

# Rome III: subsidiarity and proportionality

## Report of House of Lords European Union Committee

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In mid November 2006, the United Kingdom government decided not to opt in to the draft Regulation of the European Commission, commonly known as Rome III. The Republic of Ireland similarly did not opt in. The House of Lords European Union Committee considered the draft Regulation. Their report undoubtedly had a very substantial impact on the decision taken by the UK government. The report has now been published. It looks at the twin issues of subsidiarity and proportionality. In doing so, it takes the issue away from the purely domestic, internal United Kingdom concerns, and makes it an important document across the European Union.

The report is at [www.publications.parliament.uk/pa/ld200506/ldselect/ldeucom/272/27202.htm](http://www.publications.parliament.uk/pa/ld200506/ldselect/ldeucom/272/27202.htm)

### Brief background to Rome III

Across the European Union, the majority of countries apply the family law of the country with which the couple before the courts have the closest connection. In most cases, this is in fact the local law. However where a couple have closer connections with another country abroad, perhaps joint nationality, residence etc, these courts apply the couples' own country's law, and not the local law of the country where the proceedings are taking place. This is known as choice of law, colloquially as applicable law. Unfortunately, across those countries with this legal arrangement, the criteria for deciding when and in what circumstances the couple's own law should be applied, and indeed which law will be applied, differs dramatically. As part of its harmonisation process in family law, the European Union quite rightly decided that there should be a unified and harmonised approach to the choice of law principles. This was supported by those countries which operate choice of law.

However there is a minority of countries across the European Union which only ever apply their local, domestic, law whatever the connections the couple may have with other countries. This is known as *lex fori*. The lawyers do not have to consider whether another country's law should be applied and what is that law and how it should be applied. This minority includes the United Kingdom and the Republic of Ireland. Although in the minority of EU countries, they are jurisdictions which undertake a very substantial amount of international family law work, both with the EU and with the rest of the world. The London family courts have probably more international cases than any other family courts worldwide. The UK has a very active and vociferous law profession which has become significantly involved in family law developments across Europe after the very swift and unexpected introduction of Brussels II. The UK professions made clear that they would oppose any imposition of applicable law in their jurisdictions because of the fundamental and wholesale changes it would create across the professions, with increased costs, delays and greater difficulties in settling cases.

Nevertheless, in spring 2004 the European Union produced a Green Paper for consultation on the harmonisation of the choice of law principles. It proposed that those countries presently applying only their own domestic law would have to change dramatically and apply the law of other countries in appropriate cases. The professions in the United Kingdom took a full part in the consultation process, opposing the introduction of applicable law in those jurisdictions which applied only domestic law and making suggestions for other ways to overcome the jurisdictional and choice of law problems identified by the EU. Probably the leading counter-proposal was put forward by resolution/SFLA, the English family law solicitors organisation, with a concept of a hierarchy of jurisdictions, referred to in more detail below but which would thereby overcome the rush to court of Brussels II and the need for choice of law.

The European Union held a consultation meeting in Brussels in December 2005. In July 2006 it published a draft regulation, known as Rome III. It proposed applicable law, as set out in the regulation, would be introduced across Europe in March 2008. Fundamentally, only the United Kingdom and the Republic of Ireland had the ability to opt out of its introduction. The other EU countries could merely comment. The United Kingdom had already opted out of another EU family law regulation in spring 2006, concerning reciprocal enforcement of maintenance, with one reason being the concern about the introduction of applicable law into the United Kingdom.

A decision to opt out had to be taken by mid November. Within the United Kingdom, the law professions, interested parties and others made representations to the government. The matter was considered by the House of Lords European Union committee in October 2006, receiving written evidence and taking some oral evidence. Its report is dated 7th November, published on 7th December. As a consequence of the report, the United Kingdom government opted out of the regulation. The Republic of Ireland also opted out of the regulation. It is understood that the Parliaments of many other European Union countries have supported the regulation.

In making its recommendation, the House of Lords Committee had to consider the principles of subsidiarity and proportionality.

#### The House of Lords report

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

The House of Lords Committee noted that the objective of the Rome III regulation was to ensure legal certainty, flexibility and access to court in cases of international divorces by clarifying which law should apply in such cases.

In summary, whilst the House of Lords Committee agreed that the matter of different criteria of choice of law is one for international rather than national action as the objective could not be attained by member states individually, the Committee had doubts whether the European Commission had proved that the action proposed in Rome III was necessary. The Committee also had concerns whether the proposal was proportionate and questioned if the objective might be achieved by simpler and less prescriptive means.

#### The House of Lords' Committee's considerations

It was perhaps unfortunate for the family policy team at Brussels, keen for the draft regulation to be introduced across Europe, that Rome III was one of the measures chosen by COSAC to test national parliaments ability to consider compliance with subsidiarity and proportionality. A large majority of the European Parliaments concluded that Rome III did comply.

The House of Lords Committee summarised the intentions, purposes and proposals of Rome III. It recorded that UK practitioners did not believe that the European Judicial Network would be able to relieve the parties of the additional costs which would be incurred by the application of foreign law.

The House of Lords Committee accepted that most, if not all, member states would have to change their laws to accord with the draft regulation but that the change in the United Kingdom would be substantial because it presently only operated local law, *lex fori*, and the additional costs would be

carried by the parties themselves. The Committee said it therefore needed to be satisfied about the extent of the problems being addressed and whether the solutions in Rome III were the most efficient way of dealing with them.

The Committee then carefully examined the European Commission's intentions and purposes behind the draft regulation. It gave special focus to the EC's Impact Assessment attached to the draft regulation. This statistical survey was intended to demonstrate the practical need for the regulation. The Impact Assessment asserted that there were 170,000 international divorces pa across Europe, about 16% of the total. Hence, it said, this was a big problem, demonstrated statistically. Yet the Impact Assessment was clearly flawed. The figures were extrapolated from patchy information from relatively few countries, moreover countries with a high number of foreign residents and therefore probably a disproportionately higher number of international divorces. The House of Lords Committee found it "extraordinary" that the EC could state, without reliable evidence, that the rates of international marriages and divorces did not vary enormously amongst the larger European Union countries. Even if the figures were as stated, it was doubted whether such figures would justify the action proposed by Rome III. Moreover it was pointed out that the Commission's statistics did not even reveal the percentage or number of cases where the question of applicable law had been a problem.

A primary consideration for practitioners (and their clients!) has been the rush to court created by the first to issue principle of Brussels II. The European Commission contended that harmonised applicable law rules would greatly reduce the risk of this rush to court. The House of Lords Committee recorded that UK practitioners disagreed. It decided that the rush to court would not be prevented under the new regulation.

An essence of subsidiarity is that the EC should only act if the objectives of the proposed new law or regulation cannot be sufficiently achieved by the member states. The Committee accepted member states alone could not bring about a harmonisation of the applicable law, choice of law, principles and criteria.

The House of Lords Committee was anxious about both the EC's existence of powers to act and then the exercise of those powers. It recorded that a number of parties including at least three other parliaments, the Czech Republic, the Netherlands and Scotland, had queried the necessity of the present proposal. The Committee was doubtful whether the limitations on the EC's statistical research justified the conclusion that Rome III was required. The statistics were not a safe basis on which to act. Further research should have been conducted. There was also an anxiety that Rome III would extend to cases which may have little connection with the internal market i.e. international cases involving non EU states. (For instance, many London international family lawyers estimate that more than 50% of their international cases are with non EU states.)

Proportionality requires community action to be as simple as possible and leave as much scope for national decision-making as possible. The Impact Assessment set out and evaluated a number of options. There were many criticisms from UK practitioners on the conclusions drawn and about the cost of implementation. The House of Lords Committee recorded that a large majority, if not all, states would be required to change their laws substantially. There may be substantial costs for courts and the parties in ascertaining and then applying the foreign law. The Committee was concerned that the EC had not appreciated the full implications of its proposal and queried whether the objectives might be achieved by simpler, possibly less prescriptive, means.

They referred to the proposal made by resolution, previously known as the Solicitors Family Law Association, that if the jurisdictional rules under Brussels II were to be improved then it would not be necessary to harmonise the applicable law rules. Resolution had proposed a hierarchy of the jurisdictional rules whereby proceedings would take place in the country with the closest jurisdictional connection rather than merely which party happened to be the first to issue.. The House of Lords Committee said

that they had been impressed by the arguments raised by academics and legal practitioners about such counter proposals and were concerned that the Impact Assessment did not adequately address them.

The Committee therefore recommended to the House of Lords, and through them to the UK government, that the United Kingdom should not opt in to Rome III draft regulation. This is what occurred in mid-November. The Republic of Ireland similarly did not opt in.

### The Future

So where does this leave Brussels and applicable law?

There are only a few other countries across Europe which apply their local law, *lex fori*, rather than choice of law. It can be imagined that these countries would also have preferred to have had the right to opt out and if they had had that right, would probably have done so. This should be noted by Brussels.

There is of course no reason why Rome III cannot be implemented between those countries which have various systems of choice of law. This would be a significant improvement, for the reasons set out in the Green paper.

Will Brussels soldier on in the imposition of applicable law on jurisdictions for which it is wholly new and hitherto wholly alien? It should take note of the very real concern that the Rome III proposal was disproportionate to the objectives.

Brussels should certainly examine again the idea of a hierarchy of jurisdiction, with limited powers to transfer between countries, as a way to overcome the rush to court and the whole need for choice of law.

Unfortunately, very many of the otherwise excellent proposals now emanating from Brussels are posited on applicable law. It is to be hoped that with this development in relation to Rome III, Brussels will look again at their proposals and examine how they can be introduced without at the same time requiring "local law" jurisdictions to embrace application of foreign laws.

Brussels has a very tight timetable for its family law reform programme, to be concluded by the year 2011. Many practitioners wish them much success in most of what they are trying to accomplish. Applicable law was always going to be a step too far for some jurisdictions. Perhaps Brussels can realign its thinking over these remaining four years and bring forth the anticipated programme of family law reform, innovations and changes without the requirement of applicable law.

The wide ranging and important Brussels reforms will not affect just Europe. By the influence of such a huge population (close to 500 million) and block of unified family law procedures, there will be a significant indirect impact on the rest of the world's family laws. This will be mostly for the incredible benefit of international families, and also for purely domestic cases across the world. Yet most of the rest of the globe does not use applicable law either. Once this obstacle is removed from the Brussels reform packages, the tremendous advances, improvements and innovations in family law coming from Brussels can then move out across the world.

At a constitutional level, the analysis by the House of Lords Committee of the criteria for the introduction of proposed regulations will act as a blueprint for future proposals from Brussels both in the United Kingdom and elsewhere across Europe.

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