The European Commission – an Expanding Regime?

Report of Luxembourg conference for Resolution

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The European Institute of Public Administration held a conference 'European family law: the functioning of an expanding regime' in Luxembourg on 29th and 30th September 2005. The background was the creation of a common judicial and legal area in the field of family law as a political priority in the European Union (EU) through common approaches and co-operation including the resolution of cross border disputes. The conference focused on the latest revisions to the Brussels regime governing matrimonial jurisdiction and parental responsibility (Brussels II bis) and the new rules relating to child abduction and recognition of children orders Issues concerning applicable law, matrimonial property regimes, succession and automatic recognition and enforcement of family court orders were also covered.

There were many specialist speakers and delegates represented family law practitioners, governments, academics and others. Although the conference had a title referring to 'the functioning of an expanding regime', the underlying theme was the harmonisation of family law across Europe - what could and could not be achieved, the timetable, the production of policy and legislation and the areas to be covered. The conference took place on the last day for responses to the EU Green Paper on Applicable Law and Jurisdiction in Divorce Matters (Rome III) on which the International Committee has been working hard over the summer, and inevitably the issue of applicable law arose many times.

I attended as a representative of Resolution, formerly known as the Solicitors Family Law Association, an organisation of 5,000 specialist family law solicitors in England and Wales with a commitment to working in a conciliatory, settlement focused approach. For the past 15 years the organisation has had an International Committee which has helped its members with the distinctive and complex aspects of international cases and made recommendations for good practice and for reforms.

This report is to Resolution as my sponsoring organisation for the conference, although as a matter of goodwill is being made available to other organisations in this area of work. It is a personal report, with personalised comments and observations which are not necessarily the official views of Resolution. My recommendations for future action and policy of Resolution are separate. It is specifically not for publication. A shorter version will appear in the November edition of International Family Law magazine (Jordans), as edited by Liz Walsh, one of the delegates, with the conclusions appearing in the November edition of Family Law magazine (Jordans). A substantially shortened version, but including the conclusions, will appear in the November edition of the Resolution magazine for members. I anticipate these could be published elsewhere with prior approval, and acknowledgement in the case of Jordans. Please contact me about this. I am grateful to Liz for her help in this report.

It was a really excellent two-day conference with eight long and complex presentations. It presumed a good knowledge of the various developments occurring in family law across Europe and this report is on the same basis. I do not include purely factual matters of law. I have concentrated on those issues which I believe are of particular concern to us as practising family lawyers. Only a couple of speakers produced written papers and half of most sessions were answers to questions and debate. I have tried to report faithfully and accurately what was said.

The two driving forces behind the EC proposals in relation to family law in Europe seemed to be the requirement for unanimity between member states on issues of family law and the commitment by Brussels to complete its family law program by 2011. The need for unanimity is undoubtedly going to slow down the programme of radical reform and probably water down the reforms proposed by Brussels.

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Opening presentation

Jose Castillo Garcia from the European Centre for Judges and Lawyers opened the conference by explaining that in 1993 after the Maastricht treaty family law became for the first time an EU consideration. Work accelerated after the 1999 Amsterdam treaty on judicial co-operation. He said that sensitivity to notions of national sovereignty was essential: decisions had to be unanimous and made after consideration by the European Parliament. It was the only area subject to this consideration - member states did not want to give too much competence to the EU on issues of family law.

After the Amsterdam treaty there were two explicit priorities; the recognition across Europe of judicial orders of domestic courts and increasing convergence of family law. In reality, a major goal became the establishment of all decisions on family law in one member state being recognised in another state without the need for intermediary procedure. That was confirmed by the Hague Programme of 2005. Jose said that it was now very clear that implementation of that principle was a political priority within Europe and intended to be completed by 2011.

The large question centred around political keenness to harmonise substantive law or was it enough just to recognise the orders of other member states? Jose thought that harmonisation of national laws was required but acknowledged that not everyone agreed with that notion Delegates were aware this was a crunch issue and it was certainly introduced at the outset.

International divorces in the EU: the establishment of rules to ensure legal certainty and predictability.

Monika Ekstrom, an Administrator in the Directorate of General Justice, Freedom and Security at the European Commission (EC) is responsible for the Applicable Law Green Paper and will receive responses, analyse them and take the matter forward. She said that the intention was to create Rome III. She explained that treaties regarding applicable law were stated as from Rome whereas others were from Brussels. Rome I was contractual obligations and Rome II was non contractual obligations, each in the context of applicable law.

Monika said that Brussels II was intended to prevent forum shopping and did not deal with applicable law. It set out the grounds for jurisdiction based primarily on residence but also nationality or domicile. Divorce judgments would be automatically recognised in other member states. There was a rule of lis pendens. There were limited grounds for the non recognition of a divorce. Article 18 said that a difference of applicable law was not a basis of non recognition. It was impossible to refuse to recognise just because a divorce would not have been granted in one's own member state by local law or choice of laws.

In 2000 there had been a large comparative study of the substantive divorce laws of member states which highlighted the practical problems of harmonisation. There were major differences in the law on divorce, for instance between Ireland and Italy at one extreme and some Scandinavian states at the other, but she doubted whether there was much forum shopping on the issue of divorce itself whereas there was primarily on financial issues.

In 2003 there was a meeting of experts which focused on conflict of law issues. Reactions were mixed - some thought it was not a priority - but it was difficult to get statistics on the number of international divorce cases. In 2004 the EC collected information on the divorce laws of the accession states. In November 2004 the EC asked for a paper on applicable law. On 1 March 2005, Brussels II bis came into force.

Monika referred to Table 2 in the annex to the Green Paper which sets out the grounds for divorce in the member states: there were many differences. Divorce law was deeply rooted and based on the

cultural aspects of member states. It was an area where there were many public policy issues. The EC would not interfere with the substantive laws on divorce. There had to be unanimity in this area between 24 member states. She accepted that the requirement of unanimity was a severe limitation and divorce itself was not an area where they could try to harmonise. I don't think any of us attending the conference anticipated harmonisation of divorce laws themselves in the short or medium term but it was at least good to hear this. Monika came across as a realistic speaker and administrator.

Turning to Table 4, which deals with the choice of law rules in the member states, Monika said that most member states applied a scale of connecting factors and then determined applicable law of the closest connection. The factors were often different but many started with nationality and then moved on to residency. There were states which applied local law, primarily the Nordic and common law countries, the UK and Ireland but also Latvia and Cyprus. Malta has no divorce law but does recognise EU non Maltese divorces.

Referring to the Green Paper itself Monika said (almost in parenthesis) that the papers now produced by the EC were required to be short and more concise than before due to the translation services being heavily overburdened, hence the accompanying annexes and working documents had to be read in conjunction with Green Papers in order to divine the true intention of their authors.

Why was jurisdiction included as an option in this Green Paper? The result of a case could be very different from state to state so it was fundamental to look at both applicable law and jurisdiction, especially as substantive laws were so different. If the substantive laws were not so different as regards financial outcomes then there would be less of a problem. The Commission had to be pragmatic - some member states were totally opposed to a harmonisation, or imposition, of conflict of laws. It had to look at other options and other methods, perhaps a harmonisation of the jurisdiction rules.

The aim was to produce legal certainty and predictability. In Monika's view the biggest problem was not forum shopping but the difficulty for parties of not knowing whose or what laws would apply. The extra problem was that so many different criteria existed relating to conflicts of law. One solution was uniform conflict of law rules which, in theory, would solve the problem. However, it would be difficult to get 24 states to agree, especially as seven of them operated only local law.

Another way to legal certainty was to allow the couples themselves to agree and decide. Such party autonomy could perhaps be linked with the eventual resolution on applicable law and jurisdiction. Limited perogation and/or a revision of the jurisdiction rules in Brussels II bis was being proposed by those member states which operated local law. (I record these are recommendations of the Resolution International Committee.)

Monika recognised the problems with Brussels II bis and the risk of a rush to court. There was the temptation to strike first, as once a court was seized another court could not deal with the matter. One solution was to transfer the case in exceptional circumstances, necessarily limited to countries to which the marriage was already closely connected. This is found in Art 15 of the new Brussels II bis but such a solution had to be carefully explored. There had to be close connecting factors and safeguards to avoid delays and litigation. One also had to look at the relationship of the divorce with parental responsibility (which throughout the conference was of course interpreted in the European sense rather than the narrow English sense) and property implications. Therefore it would prove difficult to reach one solution for all of the problems which would get the blessing of all member states. It was likely that several solutions would be needed. It was a difficult issue but the most important factor, she believed, was the need for legal certainty and predictability.

Answering questions from the delegates Monika said that an impact assessment was being undertaken of the Brussels Conventions which should be publicly available in January 2006.

She accepted that when the Applicable Law project was initiated it had been thought to be simply a matter of harmonisation of the conflicts of law. Now it was believed that was impossible and other solutions, or a mixture of solutions, had to be found. She was emphatically not prejudging the consultation process. The process of conflicts of law worked well in countries such as Germany where a specialist Institute informed the judges as to the law of each member state (the efficacy of which was backed up by a delegate senior member of the German Ministry). However, most conflict of law states did not have such a valuable resource. Monika emphasised that reviewing that aspect was an important part of the impact assessment. It was important to consider the stakeholders, lawyers and judges and look at the effect of a conflict of law regime.

I asked about the closely linked progress, timetable and content of property law harmonisation in Europe. Agreeing that applicable law was interlinked with property and financial implications of marriage breakdown, Monika said that harmonisation of property law was very long-term and that it was impossible to wait for progress on the matrimonial property issue. In fact, as the questions went on, it became apparent that there was no chance of harmonising property issues on divorce "within a generation" as the difficulties were so huge. It was difficult to even contemplate the concept, she said. Applicable law on divorce would have to go ahead now.

She also said that the Commission was aware that a change in relation to conflict of law across the EU would have a dramatic effect on the way lawyers practised in "local law" jurisdictions. I referred in a question to the fact that England and Wales had 5000 specialist family law solicitors, the majority of whom would sometime each year have cases with a international element and there were probably another 10,000 solicitors, more general practitioners, who did some family law and might have cases with international aspects. However, none of those 15,000 would ever have had any dealings with any concept of conflict of law or applicable law in their careers . Monika said she was conscious of the impact on the "local law" professions of their proposals.

A UK government representative raised again the possibility of transfer of divorce cases from one country to another as the principle had been accepted for issues of parental responsibility in Article 15 Brussels II bis. Monika agreed that perhaps it was now easier to introduce for divorce cases.

It was not the keynote speech of the two-day conference, as there wasn't one! However there was undoubtedly a feeling that this was the most live issue at present and there were many questions and discussions. She came across as very pragmatic and realistic. She wants to get this reform through and I believe she will not stick doggedly to the original concept of conflict of law across the whole of the EU but instead seek a mixture of solutions for different situations.

I spoke with Monika after the session, emphasising again our support for what Brussels was trying to do in overcoming the problems that do exist yet our real anxieties about conflict of laws. Although she already had a soft copy of our response paper, I gave her our glossy colour hardcopy. She said she would be in contact with us about the further steps in the consultation process.

Matrimonial property regimes: is a common EU regime necessary?

Laurent Voisant from the Law Faculty of the Catholic University of Leuven in Brussels had undertaken an influential study for the EC on property regimes and had made proposals for reform. He asked whether it was necessary to have a property regime for the whole of the EU. Was harmonisation necessary and if so, how could it best be achieved? The first requirement was to look at national laws - what did they have in common and where did they diverge. He referred, in quite generalised terms, to those states which had one civil code in statute form containing all domestic law. Other states had a specific code for family law assisted by case law. In the Anglo-Saxon countries (e.g. the UK) case law was more influential and legislation less used.

Most member states had a primary matrimonial regime which applied to all spouses, including obligations to contribute to the debts of the family and the costs of married life, to protect against threats to matrimonial financial life, to manage accounts and similar matters. However such concepts – normal in continental jurisdictions - were unknown in Anglo-Saxon regimes. In the UK the emphasis was on provision - to protect and provide for spouses between themselves with an emphasis on autonomy and solidarity - but there was no legislative matrimonial regime.

A number of countries had a secondary regime of which there were several examples. Laurent concentrated on pre-marriage agreements which could depend on family law or on contract law. The spouses themselves could determine property issues - the rules differed as to content and depended on the state concerned. Secondary property regimes did not exist in Anglo-Saxon countries, including the UK, and there were differences across the EU about pre marriage agreements. Not a wide spread practice, in some states approximately 30 to 40% of couples made them but in some states where they were binding, such as Greece, they were made by less than 10% of couples Part of the problem was the low take-up of such contracts in states which were supportive of them and the fact that the terms of the contracts differed.

In some states the form of the contract was a solemn act, in some a notary public would be involved. In others, such as Italy, the parties simply informed the local authority and no legal representation was needed. In England, where they were not binding, the expectation was that each party had separate legal advice before they would even be judicially considered.

There were major differences in the rules relating to changes to the marriage contract. Originally in many states they were immutable and could not be changed. Now many states allowed it but there were limits to the changes. Laurent was clear that harmonisation was needed on this.

Harmonisation on property law issues was also necessary as there were major discrepancies but there were many practical problems. The legal difficulties of citizens were similar whether they died or divorced. It all depended on the matrimonial regime of the couple but it was impossible to produce proposals imposing or unifying regimes given that such matrimonial regimes did not exist in some states, particularly the UK.

He spoke in general terms about a concept that I know had been floated since the Utrecht conference in 2002 whereby couples who expect they will be moving between European states can select and opt in to a matrimonial regime that would be applied in all member states. Given how much this had been trumpeted when first proposed, it was surprising how little he or others spoke about this. I wonder if this is now no longer in vogue in Brussels?

Laurent proposed a core primary regime and some harmonisation of a common second regime but did not propose any harmonisation of substantive property law because there would be no unanimity. Dealing with the core of a primary regime, he said that the legal status of marriage produced certain 'patrimonial effects'. Laurent said that the application of the core of a primary regime should be left to individual states but he thought there were six basic elements which could be agreed by them all.

1. The possibility of signing a marriage contract (which is allowed in most states). After marriage a party should be able to change the terms with the rules on such changes being left to each state. The word binding was not mentioned by him! I suspect he thought it was implicit!
2. The freedom of spouses to have a profession, to have exclusive rights to manage their own income and bank accounts and to act alone with third parties without needing the authority of the other spouse.
3. Contributions to the charges and costs of the couple: a pooling of resources, with an obligation to contribute proportionate to income. Laurent emphasised that contributions to married life could be direct through income but also indirect through housekeeping etc.

4. Protection of the family home especially for the children: one spouse should not be deprived of the property by the unilateral actions of the other spouse.
5. A sanction against frauds committed by one spouse. A judge would have the power to annul certain acts which fraudulently deprived the resources of the other spouse.
6. Compensation for the economic and financial imbalances of family life. Each spouse should be obliged to compensate the other for economic imbalance. That did not mean the sharing of all acquisitions but it forced the spouse with the direct economic benefit to compensate the spouse who gave up his/her own economic benefit for the family.

These were, he said, the provisions for a core primary regime. It seemed to me that in striving for some sort of harmonisation, he had gone for the bare minimum. These six were of course wholly laudable but very general. It may well be that in some jurisdictions they have a material value to improve the existing law. However I felt that as far as England was concerned, and apart from the issue of binding marriage contracts, we were not only acting upon these six core elements but had substantially advanced them in our law.

As regards a common secondary regime, Laurent said that harmonisation of substantive law was impossible but that it would be possible in relation to certain secondary elements and it was important to identify elements of convergence. One common factor was the principle of participation of spouses in the course of the marriage. Wealth produced by one spouse during the marriage should be considered as common to the spouses and so should be shared. It could take the form of community of property or deferred common property as in the Scandinavian countries. However, 'sharing' did not mean equal sharing. His view was that the participation of the spouses in a right to capital should be in accordance with contribution.

Probably the most important thing he said was that it seems now accepted that there will not be harmonisation of substantive law of property redistribution on marriage relationship breakdown. I appreciate that it would be immensely difficult, and perhaps impossible to gain unanimity, but in view of the controversial initiatives and proposals of other aspects of family law across Europe, it was frankly disappointing. Moreover given that the previous speaker had accepted that forum shopping was about money and that one of the prime movers of reform was to eradicate the worse elements of forum shopping, the inability, openly admitted, to produce any amount of meaningful harmonisation was unfortunate. It is an immensely complicated issue.

Towards a system of recognition and enforcement of decisions on maintenance.

Antoine Buchet, like Monika Ekstrom an Administrator in the Directorate of General Justice, Freedom and Security at the EC, said that the Commission's aim in respect of maintenance was to make the system more efficient and comprehensive. There were a number of instruments but there were also gaps. Maintenance obligations across the EU were introduced in 1968 (Brussels I) which puts the rights firmly with the creditor payee and gives rights to the court to enforce. It was simplified in 2000 when the convention became a regulation and provided a relatively simple system for a declaration for an order made in one country to be executed in another. The main feature was the procedure.

A regulation for uncontested claims (which Antoine described as technical and complex) was passed on the 24 April 2004 and comes into force on 21 October 2005 in England and Wales. (EC Regulation 805/ 2004 on European enforcement orders provides for direct enforcement, including of maintenance orders, and abolishes exequatur in uncontested claims, for example, consent orders in ancillary relief and unopposed orders in ancillary relief. The Civil Procedure Rules 1998 (SI 1998/3132) and the Family Proceedings Rules 1991 (SI 1991/1247) have been amended accordingly.) Frankly, given that the delegates were able to understand technical and complex pieces of legislation, and given that there has been very little publicity about this regulation, it was a pity he could not have explained it! He said that it allowed rulings, by which I understood court orders, to dispense with the exequatur procedure if there

was a certificate covering certain information about the consent arrangements. It covers maintenance, which is so different from property in the minds of continental Europe.

But more than just EC instruments had to be taken into account. Antoine referred to the New York Convention of 1956 which created a central authority for claimants of maintenance obligations - not a binding system but it was a foundation. At the International Conference on Private Law in The Hague, four conventions had been adopted, two in 1956 and 1958 which were now rarely referred to and two more recent ones in October 1973, one being on applicable law and the other on recognition and execution of maintenance orders which contained less than Brussels I and had no rules on jurisdiction.

Brussels I did not override all previous conventions: it took account of them and maintained and saved existing conventions. Brussels I also allowed a number of reservations by member states. Several states had made different reservations which had produced non harmonious operation of the convention. Despite a widespread view that the position was not harmonised across Europe and that there were significant discrepancies, there was a hard core of rules and in two areas, child support and alimony, no reservations were possible.

The Commission was now working towards a convention on recognition and enforcement of decisions on maintenance for 2007. Certain aspects could not be included, such as paternity, and the link to child support, because they would not be accepted by member states. However, they proposed rules on recognition and enforcement which would be a modernisation not a harmonisation. There would be elements regarding co-operation in maintenance obligations. Antoine accepted that the binding nature of their proposals would be reduced because of the necessity for agreement between all the member states.

He said Brussels must try to stop the diversity of legal sources. There was Brussels I, 1973 Hague, Hague on applicable law, the New York Convention and others. It is not possible to suppress them, he said, but there needs to be one single instrument to cover jurisdiction, applicable law, recognition and execution. The national rules would remain but there is a need to harmonise the rules on how the parties are involved in the procedure. There was a need to get rid of some of the procedures. There should be much more automatic recognition. The exequatur procedure should not be needed.

He said the hope was direct enforcement. If there was a German order and the payer was in Sweden, why cannot action to enforce in Sweden be taken direct against the Swedish bank where the payer has his money rather than having to go via the Swedish courts? More direct procedure was needed.

One problem was how to find the payer. The intention was to use the central authorities to exchange information, to find the payer, assess and locate his property and ascertain how payments could be made. He then said that they were very aware of the data protection issues and that this was a problem to some of their plans.

He emphasised again that they were not intending to replace or supersede previous conventions as they couldn't but instead to add another to cover the gaps. He said the draft paper should be with the Council of Europe at the end of the year with a view to being considered in 2006.

There were a lot of questions. Antoine said again that they were aware that they could not propose rules too far from what is happening in countries and existing in other conventions. As to jurisdiction, they preferred residency. Some delegates challenged this and he said that the European Commission was minded to say that residency was the most easily adapted, less costly, easier to understand so jurisdiction was probably to be based on residency of the claimant. He conceded that there might be other grounds as a substitute. He was pushed on this by delegates and he said that there could also be the basis of the law of common nationality. As to choice of law, they did not intend to allow this for child support but in a simple blanket assertion, he said they would allow it for alimony. This was said very

late in the third session and in answer to questions rather than his prepared text but it seemed to me to derogate from what had been said by the first speaker. He said that he intended that applicable law would be in the proposed convention and he would need a lot of convincing to see why it should not.

In conclusion, I felt he came across as burdened by the need for unanimity, and very frustrated. It seemed clear to me that he would like one new overarching convention but had to accept that he would be filling the gaps of existing provisions. In England, reciprocal enforcement of maintenance obligations is an utter nightmare of different domestic laws, international conventions and other provisions. This is an area crying out for one common legislation. He did not mention once the United States. However my understanding is that there is a difference of opinion between the US and Europe on this issue.

There seemed from what he said that there is an imperative to get something in place fairly soon, with references to progress with a published draft convention in 2007, yet this issue is specifically not just a European problem. I was left wondering how much more the EU could do in brokering a more global deal rather than producing an internal convention for purely EU cases. Undoubtedly a convention which fills some gaps and produces a more common procedure and simplified arrangements with much more recognition will be valuable. Nevertheless his adamant assertion that it must incorporate applicable law was worrying.

Parental responsibility: Brussels II bis and the new rules on protective measures.

Nicole Cochet, a magistrate in the Directorate General Judicial Services of the Ministry of Justice in Paris had become involved in the negotiations over Brussels II bis and spoke about its potential operation and effects. She did not cover child abduction but gave a very good exposition on Brussels II bis and a number of its problems.

Nicole said that Brussels II bis contains rules on parental responsibility (which has a much wider definition than under English law), recognition of orders and cross-border cooperation. Brussels II originally was limited to the children of divorce only but now it is all children. When parental responsibility was being discussed, the negotiators wanted a broader definition than in fact appears at Article 2. However the definition eventually decided upon was as broad as it was possible to agree. She said it was concerned with the person of the child but also some property aspects. The latter is more problematical. She gave examples of issues arising in France concerning real property held for a child and the different scenarios when Brussels II bis would and would not apply. It was not just decisions by the court which were recognised but any competent authority which would include a youth authority. Jurisdiction has a wide meaning.

Nicole emphasised that the primary jurisdiction is the child's habitual residence, Article 8. There were possibilities of a transfer to another state if that was better. This can be if the state itself orders it or if it is asked to order it by another state. There were no rules on applicable law in Brussels II bis. There was a 1996 Hague Convention on applicable law but this did not concern most member states as only a few had ratified it. The rules on recognition in Brussels II bis went beyond the Hague Convention.

Nicole said it was important to distinguish rights of custody and rights of access when dealing with recognition in other states. The procedure for the former had been improved. For the latter, it had been dramatically improved. The courts of the country of origin of the order produce a certificate in a certain specified form. This is sent to the other country where it is intended to be enforced. The country examines the certificate and presuming it is in the correct form, it is enforced. There is little leeway when a judge gets the certificate to do anything other than enforce it. The judge cannot check the jurisdiction of the original order or any issues of applicable law. He simply has to check the certificate itself. It is possible to refuse enforcement if it would disturb public order and other narrow circumstances.

There are two additional provisions namely that enforcement can be refused if the decision is made

without the child having the opportunity to be heard, known to be a big issue in Germany, and if the person being refused parental responsibility and access rights had not been consulted.

The level of enforcement should be at least the level of the court which made the original order. There is no exequatur. It goes straight to enforcement. It is the judge who has to certify. Unlike the certification of rights of custody, which can be done by a central authority, the certification on access has to be by the judge himself including stating that the child was heard, parties notified and heard. She pointed out that one family Court order could have in fact three certificates, a divorce element under Brussels II, alimony under Brussels I and access under Brussels II bis.

In questions, I asked her about Article 15, transfer to a court better placed to hear a case. I said that I was particularly interested in how she expected this to operate in practice, the criteria and circumstances, both in respect of children and how it might be cross referred to divorce for the Green Paper. She said she was absolutely committed to this provision and she referred to intellectually believing in it. She thought English judges would operate it quite extensively. She thought however that many other judges may not and specifically would hold onto cases. She thought it would take some time for this Article 15 provision to become established and work in practice.

However most of the time in questions was taken with the well and often rehearsed differences between France and Germany on the issue of seeing and hearing the child. By a requirement of the German Constitutional Court, a German family court judge knew his decision would be almost automatically appealable in a child case if he had not actually spoken with the child of whatever age. German family court judges will see the child. They are quite happy to do so, had no particular concerns about confidentiality, sensitivity or privilege or if they did then they know what they can and cannot say, and how they then pass on what they are told to the parents. They are very at ease with this but specifically are very unhappy at other courts, and particularly France, who will not see the child. The French delegates said that they would hear from the child in other ways and specifically did not see the child. It is far from clear whether the German court would accept a certificate under Brussels II bis which stated that the child had been heard if it knows that in reality the child has not specifically been seen. This issue is unresolved.

Delegates from the Dutch family lawyers association, all of whom were also mediators, said that it was routine for Dutch lawyer mediators to see the child, that they had appropriate training, were aware of issues of confidentiality and that parents invariably wanted it.

This was a good presentation. It is disappointing that the perception is Article 15 will not often be used. Given the radical difference of opinion between Germany and some other countries, especially France, on Article 23 (3), it is disappointing that the EU has not found a way to resolve such a fundamental issue.

From the Hague Convention on International child abduction to the new Brussels regime: ensuring the prompt return of abducted children

Henry Setright QC of Renaissance Chambers, London, member of Reunite and a child abduction specialist, looked the interaction between the Hague Convention of 1980 on child abduction and Brussels II bis. It was an excellent presentation and I am sure that if any wanted to read his paper, they can contact him direct or contact me and I will ask for a copy. He demonstrated what we already know namely how fortunate we are to have him and others as absolute top practitioners on child abduction but also as global propagators of a particular approach to issues of child abduction.

The evening before, Resolution had had their debate on child relocation, with the motion that it was now too easy for the primary parent to move with the child. The motion had been carried with an overwhelming majority (78:19). A member of the Resolution Children and International Committees

had texted me the outcome to contribute to the Luxemburg conference, which I passed on to Henry. Although not directly referring to the debate in his presentation, Henry referred to these general concerns and anxieties in England in his talk.

He said the Hague Convention of 1980 is the worldwide standard for cases of international child abduction. It is still growing with more countries, including India, coming on board, the majority of the Sharia law countries with China and Japan being the more significant exceptions. It includes all of the Brussels II states.

To deter child abduction it provides for the speedy return of children. It is not an order based convention. It is outside the tradition of European legislation so far. It emphasises the priority to the jurisdiction of the state of the abducted child's habitual residence. It requires a return save in defined exceptional circumstances and limits the ability of the jurisdiction of the state to which the child has been taken or retained to embark on its own domestic law based investigation.

But it has limitations. It does not deal with access cases. It does not attempt to co-ordinate the family jurisdictions of the signatory states. It recognises differences of approach to domestic law between the signatory states hence Article 15 enables a request for declarations of the state of the law. It contemplates limited cases in Articles 12 and 13 where the return may be discretionary.

In his plea for a more co-ordinated approach, Henry said that the weakness of the Hague Convention is there is only the one simple Draconian choice of a return or return refused. It does not go further. If there is a refusal to return, the Hague Convention does not thereafter apply. There is no formal mechanism for judicial cooperation or to produce binding safeguards to allow returns in difficult cases.

There are, in practice, four interlinked, closely associated child law issues; namely international child abduction, choice of national jurisdiction in international disputes regarding children, the criteria for international relocation of children and enforcement of cross-border access.

Historically, lawyers, judges and lawmakers have dealt with all four separately. Henry said that in England, judge-made law provided a very liberal approach to relocation if plans were reasonable. In similar measure, English judges summarily returned most children to their habitual residence. English judges have sent children back with an expectation of their then successfully being granted relocation as an appropriate balance. There was now an increasing awareness that the much greater restrictions in a number of other countries on relocation meant this balance did not apply. There was a feeling in England that relocation law had become too liberal in favour of the primary residence parent.

In both child abduction and relocation, English judges have favoured habitual residence for jurisdiction as distinct from domicile or nationality. Moreover, English judges have quite freely redefined foreign access orders in accordance with English principles rather than simply accepting and then putting into local effect the foreign order. He said that English judges like many other judges interpreted Article 21 as providing no substantive power to enforce access, causing much frustration to parents. In fact the Court of Appeal in England is presently reconsidering this point. He referred to the 1980 Luxemburg Convention, coming in at about the same time as the Hague Convention but order based and covering both custody and contact. It has been rarely used.

But English experience was not shared abroad. The vigorous approach of the US and England in the very narrow definition of defences to child abduction was specifically disputed with many countries, some in Europe, taking a much less vigorous approach including giving the welfare needs of the child greater weight than the policy considerations of the Hague Convention. Habitual residence has not been naturally accepted. In the US there has been the concept of the home state and in a number of European countries, domicile or nationality exert a strong influence. Finally, on relocation, across Europe there is much greater weight than in England to the child's relationship with both parents and the

consequence of a relocation on the remaining parent, so a relocation applicant certainly cannot expect to succeed.

Henry said that the new Brussels II regulation addresses three of these four above aspects, with international relocation still outstanding. He set out 4 potentially conflicting criteria on relocation issues namely the European lack of restriction on the movement of people within the EU, the growing importance of promoting the relationship by a child with both parents, concepts of equality, and rights of both parents and the child for respect for private and family life.

He thought the new Brussels regulation was probably the most significant introduction of co-ordinating European legislation in the field of family law. It originated as a French initiative against a background of French and German difficulties on access and abduction and about which there had been much ill-feeling over very many years. There were two specific objectives, namely provide for the automatic recognition and enforcement of access orders in cross-border cases and provide a clear and effective means of dealing with child abduction. During its negotiation, there had been a real anxiety that it would result in the extinction of the Hague Convention. However a deal was eventually done and it drew back from the more radical outcome. There was a recognition that Hague was world wide and Brussels II bis governs only Europe. However Brussels II bis takes priority over Hague and materially adds to its provisions between European states.

Motivating factors for BII bis were a lack of rigour in that children were often not returned in Europe. There was a huge commitment by many in Europe to make Hague work better within Europe. There was a concern that some states did not have adequate domestic provisions for mechanisms for speedy and effective enforcement.

Brussels II bis deals with all cases involving parental responsibility, irrespective of whether the parents were married. The 1980 Luxemburg Convention is now effectively dead being superseded by Brussels II except for Denmark. It takes precedence over the 1996 Hague Protection Convention.

Brussels II bis provides a defined jurisdiction for dealing with applications to the state from which the child has been abducted, based on the 1980 Hague Convention but elaborating upon it. It provides an additional mechanism in the event of refusal of a summary return with reference back to the court of the State of origin and a power to that court to order a mandatory, enforceable return. It provides a framework for the determination of where jurisdiction to make custody decisions lie in respect of an abducted child.

A court cannot refuse under Article 11(4) to return the child if there is adequate arrangements made to secure the protection of the child after return. This overcame the problematical use of undertakings. Now a mechanism through international communication between judges and central authorities helps to establish whether adequate protective arrangements can be made. It is more in the concept of mirror orders. However Henry expressed anxiety that some countries have no liaison Judge and no pro-active central authorities. He was worried that this may not work as the designers of the convention intended.

He referred to the requirement that the left-behind parent has been given an opportunity to be heard, Article 11(5). The very time that is taken to bring this parent to court and have oral evidence may offend against the rights of the child and other parent to a fair trial. This may be dealt with by a video link but this can often be expensive and unreliable. There may be a latitude in interpreting what it means to have an opportunity to be heard. There may need to be more cooperation on this between particular countries.

Henry then turned to the much more problematical issue of the refusal to order a return if the child objects and has attained an age and degree of maturity to take account of the views, Article 13 Hague,

and the need for the child to be heard, Article 11(2) BII bis. He said that England was out of step with some European practice and there was reference again to the German position which had been covered the previous day. Henry asked what impact hearing the child has? Often the child's views, interesting as they may be, may not be an Article 13 objection. They may be important to be heard but not important in law. But it changes the nature of hearings. How does one go about hearing the child? He referred to a possible future change in the English position by a recent Court of Appeal decision as yet unreported. Brussels II bis does not directly deal with the problem of the child's objections but instead puts the emphasis generally on children being heard. This picks up the European Convention on Human Rights.

He referred to a presentation he gave over the summer to German judges dealing with Hague cases, when he explained the English approach and the use of CAFCASS, the court children's reporters service, and the UK belief that this procedure is sufficient and appropriate for the child being heard under Brussels II bis. However they found it hard to understand. As a deputy High Court judge he was happy to see a child (so am I but I am merely a deputy PRFD DJ!) but he said the traditional approach of English judges was not to do so. He said that help was found in recital 19 which provides that although hearing the child plays an important role in the application, the Regulation is not intended to modify national applicable procedures. Therefore where a child was not directly heard by the judge, some explanation in the judgment or order of the process by which the child had been "heard" may be needed.

Brussels II bis requires a return within six weeks. In England, the average period is six weeks so there must be many cases where it is longer. In some European countries it is closer to a year. In some countries it is much more than a year. He believes that this six-week maximum period is frankly impossible.

He referred to the procedure upon a summary return being refused as being genuinely new and absolutely logical but that many were unhappy with it. If the refusal is on the basis of Article 13, the refusing court must account to the Court of the State of origin. They must send a copy of the decision, relevant documents and a transcript of the hearing. It must be translated which Henry thought could cause lots of delays and difficulties, especially with some Eastern European countries. (A similar point had been made in the first talk on the first day as above.) There is then three months for the parties to make submissions to the State of origin about the question of custody. If there are none, the court of the state to which the child has been abducted acquires jurisdiction. There are no difficulties. He regarded this as an important development. If however there are objections, the court of the State of origin conducts a custody hearing. He went through the requirements in detail. It is set out in his paper. If the decision of the Court of the State of origin is a return, it retains jurisdiction and issues a certificate in prescribed form. This allows direct enforcement of the return order in the refusing state. As a consequence, exequatur is avoided. Enforcement of the certified decision is by domestic process.

He concluded by saying that whilst Brussels II bis was very significant:

(a) it did not deal with the approach to relocation cases which remains with individual jurisdictions,
(b) it did not deal with the approach to a child's objections which was up to the individual courts to look at it in accordance with their domestic law and procedure,
(c) whilst the abolition of exequatur and the simplification of the certification process was better, the machinery of enforcement such as the location, safeguarding and physical return of children relied on domestic provisions and sometimes those were inadequate to support the court process, in particular what happened if there were a return order and there was physical resistance to the return,
(d) the excellent provisions for the coordinated use of central authorities and international judicial cooperation needed substantial investment in infrastructure to work effectively; what was the use of wonderful regulations if there was no machinery to make it work,

(e) there remained an internal EU diversity on the approach to hearing children and parents.

Henry also mentioned the English initiative of mediation in child abduction cases, saying that it had been attempted in 18 cases with a large measure of support from the parties and success in terms of a resolution being reached outside of court. It was a pilot project about to conclude soon and a paper setting out observations and conclusions would be available in 2006. Many delegates were very interested and Henry explained more about the scheme, the process of expert mediators with knowledge of Hague remedies, how it shortened the normal mediation process, how it was not compulsory and there was particular concern to make sure it did not appear compulsory and that the take-up had been high.

I asked Henry how he felt Europe could move forward on relocation. Henry said that the free movement of people was an immensely strong principle and indeed a founding principle of the EU. If the primary carer parent has good reason to move across a European border, there ought to be a strong reason to prevent, and this would include movement with her established family including children. Against this is the enormous weight to the right of a child to have a relationship with the other parent, perhaps an equally strong relationship. He wondered whether the balance came down to the welfare of the individual child. Instead of these two relatively rigid approaches, perhaps a neutral, child-centred approach was preferable. This could be with a checklist of factors to take into account in a relocation case.

The law governing transnational successions, including the establishment of a European Certificate of Inheritance.

Wolfgang Reiring of Germany has been primarily instrumental in the comparative law study of succession in EU states and has made recommendations for reform including a Green Paper this spring. Some delegates were conventionally family/divorce lawyers but many continental European lawyers dealt with both. He was a German speaker and gave his talk in his second language of French, then simultaneously translated into English, with his PowerPoint presentation in French, and also I am not a succession lawyer, so I hope this is a faithful record. He produced a paper in French which I can send on to any who are interested.

If we thought we had problems on conflicts of law in family law, it is nothing compared to succession! There are two primary systems in Europe on comparative law. The Anglo Saxon countries apply the law of domicile to moveables and the law of location of real property. Other countries have some unity but different application. Some follow a unitary rule for all the estate, mostly on nationality of the deceased. Some base it on domicile of the deceased. Some are mixed. It causes huge conflicts. How does one draft a will if one does not know which law will apply?

The Green Paper proposes one single connecting factor for all succession cases, which allows quick liquidation of property. But which factor? Nationality or habitual residence? This was the big debate and the EU has proposed last habitual residence of the deceased. It is perceived to reflect the last centre of the deceased's life. The rule of domicile is not fully known across the EU. Should there be a minimum period e.g. 4 or 6 months or 5 years for residence? Wolfgang thought not as it is arbitrary and better to leave it to individual cases and judges. There is help in tax law. No EU country defines habitual residence in statute.

The next question was what law should be applicable to general testamentary capacity and validity. Wolfgang went through the different provisions across the EU and said they proposed that each state should determine it separately and individually.

The form of testamentary provisions is more important, and follows the 1961 Hague Convention. Wolfgang then dealt with joint wills and mutual wills, going through the differences in practice across the EU. On the former, the proposal is that the connecting factor for the applicable law is the place of

drafting or perhaps the law of the form of the drafting, both being a liberal proposal. On the latter, the proposal is application of Art 9 of 1989 Hague Convention. This is very detailed and offers stability to draft a mutual will.

A curious issue is whether a deceased should be allowed to choose the law applicable to succession. Then should heirs be able to chose? Most countries do not allow either. The proposal is that the deceased can chose, so he can plan successfully. The proposal is the deceased can chose either law of nationality or law of last residence when choice is made – not at date of death. One never knows where one will be resident when one dies! But definitely not law of location of asset. The same applies for joint and mutual wills.

There then followed a most convoluted debate, alien to English ears, about the reserved portion, the background to which will be known to succession lawyers and some family lawyers. Several complex scenario were set out. This issue was emotionally returned to in questions with France and Germany again at odds, this time with Belgium even more strongly involved. Wolfgang argued against the need for a rigid reserved portion, saying that these days when a deceased with any amount of assets died, children were well into their 40s or older and did not need such reserved portions. Some delegates would have none of this and regarded it as fundamental social and traditional rights. It was said to be the most debated issue on the study and the subsequent questions proved this.

It took away from perhaps a key proposal, namely the European Certificate of Inheritance. This would replace the grant of probate and letters of administration. Reference was made to the Hague Convention on International Administration of Succession and also the Quebec letter of verification. The European Certificate would state the issuing authority, the details of the deceased, legal heirs, portions, bank and other details with copy will attached. It could go to any EU state for automatic dealing with real and personal property. It would greatly facilitate administration. It could be used in evidence and protect third parties. It would be highly reliable. Central authorities would be in charge of it and would verify it. Notaries and courts would complete it. There could be a central register, with reference to the Basle Convention of 16 May 1972.

Wolfgang concluded by saying some proposals in the Green Paper were quite radical, was not sure if they would be accepted but believed they would help in cross border succession.

At this point questions began! One French delegate started by referring to post revolution ideals. As this was the French Revolution, it became quickly obvious to other delegates how deep seated this was. She felt the proposals were much too liberal. A Belgian delegate was of the view that a deceased should simply not be allowed to give unequal shares to children, even children of full age and independence. For a German delegate, the reserved portion was the bedrock of family life and succession! Attempts to abandon reserved portion would never succeed in Germany! It was deeply anchored in German society. It made all our concerns about applicable law on divorce seem so minor! Peace prevailed only on the basis that these arguments had been explored for over 200 years!

Another aspect was residence as a status for jurisdiction of applicable law. The German Ministry delegate pointed out that very many German residents also had holiday homes in Italy or Spain, spending six months residing in each. They would not know if the summer sun or the winter ice would take them to their graves so they would not know which law would apply. This was too uncertain.

The speaker ended the session by reiterating that of the options, the law of the location for immoveables was not acceptable and had to be abandoned. Of this he had no doubt. Just like one previous speaker, the final remark under questions was a strong voice of utter resilience against one present way of law and practice, and each time the English system. Overall I did not detect any anti English sentiments as the speakers in each session patiently went through the many laws, procedures and practices and almost each time had to say England, the UK or more often the oddly described Anglo Saxon approach

was very different to the rest of Europe. Nevertheless on a couple of occasions, continental European speakers seemed just dismissive of the UK position, law or approach. I was left wondering whether, to what extent, there had been a degree of window dressing at the conference and the final remarks by admittedly just two speakers were closer to the mark of a wider perception. I have no evidence of this at all, merely a concern based on what I describe occurred twice.

Overall he presented well, realistically, with some seemingly sensible solutions. He is tackling perhaps the most deep seated issues in European family life, and for once it does not so directly affect us nor are we in a middle of a historic firing zone!

Right to family reunification within Europe

Steve Peers of Essex University produced a full paper and outline, copies of which I can send on. He impressed with his comprehensive knowledge of the subject across Europe. He described the pendulum of trends in this area, the economic factors, the political demands, the Human Rights issues and the case law. It was a thorough, clear and careful exposition.

The development of family law in Europe: towards a harmonised system?

The final presentation was by Fernando Paulino Pereira who is responsible for the Judicial and Civil Co-operation at the Secretariat General of the Council of the EU. Fernando said that hitherto the Commission had concentrated on jurisdiction, but now they were turning to applicable law. Its experience in harmonisation of business matters was that states and interested parties started off apart but invariably found solutions in a good spirit. In family law it was always difficult especially when children were involved as the issues were highly charged and very sensitive. The reality was that there were no identical family concepts across Europe, from the northern Scandinavian states through western and eastern Europe to the Mediterranean countries. Fernando said that no one can say one law or practice is better or worse than another – it is simply that country's traditions and based on the people of that country. It is very closely linked with spiritual and religious beliefs. So it cannot be harmonised quickly. It must be developed democratically and embrace different concepts.

The Commission had to respect ideologies and traditions but it also needed to make sure competent court orders in one state were recognised in another. But there were limits. The Commission could arrange for domestic orders to be recognised across borders but they could not interfere with domestic law. They can only deal with cross-border territorial issues. The other limit was the need for unanimity. Good ideas and innovations were not enough if Brussels could not carry all member states along in unity.

The Commission's future family law programme is as follows.

- Recognition and enforcement of maintenance orders - which court has jurisdiction and what will be recognised.
- Property effects on marriage break down. Fernando said that what the Commission proposed might not be accepted by the Council.
- Succession - on which there were deep seated differences across Europe
- Applicable law - some states wanted local law, others want unified conflict of laws.
- The Hague Convention of 1996 to be signed and ratified.
- Mediation - a paper for the creation of a general framework across Europe by the end of 2006.

Fernando said that by 2011 they will have completed the exercise. It will fill gaps. He said the message is that Brussels will not harmonise all laws. They will do the best they can.

In questions, he said they had doubts about a possibility of creating common matrimonial regime of

property. More realistic (that word again!) was a mutual recognition of regimes.

I said that some of us had been endeavouring to resolve the unfairnesses of forum shopping and international cases before Maastricht and the involvement of the EU. We met as international practitioners regularly and shared ideas on how to do the best for our clients and produce fair outcomes despite the laws and approaches. We saw the sharp end of our client's cases including the impact of existing Brussels Conventions. We had good ideas to make yet too often practitioner groups felt the opportunity to give input into proposals was too little or too late. He listened to this and gave what I thought was a genuine and real answer.

He said the voice of the practitioner was crucial to them. He said they expected member states to be in contact with their professional bodies. He said he was always at the disposal of specialist practitioner groups, by phone or e-mail. He said that in the Hague programme for the future is workshops to meet practitioners, judges, lawyers and he hoped Resolution, IAML and others would take part. He said there was increasing amounts of judicial co-operation. He was certain they needed to hear from the practitioners. It was an accomplished answer and seemingly a genuine one. With this opportunity for involvement, it is now our responsibility in practitioner groups to get more fully involved.

He ended by thanking all involved in the conference.

Conclusion

This was an incredibly valuable conference; to be informed, to listen orally to presentations from and ask questions of policy designers, to share ideas and responses with other practitioners and government officials of other states and to consider what action can now be taken.

The timetable of 2011 and the need for unanimity are real limits on what a few years ago seemed an unstoppable Brussels juggernaut. Realism and pragmatism has broken out. Applicable law is now the big issue. Some speakers seemed to accept a mix of solutions was needed on conflicts of law issues. There will be no harmonisation of divorce law or of property law, the latter a disappointment in several ways for those of us practising at the sharp end of finance forum shopping. There must be a danger that the lowest common denominator will be proposed on some issues. There was a genuine rejoicing of the major success of Brussels II bis but there is still a lot of work to be done on international children issues. Where help was needed, for instance on reciprocal enforcement of maintenance, there seemed insufficient breadth of global vision and enterprise. Perhaps Europe does not realise how powerful it is for bringing about change in the world family law arena. Assurances were given that practitioners, especially the national and international groups of specialist lawyers undertaking international cases, would be listened to and involved in the process of policy development and reform.

Almost nothing was heard about the accession states and the impression was that the policies of the early part of this decade were simply going onwards irrespective of their membership. Moreover, the conference heard very little about the impact of the Islamic population, a large presence in some EU states and with bigger differences in culture and family values than exist between some EU states at present, and sometimes at real odds with the values and traditions of their host states.

There is a huge amount to be done, the law is becoming ever more complex and yet injustices and unfairnesses are very evident. This places an even greater obligation on us in Resolution and similar practitioner organisations to help our members understand and work within this international framework, to produce fair outcomes in a conciliatory fashion.

There are a couple of final personal remarks prompted by the conference.

In the 1980s and into the 1990s, international family law work invariably involved wealthy clients, whether

super wealthy or moderately wealthy. There was a relatively small group of practitioners, across the world, dealing with these cases. It was a very specialised and complex area into which it was said other lawyers should only enter with great care and caution. Many of us were keenly aware of the shortcomings and unfairnesses of the international family law system as it affected our clients but assuaged our personal consciences by the knowledge that some of our clients had a degree of wealth, whatever the outcome, and did not suffer major hardship by any injustice.

That has now all changed. There are millions of people in Europe who with some sacrifice have purchased modest holiday homes in other countries in Europe. There are many more millions who through choice or the requirements of their employer work in another European country, often at modest levels of income. There are even more millions for whom Cupid's arrow has crossed a European border, are now married to another European national but whose family situation is financially modest or average. International family law work is no longer just a "big money" lawyers' game. It now affects the entire social and wealth spectrum and impacts on all family lawyers, not just international specialists in each country.

Yet it is still an immensely complex and difficult area of law, as demonstrated by this Luxembourg conference. Moreover, it is still an area of immense injustice and unfairnesses, with gaps in the law. Finally, it is an area where the economically more vulnerable or weaker party and the child is at an even greater disadvantage than in domestic cases. So what are some of the implications, as highlighted by the conference?

1. Brussels is absolutely right to have an urgent timetable, and this should be actively supported by us. Every day, more families and children find themselves in international cases and need better help.

2. Brussels is absolutely right to decline to engage in areas of family life which are deeply rooted in religious, traditional and national family values. Unanimity on change of such issues is fundamental. Yet this could be too widely interpreted. There is a need to resolve many international family law issues, some of which have little bearing on traditional, national values. More often it is simply the way we have done things historically in the past, with which we are comfortable in our own countries but which may no longer serve international families and the international community in which we now live. I left Luxembourg convinced of the need to be more open and flexible to future changes even though it may take us beyond our historical comfort zones as lawyers.

3. Brussels is absolutely right to be pragmatic and realistic about what is achievable yet it must not do so by adopting the lowest possible denominator of acceptability. Boldness and innovation is required alongside pragmatism and realism.

4. Brussels is absolutely right in saying it will not interfere in purely domestic law but instead will deal with cross European border cases. However the latter ignores that some international family law issues are global, not European, and Europe has very great influence and power when it comes to bringing about global solutions. In the world family law community, Brussels is probably the best placed organisation to establish global changes and should actively and urgently seek to do so. Some European problems cannot be sorted out without a global solution.

5. Brussels is absolutely right to seek help from academics including understanding comparative law and from governments in understanding political imperatives. However Henry Setright's excellent presentation powerfully demonstrated how top lawyers in daily practice can identify where problems exist, where gaps arise and where injustices occur, and often make very good proposals to solve them. Brussels needs to listen, and show it is listening, to

practitioners and practitioners' organisations such as Resolution in the identification and development of policy and to do so at an early stage. We do not suggest we have all of the answers. But we can identify many of the injustices, unfairnesses and gaps. We want to play an active part as a partner with Brussels in creating a fairer and more just international family law regime, not least for the sake of our future clients.

6 Brussels is absolutely right to organise, promote and fund the European Judicial Network in family law matters. It is fundamental for the smooth operation of many international laws and regulations and already working successfully in difficult cases. However with many more lawyers, in all countries, dealing with international matters, we also need a European practitioners network, for lawyers to be able to access practitioners in other countries on international cases. Resolution has been trying unsuccessfully for about 10 years to bring this about. The IAML is one model which works well for what its highly specialised members require of it. Family lawyers across Europe needing only occasional access to lawyers in other jurisdictions perhaps need another model by way of a network. Yet no national practitioners organisation has the time, facilities or funds adequately to create and run it. Perhaps Brussels can help. The Luxembourg conference showed that a network of practitioners is needed for the smooth operation of the various European conventions and regulations and for the European citizens who seek international family law help.

7 Brussels is absolutely right about the need to educate all family law practitioners about the European aspects of the work. The internationalisation of families in the past ten years across the social and wealth spectrum means international family law has now broken out of the very specialist firms which have historically undertaken much of the work. There will now be many more international cases of relatively modest income families. These cases are spreadacross the country and across firms which have had no pretensions of undertaking international work. This means that family lawyers must know much more than in the past. Family lawyers must now understand the basics of family law where it relates to modest income families with connections abroad. Convincing of the need for education may be harder than explaining the law! But it must be done.

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13 October 2005

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Addendum

On 17th October the Law Society held a half day family law conference on European implications as part of the EU Presidency. There was a very good turnout which was encouraging. This is not intended as a detailed report but to set out new matters not recorded above.

Baroness Ashton of Upholland, Parliamentary under secretary at the DCA, spoke of the government's political imperatives on family law, especially to remove obstacles of cross border cases, produce effective co-operation and mutual recognition and to produce very practical solutions. She explained the process of reaching unanimity as required on family law issues amongst the member states. She described the Applicable Law Green Paper as a bold move, and asked if it encroached on national

legislation rather than just cross border cases, whether it would work, how to decide what is applicable law and said she thought it was a long way from a considered view.

Monika Ekstrom spoke on the background to international matters in the EU. As with her later talk on BII bis, it was an abbreviation of what she had said in Luxemburg. She did say the consultation meeting for Rome III would be on 6 December. She said that a real benefit of BI and BII being a directive and regulation is that it is now directly applicable in local law and allowed application to the Eur Court for any interpretations. A key goal for the future is that a citizen should be able to approach a court in another member state as easily as if own member state. But mutual recognition was the cornerstone, to abolish the exequatur procedure, to introduce it in matrimonial matters and pr, property rights and wills/succession. She explained the working method of ordering a study, then consultation paper then further consultation. She emphasised that they were very keen to hear from practitioners. Next year there would be a Green Paper on Property consequences, for married and unmarried couples, and an expert group was being set up to involve practitioners at an early stage.

She accepted that the Applicable Law Green Paper was a bold move but the EC had little choice and no room to manoeuvre on the issue, having been asked to produce a paper. She said, as she had said in Luxembourg, that it seemed there would be a mix of solutions with no one solution. There was a need for a combination of legal certainty (couples to know which law will be applied) and flexibility (variety of solutions to include agreements as a basis for jurisdiction and for a review of jurisdiction criteria).

Monika said there would be a proposal on maintenance by the end of 2005, which I understood to mean being published, which is a year faster than I understood Antoine had said at Luxembourg!

Mark Harper, solicitor, gave an excellent presentation as a practitioner on cross border litigation. I expect he would release his notes if asked. He reminded that although not a signatory to BI, Switzerland was a signatory to the Lugarno Convention of Sept 1988 which had similar effect; of importance as 20% of private wealth is held there! He drew attention to SI 1997 No 302 on free standing freezing injunctions for non EU cases. He referred to R2.27A FPR for stays under BI and BII. He drew attention to the importance of not failing to effect service if a BII case and of EU Reg 1348/2000 and he gave out details of the Foreign Process Section at the RCJ. He concluded by highlighting some live issues in practice and the need to be aware of these issues in all practices.

Mathew Thorpe, Court of Appeal judge and, since Jan 2005, Head of International Family Justice, spoke of what the work involved and how it linked with other practitioners.

There was a need for collaboration and activism amongst family judges in other countries. International cases needed specialist judges. He gave an illustration of how he would liaise with his opposite number in other countries quickly and effectively to lead to judicial communication on an international case; who did what and when in individual cross border cases. There was the increasingly successful European Judicial Network and a need to bolt on a complimentary service for family cases.

There should be representation of this jurisdiction as a common law country at conferences, especially those run by the EU and the Hague.

There had to be collaboration on international instruments. It was vital England was represented on the expert group referred to by Monika. He referred to the English involvement on the outstanding Practice Guide to BII bis. There had to be good collaboration between the DCA and practitioners. Once there had been implementation, there had to be regular reviews of regulations and he referred to the review model of the Hague. Collaboration had to be domestic, and it was important practitioners had a voice on family law issues arising on the DCA EU Stakeholders Group (on which I record the Resolution International Committee has a standing representative).

He said there was no substitute for personal contacts in other countries built up through meetings at conferences etc as a means of making better progress and greater understandings.

It was important to take part in European conferences and he referred to the Anglo French and Anglo German conferences and the several other countries which could be introduced by the primary participants. Equally it was important to look outside Europe and he referred to the initiatives with Pakistan and Egypt, with hopefully India and Bangladesh to follow.

International jurisprudence had to be considered. Under Hague there is no court to which disputes can be referred. But there is under Brussels Conventions, and there is a concern for the speed of such adjudications, especially if they have to go to the HOL first and then to Europe, and he said a small group will be meeting the Advocat General soon to see if a shorter, quicker, perhaps abbreviated process can be obtained.

A future area for progress is ADR in all its various manifestations, and Mathew referred to the GEMME group of European family court judges developing this and to the Paris conference on 8/12/05 to which he was attending.

As to challenges for the future, Mathew said they were enormous and many; the extension of liaison of European judges, the gulf between our children laws across Europe and Islamic children law; the building up of practitioners committed to working with international family law issues and being proactive and strengthen our resources in this area.

Mathew concluded by saying that international family law is still in its infancy, which is both a strength and a challenge. Our domestic system is highly sophisticated and developed. International family law is in contrast young and malleable. He called for more to get involved in its development and for those already involved to be encouraged to keep going.