensible, fair and reasonable to harmonise the different conflicts of laws across Europe.

However dramatically it also imposed on those countries which had hitherto, for many centuries, only applied local law. England, and the rest of the United Kingdom, would have had the most colossal change in the law; more dramatic possibly than any other change since family law left the ecclesiastical courts.

Amazingly, it was not picked up by the media, normally known as eager to pick up on any family law issues. Nevertheless it would have meant that within a decade of the 1996 divorce reform controversies through Parliament, an English family court might grant a divorce after only six months separation, within a year of the marriage or might prevent a couple from divorcing until they had been separated for over five years, dependant on the law being applied. Moreover in some cases, the English courts would apply conduct extensively and for instance refuse spousal maintenance to a wife who had committed adultery or give a two-year maintenance order for a fully dependent wife. So many wonderful possibilities of gross injustice yet not a mention in the national media!

The various branches of the English family lawyers profession scrambled quickly into action and put forward responses in opposition together with various counter proposals. The government decided not to opt into these proposals in November 2006. Subsequently there was pressure from across Europe on the United Kingdom to accept Rome III. However other jurisdictions slowly and surely indicated that they too were not prepared to accept the comprehensive imposition of applicable law. Sweden and Finland voiced their opposition through their governments. Eventually the European Union decided that it could not succeed and apparently have shelved the proposals. This is much to be applauded.

However, reform in this area is much needed. Those countries using applicable law do need some harmonisation of their conflicts of law. Moreover the reforms have again cast considerable debate on the jurisdictional basis for divorce across Europe found in Brussels II, and the corresponding race to issue. Other proposed legislation from Europe had been based on the introduction of applicable law. There is an urgent need for some reform to answer these and many other difficulties. The vacuum created by the shelving of Rome III needs to be filled. European Union should urgently review other proposals

Proposals for reform of European Union family law

The following areas need urgent reform:

- The different criteria for conflicts of law, the adoption of applicable law, found in many continental European Union countries
- The different, overlapping jurisdictional basis for divorce found in Brussels II
- The race to issue, lis pendens, which alone gives exclusive jurisdiction even though another country may have a much closer connection with the family
- Other forthcoming and urgently needed legislation such as improved reciprocal enforcement of family law financial orders across Europe which are presently posited on the introduction of applicable law

I urge the European Union law reformers to consider a proposal which would resolve these problems and is believed to be acceptable to all or most European family law practitioners. It is in essence a simple proposal. It was made by those of us on the SFLA/resolution International Committee in responding to Rome III

The jurisdiction for divorce within Brussels II presently consists of about seven possible grounds for jurisdiction, with any or all of them able to be used and without any priority between them.

The proposal is simply to replace them with a hierarchy of jurisdiction. Various forms of jurisdiction would be graded within a hierarchy list, with a country having jurisdiction based on the highest level of jurisdiction which was available.

This would thereby indicate the appropriate country to deal with the family's affairs, being the country with which the family had the closest connection on this hierarchy of jurisdiction. That country would then

apply its own local law on the basis that it was the country with the closest connection with the couple. There would then be no more need for conflicts of law or applicable law, as this would be satisfied by the hierarchy of jurisdiction. There would be no more races to issue as it would be clear which country had primary jurisdiction, being the country highest up the hierarchy with jurisdiction. The lis pendens race to issue would immediately be removed. Future European union family law legislation would then build on this hierarchy of jurisdiction so applicable law would not be needed in future legislation. A couple moving around Europe would have certainty and clarity about which country would deal with their family law affairs, which is a fundamental criteria for European law reformers. Crucially, an agreement reached between a couple after disclosure and independent legal advice would probably be treated as the top of the hierarchy. Thereafter it would be dependent upon lengths of joint residency, then perhaps nationality or domicile and then periods of sole residency. The jurisdictional hierarchy grounds would be wider than Brussels II in order to make sure that all possible cases were covered.

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

It seems beguilingly simple! My understanding is that within Brussels amongst the European Union law reformers, it is accepted as having considerable appeal. Their difficulty, as they perceived it, is reaching agreement on the hierarchy. Hence they preferred Rome III which was perceived as a simpler solution except for those countries then recipients of the imposition of applicable law! Now Rome has fallen, they should urgently reconsider this proposal and accept its considerable appeal including to family law professionals across Europe.

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

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

Conclusion

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

It is said nature abhors a vacuum. The European Union has shown itself ready to step into many areas of national life. It should now do so and accept this commonsense and highly settlement orientated proposal to resolve a number of real practical difficulties within European family law.

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