

# Green Paper on Applicable Law in Divorce Matters Unpopular in Brussels

It seems that the European Commission's proposal to establish common rules on the applicable laws in cross-border divorce ("Rome III") has met with widespread criticism in Brussels amongst the EU member states. The proposal sets out which national legislation should apply in the case of a couple of two nationalities or a couple living in their non-native country, such as an Irish and Finnish pair of EU civil servants living in Brussels. One may immediately ask why the EU needs to legislate for this at all. The Commission answer thus:

*An "international" couple who want to divorce are subject to the jurisdiction rules of the new Brussels II Regulation, which allow the spouses to choose between several alternative grounds of jurisdiction (see point 3.6 of the attached working document). Once a divorce proceeding is brought before the courts of a Member State, the applicable law is determined pursuant to the national conflict-of-law rules of that State. There are significant differences between the national conflict-of-law rules (see point 3.4 of the attached working document). The combination of different conflict-of-law rules and the current jurisdiction rules may give rise to a number of problems in the context of "international" divorces. Apart from the lack of legal certainty and flexibility, the current situation may also lead to results that do not correspond to the legitimate expectations of citizens. Moreover, Community citizens who are resident in a third State may face difficulties in finding a competent divorce court and to have a divorce judgment issued by a court in a third State recognised in their respective Member States of origin. There is finally a risk of "rush to court" under the current situation (Green Paper, p.3).*

The Commission's proposal for the default choice of law rule?

*The objective would be to ensure that a divorce is governed according to the legal order **with which it has the closest connection**. A number of connecting factors, which are commonly used in international instruments and national conflict laws, could be envisaged, such as the spouses' last common*

*habitual residence, the common nationality of the spouses, the last common nationality if one spouse still retains it or “lex fori”.*

The Swedish Justice Ministry study into Rome III highlights some of the causes for concern; in cases involving non-EU citizens or non-EU states, Rome III would also favour a legislature to which both spouses have a strong connection. For example, a Swedish woman marries an Iranian man in Sweden and emigrates to Iran but after several years decides to leave both her spouse and his country and go home. “The proposal means that Iranian divorce law would be applied by the Swedish court,” the justice ministry study states.

Throwing all the different approaches to marriage and divorce into one big melting pot was bound to cause controversies – issues such as forced marriage, or the legality of divorce at all (it is illegal in Malta, for example), or the minimum “separation” period, are all different in each member state, and member states will not want to water down their divorce laws. The Irish Ministry for Justice has, in its press release on the Irish opt-out from Rome III, stated that:

*If Ireland were to adopt and implement this measure, this would allow EU nationals resident in Ireland to obtain a divorce in our courts on substantially different and less onerous grounds than that provided for in our constitution.*

The cost, and added time needed for finding foreign experts is also a worry, and one of the reasons behind the UK’s opt-out. All in all, Rome III is not the most popular green paper in the playground right now. Is the criticism justified? Comments welcome.

Update: Mark Harper (Withers) has written a summary on the UK Government’s opt-out of Rome III at [legalweek.com](http://legalweek.com). He concludes:

*This failure by the Government to opt in will mean a two-speed Europe when it comes to family law. The rest of Europe will move forward towards harmonisation of these rules, as opposed to harmonising substantive law, and we will be left behind.*

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# **Conference in Germany: Recent Developments in Private International Law**

From 9th to 10th November a conference will take place at the Academy of European Law (ERA) in Trier, Germany where recent developments in private international law will be presented.

Here are the areas which will be discussed:

- Legal and Practical Consequences of Landmark ECJ Decisions (e.g. Lugano Convention Opinion (1/03); Owusu)
- The European Enforcement Order in Judicial Practice
- (The Revision of) the Regulation on Service of Documents
- Cross-border Attachment of Bank Accounts
- International Insolvency Law
- Hague Convention of 30 June 2005 on Choice of Court Agreements
- European Payment Order
- Towards a European Small Claims Procedure – The State of Play
- Future Developments in European Private International Law: Rome I & Rome II

See for the full programme, the list of speakers and further information the website of ERA.

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## **House of Commons Select**

# Committee on European Scrutiny and the Conflict of Laws

The House of Commons Select Committee on European Scrutiny has produced its thirty-seventh report. It includes discussion of the

- **Draft Regulation on the law applicable to contractual obligations (Rome I),**
- **Commission Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition,** and the
- **Draft Council Regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters.**

The section on the Draft Regulation on the law applicable to contractual obligations (Rome I) contains an interesting, if out-of-date, appraisal of the Rome I Proposal by Parliamentary Under-Secretary of State at the Department for Constitutional Affairs (Baroness Ashton of Upholland) in a letter dated 20th July 2006. The Under-Secretary of State's objections to Rome I follow the usual pattern, the legislative bones of contention include: Article 1 (scope); Article 3 (freedom of choice); Article 4 (applicable law in the absence of choice); Article 5 (consumer contracts); Article 7 (agency); Article 8(3) (application of the mandatory rules of third countries); Article 13 (voluntary assignment and contractual subrogation) and Article 21 (States with more than one legal system).

Article 8(3) (application of the mandatory rules of third countries) is, of course, cited by the Under-Secretary of State as "the greatest single reason behind the [UK] Governments decision not to opt-in under our Protocol". The Select Committee agreed with the Under-Secretary's evaluation, stating:

*We welcome the Government's decision not to opt into this proposal. We also agree with the Government that notwithstanding this decision the United Kingdom should try to participate constructively in the framing of the proposed legal instrument. We ask the Minister to keep us informed as negotiations continue.*

With its deletion in both the JURI report (to which the Under-Secretary alludes in her letter), and the Finnish Presidency text produced on the basis of meetings in the Committee of Civil Law (we do not believe the Finnish Presidency Rome I text is publicly available yet), a partial thawing of the attitude towards Rome I *may* be on the horizon in the UK executive.

In response to the Commission Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition, Government Minister Harriet Harman "cautiously" states:

*This is an area of very considerable technical complexity, and the differences in the law relating to matrimonial property differs significantly among the various Member States. **The relatively high-level questions raised in the Green Paper do not obviously reflect this concern.** The Government will consider how best to respond to the Green Paper and will keep the Scrutiny Committees informed.*

The Scrutiny Committee's equally cautious response:

*We ask the Minister to explain under what legal base, if any, the Commission may bring forward future legislative measures pertaining to the applicable law regimes governing trans-national matrimonial property proceedings. We also ask the Minister for further information as and when the Government's position on the specific questions raised by the Commission crystallises, and in any event, before the Government formally replies to the Commission.*

The Draft Council Regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters also receives a mixed welcome, with the Parliamentary Under-Secretary of State raising concerns about the applicable law under the Draft Regulation:

*A number of other Member States have rules which allow foreign law to apply to family proceedings. However, family courts in the UK are not accustomed to applying foreign law. The Government's approach is that such provisions are not obviously necessary here and that the law of the forum should continue to apply.*

*"The Government is concerned that to apply the law of a foreign jurisdiction in the UK could involve considerable practical difficulties, cause delay and increase costs, because it may be necessary to call expert evidence as to the foreign law. It is Government policy that the costs to parties should be reasonable. The Government is not at this point wholly persuaded that there are such problems with the lex fori principle to justify departure from that principle.*

The response by the Scrutiny Committee is fairly negative as well:

*...we share the Government's reservations about the practical difficulties involved in the application of a foreign law in matrimonial proceedings. We ask the Ministers if the Government's thinking in this respect has changed and, if not, if the Government nevertheless intends to opt into this proposal under Title IV.*

*...we are concerned in particular about the added complexity and additional costs of litigation likely to flow from applying foreign law not only in the courts of England and Wales but also in Scotland and Northern Ireland.*

*Finally, we note that legal problems associated with "international marriages" are not restricted to marriages between spouses of EU nationalities. We therefore ask the Minister if the Government agrees that the Hague Conference on Private International Law would more appropriately deal with this issue.*

All comments welcome.

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## **Articles on Family Law and English Private International Law**

A few short articles on various aspects of private international law in family law have been published this week. They are:

James Copson (*Withers LLP*), Alain Berger (*Berger Recordon & de Saugy, Geneva*) and Alexandre Boiche (*Cabinet Veronique Chaveau, Paris*), "**Cross-border Matrimonial Law**" *Family Law Journal* (2006) No.60 October Pages 3-5. The abstract reads:

*This, the second in a series of international articles, uses a case study involving an international couple who own properties in England, Switzerland and France and who are divorcing after a long marriage to explain how the choice of jurisdiction can effect the financial award made. Summarises the approach adopted in each jurisdiction to: (1) the division of assets, including the effect of prenuptial agreements; (2) applications for compensation for loss of the ability to share the other parties future income; (3) child support; and (4) taxation of awards. Outlines the position under European law to determining habitual residence and to the effect of competing proceedings.*

Suzanne Kingston and Faye Fitzsimmons (*Dawsons*), "**Miller and McFarlane - the international aspects**" *Family Law Journal* (2006) No.60 October Pages 16-18. The abstract reads:

*This, the second of two articles considering the House of Lords judgment in Miller v Miller, discusses the potential for the decision to lead to an increase in forum shopping within the EU in divorce cases involving international couples with substantial assets. Uses a case study involving German nationals to compare the financial consequences of divorce proceedings commenced in England with those resulting from proceedings being issued in Germany. Considers the impact the proposed EU Regulation, known as Rome III, will have on choice of jurisdiction.*

Keith Gordon (*Atlas Chambers*), "**Jurisdiction jigsaw**" *Solicitors Journal* (2006) Vol.150 No.41 Pages 1378,1380. The abstract reads:

*Explains the importance of the law on domicile for applications made under the Inheritance (Provision for Family and Dependants) Act 1975 and other areas of the law. Considers the distinction between domicile of origin and domicile of choice, providing examples of a revived domicile of origin and the acquisition of a new domicile of choice. Notes the need to prove a permanent and indefinite intention to reside in a domicile of choice.*

# Seminar: A Coherent Legal Regime for EU Media - Balancing Liberties

Diana Wallis MEP, on behalf of the ALDE group, is holding a seminar on 17 October 2006 in the European Parliament. The seminar is entitled: '**A coherent legal regime for EU media - Balancing liberties. The right to be let alone v. freedom of speech**'. As Ms Wallis' website states,

*This event will gather experts, academics and Members of the European Parliament to discuss the current legal regime for EU media and explore possible options for the future, in particular with regard to the issue of applicable law. This seminar is set against the background of the Commission's rejection of Parliament's first reading formulation on defamation and the withdrawal of these provisions from the draft Regulation. The second reading of Rome II scheduled for the end of 2006 also coincides with the discussions on Television without Frontiers and the review of Brussels I and the E-commerce Directive.*

## **DRAFT PROGRAMME**

**12.45 - 13.00: Introductory Welcome**

**Session 1. Chair: Diana Wallis MEP, Rapporteur on Rome II**

**13.00 -13.30: European Private International Law and the media: relationship between existing instruments**

- Speakers: Gregory Paulger, DG 'Information, Society and Media', European Commission
- Claudia Hahn, DG 'Justice and Home Affairs', European Commission



### **13.30 - 14.00: Jurisdiction, applicable law and the country of origin principle**

- Speakers: Horatia Muir Watts, Université Paris I Panthéon Sorbonne
- Professor Paul Beaumont, University of Aberdeen

### **14.00 - 14.30: Q&A**

### **14.30 - 14.50: Tea and coffee break**

### **Session 2. Chair: Jean-Marie Cavada MEP, Chairman of LIBE**

### **14.50 - 15.20: Applicable law to the violation of personality rights - a quest for reasonableness?**

- Speakers: Marie-Christine de Perçin, vice chairperson of Presse-Liberté
- Speaker invited

### **15.20 - 15.50: Regulating the media: what role for the EU?**

- Speakers: Tim Sutter, OFCOM
- Cecilia Renfors, Swedish audiovisual board

### **15.50 - 16.20: Q&A**

### **16.20 - 16.30: Conclusions**

**The event will take place on** Tuesday 17 October 2006 from 12.45 to 16.30 at European Parliament, Brussels, room ASP 3G3. More information on attending the event can be found [here](#).

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# **German Publication: On the way to a European Law Applicable to**

# Divorce

A dissertation has been published which is of particular interest with regard to the recently published proposal of the European Commission for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters: *Sinja Rüberg, Auf dem Weg zu einem europäischen Scheidungskollisionsrecht*

Here is a short summary:

*With the ever-increasing migration of European Union citizens, more and more people are entering into cross-boarder matrimony; a freedom guaranteed by Art. 6 GG. This brings with it a rise in the number of international family relations and, in parallel, divorce procedures. At the moment in the area of divorce law, the courts in Europe use various choice of law rules and substantive laws for one and the same circumstance. This legal position enables the divorce-seeking applicant to choose the best terms for his purpose. This “forum shopping” conflict can, under exemption of a presently available possibility for harmonisation of the substantive divorce law besides already existing unified rules on jurisdiction and a European accreditation system for family law, only be solved by a unified choice of law rules. The necessity and the possibility of reaching this goal become clear considering the historical development in the area of family law on a European level as well as the deficits in the Brussels II Regulation.*

*In order to point out how diverse the consequences of a divorce case with international bearing can be, the reader is first provided with a legislative-comparative overview of the various larger Central and Western European EU member state’s substantive and international divorce laws regulations. Furthermore, it is demonstrated that the problem has been recognised and taken seriously by the European legislator and that “Rome III” is not just a long-fallen star on the European agenda. Subsequent to this, the disputed question concerning the scope of competence of the European legislator in passing a European Law Applicable to Divorce is discussed.*

*Under consideration of the aforementioned European aspects, this work draws up a concept for a unified choice of law rules, an assignment already commenced by the European Commission under Regulation “Rome III”. The goal must be to localise the legal and the spouse relationships as well as*

*possible and to determine the state to which the closest ties are exhibited. This work should contribute to the necessary pan-European discussion on the causes and arguments for the various national civil law regulations. The new law applicable to divorce should meet the needs of the involved parties exactly. All conceivable tie-regulations are correlated in great detail and examined with regard to their suitability for "Rome III". An orientation on both the tie-system of the Brussels II Regulations as well as the autonomous international civil regulations regarding the divorce laws of the member states occurs at this juncture. The rationale on which the ties are based is researched in order to assess their transferability to a regulations system within a European law applicable to divorce. Within these bounds, the principal question of whether either the common nationality of the spouses or their habitual residence should have priority in European law applicable to divorce is addressed in detail. The author deals in depth with the adoption of an evasion as well as an absorption clause and discusses the pros and cons of a party autonomy authorisation in law applicable to divorce.*

*The results of these considerations consolidate into a European legal instrument on the law applicable to divorce - "Rome III", such that the author would recommend this work to the European legislator.*

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# Publication:            EU            Private International Law

✘ Peter Stone (University of Essex, UK) has published ***EU Private International Law: Harmonization of Laws***, part of the Elgar European Law Series.

This book focuses on harmonization of conflict laws at the European Community level, which has been driven by the introduction of a series of conventions and regulations. It offers critical assessment of these advances across four main areas

of concern: civil jurisdiction and judgments; the law applicable to civil obligations; family law; and insolvency.

Specifically, the measures examined and evaluated include:

- the Brussels I Regulation on civil jurisdiction and judgments
- the Regulation on uncontested claims
- the Rome Convention 1980 on contracts
- the Rome II Proposal on torts and restitution
- the Brussels IIA Regulation on matrimonial proceedings and parental responsibility
- the Regulation on insolvency proceedings.

**Contents:** Preface Part I: Introduction 1. Introduction Part II: Civil Jurisdiction and Judgements 2. History, Outline and Scope 3. Domicile 4. Alternative Jurisdiction 5. Protected Contracts 6. Exclusive Jurisdiction 7. Submission 8. Concurrent Proceedings 9. Provisional Measures 10. Recognition and Enforcement of Judgements 11. Enforcement Procedure Part III: Choice of Law in Respect of Obligations 12. Contracts 13. Protected Contracts 14. Torts 15. Restitution Part IV: Family Matters 16. Matrimonial Proceedings 17. Parental Responsibility 18. Familial Maintenance and Matrimonial Property Part V: Insolvency 19. Insolvency Index

The book is priced at £99.00. More information can be found on the publisher's website.