Freedom, Security and Justice: What will be the Future?

Family Law

Response to the EU Public Consultation

David Hodson

David Hodson
Panorama
Guildown Road
Guildford
Surrey
GU2 4EY
07973 890648
dh@davidhodson.com
www.davidhodson.com
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This paper is my personal response to the EU public consultation of September 2008 on the future programme of freedom, security and justice within the European Union. This response is limited solely to matters affecting family life and family law. I am very committed to the many opportunities for the improvements to family life and family law from the EU yet I am very anxious about certain directions which are and/or could be very contrary to national family life.

I am excited by the opportunity presented by the forthcoming European Union programme, building on the good work already undertaken, and by what it can do for the increasing number of international families and their children and to support family life especially marriage.

Summary

- Excellent work has already been undertaken as part of the EU family law program and this should be the foundation for the forthcoming programme of support for family life and for the development of family law
- Mutual recognition of the status of domestic relationships has made good progress and should be continued
- Cross border judicial and other cooperation in issues regarding children has worked well but inevitably there is still a lot to be done
- Automatic enforcement of family court orders across Europe has made good progress and should be the subject of greater progress in the next programme of reforms
- Procedure is often as important as substantive law and good progress has been made, although consultation with practising lawyers is important
- ADR including mediation must remain centre stage in all considerations of family law reforms
- Opportunities to save saveable marriages and other relationships should be paramount, and not defeated by the operation of law in practice
- Lis Pendens of Brussels II must be removed at the very earliest opportunity; it is thoroughly anti-family, anti-settlement and contrary to the whole ethos of family law work
- Choice of law, applicable law, is inevitably proving a major stumbling block; reform is needed amongst choice of law jurisdictions but not imposed on local law jurisdictions
- A solution for applicable law and lis pendens is available
- There should be consistency of the requirements of when marital and other domestic relationship agreements will be binding
- EU assistance is needed to create panels of specialist lawyers and network referrals for family lawyers across Europe
- Greater policing of member states is needed of child abduction under Brussels II revised
- Consensus following debate needs to be created by the EU on child relocation
- Harmonisation of financial outcomes and matrimonial property regimes may be more satisfactory by allowing grass roots co-working of the family law professions over time rather than imposition of legislation
- The excellent work in respect of the rights of the child and domestic abuse must be continued
Introduction

Professional background

I set out my details in the appendix. In summary, I have practised as a specialist family law solicitor since 1985, almost entirely in central London. The primary area of my work has been financial aspects of marriage breakdown, often with an international element. I have recently worked for two years in Sydney, Australia and qualified as an Australian solicitor, barrister and mediator. I have also been a deputy district judge at the Principal Registry of the Family Division (PRFD) of the High Court in London for the past 13 years. I am a mediator and arbitrator and very committed to ADR.

In 1985, I was one of the few solicitors then dealing with any amount of international family law work, working with a highly experienced international family lawyer, Mrs Blanche Lucas, who was founder and President of the Solicitors European Group. I have over the intervening 23 years seen the dramatic increase in the number of international families, and correspondingly the number of breakdowns of international families and issues concerning children in the international context. Moreover during this period I have seen international family law cases move from the very wealthy to the moderately wealthy and now right across the social and wealth spectrum. This itself has had significant implications for which I believe the legal professions across Europe have not yet fully caught up.

I have been very involved in representative bodies dealing with international aspects. I was the founder member in 1991 of the International Committee of the Solicitors Family Law Association, now known as Resolution. I have been a member of the International Committee chaired by Lord Justice Thorpe over the past 10 years or so. Since 1995, I have been a Fellow of the International Academy of Matrimonial Lawyers. I have practised family law in Australia which gave an incredible insight into the developments across Europe from a global perspective outside of Europe.

I have written the leading textbook for practising lawyers “A Practical Guide to International Family Law”, published by Jordans and with the emphasis on the practical aspects of doing this work. I commend this book to those considering the way forward for the European Union in the family law context. I am happy to provide a complimentary copy to those considering European Union family law program if this will assist.

I have on a number of occasions been retained by continental European family lawyers to give advice on English family law for the purposes of foreign proceedings where English law will be applied. I am familiar with the concept of choice of law.

Finally, in April 2007, I co-founded The International Family Law Group, a specialist law firm in Covent Garden, London, specifically directed towards the needs of international families. We have a contract with the UK government in respect of child abduction matters. My work is primarily international cases regarding finance and forum. We have been immensely successful in our first 18 months, highlighting the considerable amount of work which exists and also the difficulties many national
lawyers have in these matters. As access to justice is so important, I refer specifically to this element in this paper.

On a personal level, I have a Bulgarian sister-in-law, a Greek brother-in-law and an Australian nephew and niece.

**Personal perspective**

I have been personally and politically pro-European throughout my life and I support the general aims and historic intentions of the Common Market, now the European Union. (I voted in favour of joining in the 1975 referendum!)

As far as family life is concerned, I have always felt that we have much to learn, within England, from some continental countries. This is issues of stability, permanency, cohesion, greater respect for the wider family including grandparents and much more. Equally I am sure that some continental countries may have some things to learn from us.

However perhaps more than any other area of social life, family life is deeply rooted in the social mores, traditions and beliefs of communities including sovereign states. It is an aspect which requires very considerable sensitivity and care. Two neighbouring countries with perhaps elements of a shared history may nevertheless have very different perspectives on the priorities and concerns for family life including justice and fairness on family breakdown. There are very many examples which could be given but two immediately are obvious. First, the different role and respect for men and women in family relationships and secondly the importance of independence post separation balanced with the impact of recognising and supporting marital commitments and sacrifices.

This deep-seated element of family life within communities and member states is a primary difficulty for the European Union in this area of European community life. I believe our task as international family lawyers is to work with politicians and academics and other representatives of our communities to find the best way forward, urging onwards to a more fair and just way of dealing with matters yet cautiously looking always at our roots, heritages and valuable traditions. As a lawyer and as a part-time family court judge, I am keenly conscious that our English perceptions of fairness and justice are very rooted in our national traditions, beliefs and values, which other member states may not share.

This is a reason why we need to move slowly and cautiously. It is an area of law and national life where some seemingly minor changes and reforms can have dramatic social effects on changed behaviours and changed relationships.

**Progress report**

As far as status is concerned, there should be as much harmony of mutual recognition of marriages, divorces etc as possible. I am very pleased at the excellent progress made by Brussels II in this regard. It has made life much easier for international families across Europe. I deal with a number of cases of recognition of foreign
marriages and divorces from other parts of the world and I am very aware how
difficult are these issues.

As far as children are concerned, there should be as much cross-border judicial and
state cooperation as possible, properly funded and resourced, to look after the welfare
and best interests of the children of international families. Again, I am very pleased at
the excellent progress made by Brussels II revised in this regard, building on the
excellent work of the Hague Conference. Nevertheless there remains a lot to be done
to make sure that it works in all European Union countries in practice and as intended.
This must remain a top priority. I return to this

As far as enforcement is concerned, there should be again as much opportunity for
automatic entitlements to enforce as reasonably can be permitted and without
encumbrances of local registrations, exequaturs, and similar. I have this summer been
directly involved with the UK government in commenting on the draft Maintenance
Regulation, and I believe this will provide considerable benefits, especially as often
those having to enforce these sorts of orders are from middle and lower income
families, often single parents. I would like to see the automatic recognition of contact
and return orders in Brussels II extended to all children orders. Inevitably from a
common law country with no real distinctions of maintenance and other financial
provision on divorce, I would like all financial orders of judicial authorities including
notary outcomes to be able to qualify for automatic enforcement. The artificiality, in
English eyes, of European wide enforcement of maintenance and non-enforceability of
non-maintenance in financial outcomes must be dealt with urgently.

As far as procedure is concerned, the European Union is making considerable
progress with service abroad, transmission of legal aid, taking evidence abroad, video
conferencing, translations and other areas. Again, this is considerably helping the
international family by reducing costs, uncertainties and delays and unnecessary
procedural hurdles. There is of course still a long way to go and much more
consultation is needed with practising lawyers about impact in practice but progress is
now coming frequently and fast.

As far as ADR is concerned, a topic close to my concerns to try to bring about a
resolution of more cases without final court hearings, the recent Mediation Directive
is thoroughly to be supported, coupled with developments such as GEMME. I think
that there is still a lot to be done from practitioners but the European Union has led the
way with the Directive and the three-year timetable

So in these and a number of other areas, there is a very considerable amount for which
the population of the European Union and especially European families should be
very grateful. There are some excellent foundations already laid.

However in two very crucial areas, I believe the European Union has created, and is in
danger of creating, thoroughly anti family and anti-settlement orientated laws which
very many practitioners and others have condemned and from which many parties
have unreasonably suffered. Rectification and resolution of these areas are
fundamental for the further consensual construction of a European family law system
on the foundations already well laid. If these issues are not sorted out, there will
continue to be, for many more years, very real difficulties, for which international
families and their children will be the losers and for which there will be constant criticism by professionals, politicians, the media and others. I believe very strongly that we must face these issues and deal with them. They are the first to issue principle in Brussels II, lis pendens, and the concept of applicable law imposed on all local law jurisdictions.

There is in fact a third area which is equally important in my consideration and which has had very little publicity. It concerns the importance of having family law practitioners across Europe able competently and knowledgeably to deal with international families and a network of family law practitioner organisations to which a lawyer in one country can refer for help on cross-border cases. In a few European Union jurisdictions there are highly advanced organisations and a good body of highly specialist practitioners. In some other European Union countries, including countries with a considerable number of foreign nationals resident or working, there are hardly any practitioners and specifically no practitioner organisations. I return to this.

The history of involvement

Although in the late 1990s some of us had been undertaking international family law cases for over a decade, this was invariably discretionary forum disputes in the context of the dramatically different financial outcomes. Within England, the family law solicitors profession was invited to take part in a consultation which became Brussels II (BII). I remember clearly that two solicitors from London, one of them then a partner with me in my law firm, attended a consultation meeting in Brussels. They supported common jurisdiction for divorce across the European Union. They supported mutual recognition of divorce orders across the European Union. However they gave the most severe and dire warnings of the implications in practice of the introduction of a forum criteria of first to issue, lis pendens. Those of us providing briefing notes and background material to help these two solicitors make the representation were astonished that it could even be contemplated. We knew what would happen in practice. We have been proven right. Our warnings were not heeded.

We heard nothing more after the consultation meeting. We did not then have the considerable benefit of monthly briefings from the English Law Society Brussels office. The next that the profession heard was very late 2000, and specifically in about December, that Brussels II would be introduced on 1 March, 2001. I was one of the first to find out and alerted the rest of the profession. A couple of us met in the first week of January and I did the best to notify other practitioners. Specialists found out but it was very last minute and highly unsatisfactory. Moreover the concept of first to issue went against the entire ethos of English family law, to which I refer below.

There was very much a feeling that we had been caught unawares without having sufficient opportunity to engage further in the consultation. There was a tacit commitment then to make sure that this did not happen again to us. This is perhaps why the English family law solicitors profession has taken a very active involvement ever since; sadly perhaps more due to mistrust and suspicion than always an active encouragement!
There is now at last some recognition from Brussels that our warnings were correct.

The lack of representation for European international families

One of the major difficulties for international families is that they have no obvious representation, apart from individual lawyers at the micro level and the European Union at the macro level. Too often national governments have found it too easy to put national families and national family life first. Often these international families have no suffrage where they are then living and working. Yet they are many in number and increasing.

For many of them, they are living in an international community, working in an international market place, trading in an international shopping mall with international brands, with their children attending international schools and taking internationally recognised exams, preferring to use international currencies and keenly aware of international political and religious/ethnic issues. They deserve better from their relationship breakdown than what is still sadly an xenophobic hotch-potch of:

- Directly conflicting laws on outcomes
- Directly conflicting laws on jurisdictions, certainly outside of Europe
- Directly conflicting (and/or very unsatisfactory) laws on stays
- Directly conflicting laws on divorce
- Directly conflicting laws on child support
- Directly conflicting laws on the financial outcome
- Directly conflicting laws on working out the best arrangements for children
- Laws which favour the first party to break up the marriage
- Laws which favour the wealthy
- Lesser qualified and/or inexperienced judges dealing with international cases
- Major difficulties in international enforcement
- General jingoistic nationalism

International families have no constituency, no lobbying group, no uniformity and often very little interest beyond their own family affairs. Yet they now represent a not insignificant percentage of the world population, at least in the developed world and certainly in Europe. International families and international children deserve better than the international family law which presently exists. I consider there is an important role for family lawyers to bring to the attention of national governments and international governments the real issues in practice affecting international families.

It is for this further reason that I welcome this opportunity as an international family law specialist in contributing to the future programme of the European Union in looking after the interests of international families and their children. The European Union may be one of the only macro organisations able effectively to look after their interests. This is why this present review of the future programme of family law within the European Union is so important and crucial

The influence of the European Union in family law
No one concerned with family law at the European Union should underestimate the opportunity available across the world for good, for beneficial global influence, for the benefit of children and in the furtherance of justice and fairness of the combined juridical and population block now represented in European family life. In very approximate terms, the European Union is 1/13th of the world's population. However in reality, the European Union comprises a considerable percentage of the world's mobile families, outside those moving for reasons of refugee, asylum or other elements of poverty.

I observed with the benefit of distance during my time in Australia how the changes in family law from within Europe were now having a normative impact generally across the family law world.

With this opportunity of course comes responsibility, a yet further reason for much care and sensitivity in reviewing the European Union family law program as it involves issues of mores, personal values, faith values and national traditions. As many ethnic and religious groups outside of Europe are very well represented within Europe, the European Union programme needs a global awareness rather than a purely Euro centric emphasis. The opportunities for this present European Union family law program are considerable.

_Europe is not the rest of the world_

With the colossal influence coming from one large block of family law jurisdictions, the European Union, there must nevertheless be an important appreciation that there are a number of important Western jurisdictions which operate systems of law fundamentally different from those in continental Europe. In my experience as a specialist international family law practitioner in central London, I consider that England sits astride these two very different systems of law.

I anticipate that perhaps one half of my cases involve European Union matters. Crucially the other half often involve America, Australia, the Indian subcontinent, the Caribbean and other countries formerly part of the British Commonwealth or in other ways linked with the common law process. Many nationals of England have strong family connections with these countries, often going back several generations. These ties are strong, deep and frequently enforced and renewed. For some, the ties are as strong as with the European Union. For some, these ties are even stronger than European ties.

To these countries, concepts of lis pendens, applicable law and similar are thoroughly alien as they are for the majority of English specialist practitioners. Moreover whilst English practitioners try to understand the perspective of European Union practitioners and law reformers because of our geographical and political ties, lawyers in these other countries don't bother even to try! It is inconceivable that an American judge or Australian judge will ever be inclined to apply the law of another country.

Therefore in England we find ourselves caught completely in the middle of very different jurisprudence and processes. We are trying to understand reforms coming from the influences of continental Europe and trying genuinely and actively to find
compromises and middle ground. Yet for the other half of our cases, it is a simple matter of discretion and the application always of local law.

The European Union must of course look after members of the European Union, whether its constituent states or its demographic population. Nevertheless it must be aware in its family law context that some member states are regularly and frequently dealing with jurisdictions who have no intention of ever adopting the European Union position on some of these issues and whose families have very considerable, perhaps greater, ties outside the European Union.

In fact, my reference to the equal split of EU and non-EU is more middle income and big money. The perception of English inner city law practices acting predominately for state funded parties and situated in poorer parts of the country is that their international cases are primarily outside the European Union. Here again there must be recognition by the European Union of this feature of UK family life and demographics. Because there is such inherent prejudice against the financially poorer spouse, or the one who seeks legal aid or other state assistance in legal representation, within some European Union family law legislation, it is crucial that future European Union reforms and program embrace these communities.

**Lis pendens: the major problem with Brussels II**

Without exaggeration, I believe that the lis pendens, the first to issue, in Brussels II is the most anti family, anti settlement, anti conciliatory and anti-good practice piece of legislation in English law, and perhaps across the European Union, in its impact. I appreciate that it has the considerable effect of removing altogether any discretionary element of forum adjudication. Nevertheless it has substituted a grossly unfair and unjust law. It has so flown against the whole direction of family law in many conciliatory orientated countries, of which England is probably pre-eminent across the world. A future programme must change it.

It is worth recording the views of English judges before Brussels II about the actions now forced upon spouses by lis pendens. Judges publicly deprecated the party who broke first from the marriage and unilaterally issued proceedings without any attempt to negotiate or resolve. They publicly turned their backs on being influenced by which party is the first to issue. In Mytton (1977) 7 Fam. Law 244 the stay of English proceedings were refused, although Swiss proceedings were earlier in time, because the wife and children with the agreement of the husband had made their home in England. In S v S (Divorce: Staying Proceedings) (1997) 2 FLR 100.112 Wilson J made clear that in this jurisdiction at least not much turns on being first to issue. “It would be indeed unfortunate to encourage litigants to think that they can win an advantage by racing.” Thorpe J in M v M (1994) 1 FLR 399.403G condemned stealth and deceit in relation to the issue of proceedings in the other jurisdiction. This is entirely in keeping with the SFLA Code of Practice and the Law Society Family Law Protocol. But it was demolished overnight within Europe by Brussels II.

Instead BII introduced the deceptively simple “first past the post” provision. The first party to issue proceedings in a country secured priority whatever the strength, or weakness, of the connection with that country - provided of course jurisdiction
existed. The country receiving the family law proceedings second in the EU has to stay its proceedings of its own accord, even though the connection may be much stronger.

Brussels II directly encouraged the practice of racing to issue into international family law practice: the fact that EU civil servants and law reformers then expressed amazement and dismay at the consequential advice and actions of practising lawyers is evidence of how badly thought out was this law and the harmful effect it has had on many spouses and families. Professional practitioner organisations and individual lawyers had warned that this would occur: these warnings were disregarded or discounted.

BII lis pendens is certainly easy and simple to apply and immediately ends the substantial costs of discretionary forum litigation; I appreciate this appeals to law reformers. But it has had major consequences in practice. As Europe still has very different financial outcomes between countries, there is a huge importance in securing jurisdiction in the most favourable jurisdiction to obtain the most favourable financial outcome. Yet it involves simply issuing first. Seemingly the proponents of the Brussels II legislation did not realise the disadvantages. Four were immediately obvious and have proved so in practice.

1 No one should mediate (or propose or engage in any other ADR) until they have first issued to secure jurisdiction. Then, what chance is there for successful mediation or other ADR if one party knows the other has taken unilateral and tactical steps to secure their interests in litigation? Many mediators give little prospect of successful outcomes in mediation after such an ominous and acrimonious start. It is good practice for lawyers never to propose mediation or any other ADR in a potential BII forum dispute without securing jurisdiction by issuing first. This is thoroughly contrary to the intentions of the Mediation Directive and the preferred style of approach of lawyers in many member states.

2 But it is even worse. Who arguably now suggests relationship counselling if to do so and admit the marriage was in difficulties might prompt and then precipitate the other spouse to issue first to their significant advantage? And having issued first and tactically, what chance is there for successful counselling? BII lis pendens directly encourages and endorses the party who is making the break in the marriage, whom many in society would often consider at least the more responsible for bringing an end to the relationship and without giving a full chance to overcome relationship difficulties and save saveable marriages. This is totally contrary to all good family law policy which must be to do everything possible to encourage reconciliation and save saveable marriages.

3 Agreements about jurisdiction, choice of law and location for any proceedings are irrelevant under BII. So pre-marriage agreements with jurisdiction clauses, choice of law regimes, even post separation agreements about preferred jurisdiction count for nothing. Private ordering in family matters is highly encouraged in many jurisdictions and favoured by many spouses. Yet Brussels II simply ignores such agreements. Entering into a separation agreement is highly dangerous if another country's courts might later deal with the case: it is good practice for lawyers to issue immediately instead. BII does not even allow courts to transfer cases abroad consensually. Even
the European Union proposes in its draft regulation known as Rome III that parties should be able to agree between themselves on the law to be applied in their case.

4 Finally obtaining advice as to which is the best jurisdiction requires good lawyer contacts in other countries and an ability to pay for that advice (and invariably pay upfront and quickly). In short BII favours the wealthier spouse with easy access to specialist (often expensive) lawyers with international experience. The less wealthy spouse suffers badly. The spouse requiring public funding is totally vulnerable.

So BII favours the wealthy, the one initiating the relationship break up, the one who is not prepared to consider mediation and counselling etc. It is difficult to conceive of a more non family friendly piece of legislation, out of step with the whole global ethos of family law practice and pro marriage policies. Premature or the unilateral issuing of divorce petitions, especially when perceived as for tactical financial reasons, invariably creates huge ill will which casts a shadow over all remaining resolution of issues. It destroys prospects of reconciliation. It hampers co-parenting. It negates meaningful mediation or helpful dialogue. Distrust between the parties is inevitable in all that follows. The court first seized may be far from the country with the most connection with the parties or the one previously agreed by the parties as their chosen country or law. The court first seized may be very slow, may have inadequate disclosure powers and other causes for concern about outcome. Brussels II is certainty and avoidance of litigation against opportunities for fairness and justice, for reconciliation and conciliation. Yet local, national politicians have been powerless. Attempts by family law professions since March 2001 to alleviate some of the worse elements of lis pendens have come to nothing.

It should not have been introduced without also the reform of harmonising financial outcomes. Until such reform arrives, lawyers and clients have each to work to their own advantage with this law, however much it offends the whole basis on which the remainder of family law work is undertaken.

But Brussels II “first in time” is only Europe! It is unfortunate that one set of provisions, encouraging precipitous unilateral action by one spouse, fares well in Europe but is specifically deprecated in case outside of Europe! This is however now the case. Many non EU countries decide their forum cases with England and other EU states on classic discretionary connectiveness criteria.

When the SFLA International Committee was formed 15 years ago, we campaigned for a way to overcome the jumble of various and differing stay laws internationally. Brussels II has given a Europe wide jurisdiction basis and abolished any need for stay proceedings. But in hindsight I believe the International Committee was wrong. A comprehensive jurisdiction system and mandatory stay laws can only work fairly when there is also a comprehensive uniform financial provision law with uniform procedures and court powers. One without the other creates certainty of forum but also injustice and unfairness on financial outcomes.

Forum races have been won and lost by one party issuing proceedings in a matter of minutes before the other party in another jurisdiction. Not so much blind justice but very fast justice. Where financial outcomes can differ so dramatically across Europe,
even in average income, average capital cases, lawyers will continue to race to the finishing line of issuing the petition first. We warned this would happen in 1999. The warnings were not heeded. What we said would happen in practice has occurred. It is thoroughly inglorious and an appalling demonstration of family law reform for what should be the flagship of the European Union family law legislation. It must be removed and quickly.

However from our English discretionary jurisdiction, I do not argue for a return to unfettered discretion of forum disputes. There is a better way, which has found favour across many family law professions in Europe, and which also resolves the issue of applicable law. I refer to it below. If this is not acceptable, some other way forward must be urgently found as part of a future programme.

**Applicable law**

This is the second conundrum for family law within Europe and again this needs resolving before any future programme of reform of family law can go ahead.

I am very clear that there is a need for a regulation such as Rome III in order to produce harmonisation of the various and quite different choice of law rules and regimes around Europe. It is confusing for many continental family law practitioners. It is confusing for those of us from local law jurisdictions dealing with choice of law jurisdictions. As far as I can tell, the provisions in Rome III seem a satisfactory and sensible resolution of these different conflicting choice of law rules.

However it was unreasonable and unrealistic to seek to impose applicable law on all jurisdictions across Europe, including those which have never throughout their history had any concept within family law of applying the law of another jurisdiction. Before Rome III was published as a draft regulation, several of us in England had vociferously argued against its imposition. We were therefore surprised that certain law reformers in Brussels expressed astonishment at the scale of the opposition to the draft Rome III!

Many of us in England consider that if applicable law was introduced, it would take much longer to settle cases as it would be necessary thoroughly to investigate and understand what was the foreign law, with significantly increased costs, with lower settlement rates because of the uncertainty and unpredictability, and with dramatic examples of injustice as identical cases had totally different outcomes dependent on the law being applied. All family lawyers in England would be dramatically affected. It would have made the most dramatic changes to English family law since family law left the ecclesiastical courts about 200 years ago!

It would create the injustice of very different outcomes in identical cases heard consecutively before the English family courts due simply because very different law was being applied; an element which I do not believe either the English public or the English legal profession would find acceptable.

The UK government opted out of Rome III in November 2006. However the European Union is continuing with its Rome III proposals hoping that the United
Kingdom will join in later. Nevertheless the huge controversy resulting from the speech by the Archbishop of Canterbury about parallel systems of Islamic law in English law, including some elements of the introduction of Islamic applicable personal law, showed the strength of feeling within the country against the operation of non national laws. Any doubt existing concerning the vigour to the UK public opposition of applicable law was removed overnight by the reaction to the Archbishop’s speech. England is not willing and not prepared in family matters to have the application of the laws of another country or from another personal law.

Within the family law context, and with an English family law profession which is very diligent and thorough in its preparation and representation, applicable law will dramatically increase the costs, the delay in reaching an outcome and make reaching an outcome even more difficult because of the uncertainty of the law being applied. Like Brussels II, it would run completely counter to the entire ethos and spirit of family law work in this jurisdiction, with his emphasis in practice on keeping costs down, resolving matters reasonably quickly and doing so by out-of-court settlements through ADR. The English family law profession cannot have another anti-conciliatory and anti-settlement change imposed on it.

Unfortunately, one impact is that other, and this time beneficial, legislation coming from Europe may not be received so quickly or so fully as applicable law is included within them. Both Brussels and the Hague are bringing forward legislation to improve recovery of maintenance abroad through direct enforcement, use of central authorities and other means. This is desperately needed. I am glad that a way has been found for the United Kingdom to sign up to these international legislations without at the same time committing to applicable law. The United Kingdom is such a primary international family law jurisdiction that a way must be found for the United Kingdom to embrace such improvements without also imposing applicable law.

A major concern is that the imposition of applicable law into the United Kingdom will put us at considerable odds with many countries with which we have close historic links and many ongoing family law cases and connections. We do not want to abandon these connections by being forced into adopting applicable law as part of UK family law. It would be unfair and disproportionate and unreasonable.

Moreover our discussions with the civil law family lawyers always produces anecdotal evidence that applicable law is not applied consistently or fairly. First, the local law is invariably applied to procedural matters yet England does not have such a demarcation between the substantive and procedural. The gathering of financial information and disclosure could be argued to be procedural yet the court cannot do fairness and justice in a case without full and proper disclosure. The procedural and the substantive go closely hand-in-hand. We are often told that if a judge cannot comprehend the foreign law to be applied, he simply uses his own local law. I have set out above the very real anxiety about the high costs which will inevitably arise if foreign lawyers have to be cross examined on the application of the law. I do not consider the English family law profession will accept, in my opinion, reading what is written on a website regarding the law of another country. This may be satisfactory for some however it will not be satisfactory for others including us.
Finally, the last few years have seen dramatic improvements and progress in judicial communication, dialogue and networking, including the European Judicial Network. There is a very real anxiety that if decisions of foreign courts applying English law were clearly at variance from the outcomes in England applying English law that real difficulties will arise. It would create stresses and tensions.

I do not underestimate the difficulties if applicable law were to cease to feature. I am aware how deep seated it is in some jurisdictions just as application of local law is deep seated in the UK and some other jurisdictions. A way forward must be found as part of the program for family law reform.

I now turn to this

**Resolution of issues concerning applicable law and lis pendens**

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

I urge the European Union law reformers to set out in the future programme the priority to a resolution of these issues. There is one obvious and relatively simple proposal which would resolve these problems and is believed to be acceptable to a number of European family law practitioners. It is in essence simple.

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

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

This would thereby indicate the appropriate country to deal with the family’s affairs, being the country with which the family had the closest connection on this hierarchy of jurisdiction. That country would then apply its own local law on the basis that it was the country with the closest connection with the couple. There would then be no more need for conflicts of law or applicable law, as this would be satisfied by the hierarchy of jurisdiction. There would be no more races to issue as it would be clear which country had primary jurisdiction, being the country highest up the hierarchy with jurisdiction. The lis pendens race to issue would immediately be removed. Future European union family law legislation would then build on this hierarchy of
jurisdiction so applicable law would not be needed in future legislation. A couple moving around Europe would have certainty and clarity about which country would deal from time to time with their family law affairs, which is a fundamental criteria for European law reformers.

Crucially, an agreement reached between a couple after disclosure and independent legal advice would probably be treated as the top of the hierarchy. Thereafter it would probably be dependent upon lengths of joint residency, then perhaps nationality or domicile and then periods of sole residency. The jurisdictional hierarchy grounds would be wider than Brussels II in order to make sure that all possible cases were covered.

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

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

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

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

**Conclusion**

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

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

Who implements the European Union reform?

Whilst reform will be implemented by the governments of member states, the actual reform legislation will be put into effect by lawyers for the parties. There are some excellent specialist family lawyers around Europe. There are members of the European Chapter of the International Academy of Matrimonial Lawyers. There are many other lawyers undertaking international cases on a regular basis and grappling with these issues and doing the best for their clients.

However a fundamental element of international family law work is liaising with family lawyers in other jurisdictions, perhaps on advice on enforcement, recognition, jurisdiction, legal funding and many other matters. It is important that each lawyer should be generally aware of the background to the law and procedure of these sorts of issues and the context in which advice will be required and given.

As stated above, family law now involves the complete social and wealth spectrum. Lawyers for a client of modest means will not want to go to a lawyer abroad in a major city or an expensive law firm. Instead they will prefer to seek a lawyer, like themselves, in a provincial town dealing with a case with only average assets. How do they find this a lawyer? The answer is: with very considerable difficulty.

I identified this problem a couple of years ago writing in the International Family Law magazine about the importance of creating a network of family lawyer practitioner organisations across Europe and further afield. A lawyer in Blackpool should be able to contact a lawyer in Bratislava through an organisation of family lawyers in Slovakia. A lawyer in Oslo should be able to contact a lawyer in Oporto through an organisation of family lawyers in Portugal. This is what happens within countries when a lawyer in one location wants to locate a specialist lawyer in another part of the country. What is needed is a network of existing national organisations of family lawyers.

In furtherance of this network, I have worked very hard, with some help from other family lawyers in England, to set up this network. I can send details. It is intended to be launched in the next month or so. In some countries I was pleasantly surprised at the lists of specialists available. I was aware that some countries are already very well developed. I was not surprised that there were no lists or panels in some countries in the European Union. What frankly did amaze me was that there are some countries, such as Italy, where there is no grouping of family lawyers whatsoever and no available lists. There are other countries, such as Greece, where I was told adamantly
that there is no intention whatsoever to create such an organisation or listings. The suspicion inevitably is that those lawyers with an existing international reputation seek to retain the work. In yet other countries, there was incredible enthusiasm but difficult progress. In Portugal there are apparently some real professional barriers to identifying as a specialist yet several family lawyers are keen to create such an organisation.

The simple reality is that progress cannot be made in reform of family law across Europe without having a body of specialist family lawyers in each jurisdiction, able to be identified as a group within their jurisdiction, and being familiar with these issues and so able to assist lawyers in other countries on cross-border cases. I have made some progress and I have identified where progress is now needed. I cannot imagine any national organisation being willing or prepared to fund what is needed to create this European network of family lawyer practitioner organisations. It is not difficult nor complicated but it does need perseverance, time and commitment.

I urge the European Union as part of its future programme to actively encourage and resource this network. It is complementary to the European Judicial Network which is encouraged and resourced

**Harmonisation of financial outcomes**

I have referred above to the premature introduction of lis pendens until financial outcomes are ready to be harmonised or similar. Yet this is a massive task. There are differences of approach, law, philosophy and objectives which are very great indeed.

However I venture to suggest that it is not so massive as it was perhaps five years ago and certainly 10 years ago. Without necessarily any imposition of harmonisation through legislation, I perceive a general trend towards more similar features and factors being taken into account towards the financial outcome, and which incorporates both income and capital, maintenance and property adjustment. England is itself in huge turmoil at present about what should be the appropriate law for financial outcomes on divorce. We have had no statutory changes for about 40 years and our law is almost entirely judge made. Many consider this is an unsatisfactory state of affairs and requires parliamentary reform.

So where and how should Europe go forward?

I do not consider that this is of paramount urgency. Even if it were, the resistance to an imposed change such as anticipated by the Matrimonial Regime Green Paper is great. The present systems for resolution of financial matters on divorce are very culturally based and unlikely easily to be moved.

Instead, I suspect strongly that what will happen is that over the next decade there will be a much greater coming together within Europe of family law practitioners, judges, mediators, academics and reformers, and of course a significantly greater number of international families with cross-border issues. As a consequence, there will develop intrinsically and realistically some consensus of what represents, across Europe, a fair and just outcome of financial issues. This may include some liberalisation of the
more strict community of property rules. I suspect it will almost certainly include some restriction on the breadth of discretion. The definition of “maintenance” should be established and accepted, which it is not now.

I said at the beginning that I support very strongly the European initiative within the family law dimension. By disposition, I am keen for urgent reform and urgent improvements! Nevertheless I consider that this is one area where sensitivity and perhaps wisdom cautions us to hold back and let practice develop and harmonisation occur, from grass roots casework upwards rather than imposition from Brussels. We may be surprised in late 2008 how much closer our European family law jurisdictions are by 2015 on financial outcomes.

Instead of imposed substantive law on matrimonial regimes and financial outcomes, I think it is much better that we work towards harmonisation of procedures and processes in cross-border cases to facilitate the resolution of cases; and we may then find that harmonisation of outcomes becomes a much easier task in time. Imposition now is likely to produce opposition, resistance and cynicism about the whole process. A gentle enabling of other processes might make the task ultimately much easier and certainly more satisfactory.

In doing so, it will move with and accommodate the social mores, traditions and fairness beliefs of community and national family life and will be complementary.

**Child abduction**

The Hague Convention in respect of child abduction is probably the earliest and perhaps the most successful piece of international family law. Very many countries are signatories. In very many cases it works as it was intended to work namely there is no investigation of longer term issues and instead all steps taken by the courts and by civil and criminal authorities for an immediate return of the child.

Brussels II revised added to the Hague convention in a number of important means. It was an excellent additional element, as to procedural law such as timetabling and as to substantive law such as the so-called “trumping” provisions.

The practice guide published alongside Brussels II revised is a stunning example to national governments of how a complicated piece of legislation can be reduced to simple text, flow charts, tables and similar. It deserves the highest praise.

England is probably one of the most observant countries of the Hague Convention on child abduction, strictly observing time limits including the Brussels II requirements, narrowly interpreting the defences and rarely refusing return orders. Yet across the world, the specific requirements and the general intentions of the Hague Convention seem sometimes to be flouted. Ironically, some of the worst offenders are within Europe, being very slow and very reluctant to return children. The English judiciary led by Lord Justice Thorpe have made considerable progress in inter judicial dialogue but there is still a lot to be done. It seems now that it is reaching a point where bilateral discussions are either no longer appropriate or perhaps no longer having their effect.
There should be some global policing of the Hague Convention standards and of frequent breaches. The Hague Conference does excellent work. However it has its limitations simply because of the number of members, their geographical and political diversity and the inevitable need to work consensually as much as possible - in itself highly commendable. Within Europe, these problems are not so intense. However within Europe there are clear examples where the child abduction provisions of Brussels II revised simply seem not to have any material impact on the national courts structure, the commitment of national resources and similar. Because Europe is increasingly perceived as one large group of member states working closely together, as indeed the European Union has rightly promoted, gross failings of a few member states in such an important issue as child abduction weakens the overall structure significantly. It detracts from the respect given to the enterprise and commitment of other member states. Worst of all of course, it is bad for the abducted child.

I believe the time has now come where the European Union must play a much more active part with member states, and specifically be seen to play this active part, in making sure that the child abduction commitments in Brussels II revised are implemented. This is not just in one or two difficult case outcomes. This is where there are gross delays, inadequate resources of central authorities, inappropriate level of judiciary, lack of commitment of enforcement agencies and similar. The European Union should now take child abduction law from a success story of being a truly international family law to making sure that it is truly international in its implementation across the European Union states.

Child relocation

England returns children from this country who have been abducted in the expectation that the country of origin will give fair and generous consideration to an application to relocate. In this relocation law, England is probably the most liberal jurisdiction in allowing relocation orders. Provided the primary carer is able to put forward good, practical, well-prepared and considered plans, especially if able to demonstrate unhappiness at having to remain, then permission to relocate will usually be given. Life style choices of one parent are a perfectly acceptable reason for moving to the other side of the world, perceived by the other parent and grandparents etc as putting the future of the primary caring parent above the interests of the child to have a geographically close, ongoing relationship with both parents and wider families. English child relocation law has not significantly changed for over 30 years. However patterns of parenting have changed dramatically in the past 10 years. It can only be a matter of time before England changes its emphasis within relocation work, perhaps directly as a consequence of more shared parenting arrangements.

Whilst child abduction has two major international conventions, child relocation has none. Specifically the jurisprudential rationales for permission to relocate differs significantly around Europe and the rest of the world, whilst being notionally in the best interests of the child. Some countries put much weight on the importance of the child having an ongoing close relationship with both parents even if that means preventing one parent from a move internationally. Other countries at the other extreme allow relocation provided a good case is presented on the plans for the
proposed move. Some countries will allow the primary residential parent to relocate even though the other parent objects. Whilst marriage should always be promoted and encouraged in all family law legislation, it should not be to the prejudice of the child; some countries have very different relocation arrangements dependent upon the marital status or otherwise of the parents. There are many other differences globally and even within Europe in respect of relocation.

Relocation applications have become one of the most common instances of the national family lawyer dealing with international aspects.

Internationally, there is no consensus about the appropriate criteria and there is no movement towards reaching one. The number of international families will continue significantly to increase and correspondingly the number of circumstances in which one parent wants to take the child from one jurisdiction permanently to live in another jurisdiction. This is an issue which is directly ancillary to one of the fundamental precepts of a European common market namely free movement of labour. How much freedom should be given to the movement of children with one parent against the objections of the other parent? What does it mean to consider “the best interests of the child” in this scenario?

The European Union is most ideally placed to create some consensus and understanding about the appropriate criteria, internationally, for child relocation permission. Within Europe, it is to be hoped that there will be some initial and foundational consensus, perhaps building on the excellent work already in Brussels II revised. A future programme should incorporate tackling this issue. It is a difficult issue which, unlike the relocating child, will not go away!

**Domestic abuse and rights of the child**

It is without any suggestion of belittling these issues that I include these topics at the end. Without much publicity, certainly within the legal profession in England, the European Union has undertaken phenomenal work in these regards. The July 2006 paper “Towards an EU strategy on the Rights of the Child” is groundbreaking and fundamental, not least in its likely impact beyond the European Union itself. The Daphne II project, encouraging many smaller initiatives around the European Union to combat domestic abuse, will have a long-term benefit in family life. These unsung initiatives are so important and must remain a fundamental element of the future programme for family law and family life.

**Conclusion**

As stated at the outset, I come from a position of being supportive of what can be done across Europe to strengthen family life and improve family law for national and international families. An incredible amount of good has already been done by the European Union and I look forward to much more being accomplished. I am glad that there has been this consultation in advance of the next stage of the program.
At this present stage in the development of family law across Europe, there are some big issues which must be addressed with positive outcomes. These will be the most important issues for resolution over the next five years. There must be meaningful consultation with family lawyers, the media, national politicians and others involved in family life. With the foundation of what has been accomplished and hopefully with a program which deals with the resolution of these present difficulties, much good can therefore be created for the future of family life across Europe.

I commend my paper to the EU for their consideration.

David Hodson
dh@davidhodson.com
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Appendix

Details of the author

David Hodson is a family law dispute resolution specialist. He is a English solicitor (1978 and accredited 1996), mediator (1997), family arbitrator (2002), Deputy District Judge at the Principal Registry of the Family Division, London (1995) and an Australian (NSW) solicitor (2003) and mediator.

He was joint founder in 1995 of probably the world’s first metropolitan practice to combine family lawyers, mediators and counsellors and with an emphasis on a conciliatory and holistic approach. It was subsequently copied in many practices across the world. He is past chairman of the Solicitors Family Law Association's Financial Provision Reform Committee, Training Committee and Good Practice Committee and a member of its International Committee. He is a member of the Law Society’s Family Law Protocol Committee. He is a member of the President’s International Committee. He is past vice chair of the UK College of Family Mediators, the umbrella organisation for family mediation. He is a member of the Chartered Institute of Arbitrators. He is co-author of “Divorce Reform: a Guide for Lawyers and Mediators”, “The Business of Family Law” “Guide to International Family Law” and consulting editor of “Family Law in Europe”. He is a SFLA Accredited Specialist (with portfolios in Substantial Assets and International Cases), a Fellow of the International Academy of Matrimonial Lawyers, a past trustee of Marriage Resource and member of the Family Law Section of the Law Council of Australia and a member of the Lawyers Christian Fellowship.

He has written and spoken extensively on family law including many conferences abroad. Some papers and articles can be found at his web site below.

He is the author of “A Practical Guide to International Family Law”, published by Jordans in June 2008, probably the leading textbook for practising lawyers on dealing with cases with an international element.

He is practising in London and Surrey, England and Sydney, Australia as a consultant at The International Family Law Group, www.iflg.uk.com

More details can be found at www.davidhodson.com. He can be contacted on dh@davidhodson.com.