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European Family Law: the Beginning of the End for “Proper” Provision?

Lucy-Ann Buckley *

Introduction

European law has become increasingly relevant to Irish family law issues. The measures in question are wide-ranging, covering matters as diverse as the enforcement of maintenance decisions in other Member States, the jurisdiction for hearing divorce and separation claims, and most recently, the determination of applicable law in divorce. Although Ireland has not acceded to the full range of European measures, they are all nonetheless highly significant in Irish family law, particularly in relation to “international” family situations where one or both spouses are foreign nationals, or where an Irish couple has a connection with another jurisdiction, perhaps due to previous residence or because the marriage took place abroad. This article examines a number of European measures that are particularly relevant in the marital breakdown context,¹ and argues that the increases in legal certainty attributed to these measures are not as great as often assumed, and may come at the expense of Irish statutory and constitutional requirements that “proper” provision be made on marital breakdown.²

Brussels *Ibis* and the Maintenance Regulation

Under the 1968 Brussels Convention³ (“Brussels I”), the European Economic Community sought to develop uniform rules on the recognition and enforcement of judgments. Its objective in doing so was to permit economic actors to avail fully of the potential advantages of the common market, by guaranteeing an appropriate level of legal protection.⁴ This in turn required judgments to be enforceable in other Member States. Brussels I excluded matrimonial property issues apart from maintenance because jurisdictional rules in this area were considered too complex for inclusion. In addition, matrimonial property was not regarded as directly affecting economic integration. However, following the Treaty of Amsterdam, the second Brussels Convention⁵ aimed to standardise the rules relating to the recognition of foreign divorces and family law judgments in the European Member States.⁶ The draft Brussels II Convention was subsequently transformed into a Regulation⁷ (“Brussels II”). This, however, was subject to revision almost from before its commencement

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¹ Accordingly, measures applicable to matters such as succession will not be discussed, though also relevant to the family context.

² “Proper” provision is a mandatory requirement for divorce under Art.41.3.2° of the Irish Constitution and is a legislative requirement for both divorce and judicial separation under (respectively) s.20(1) of the Family Law (Divorce) Act 1996, and s.16(1) of the Family Law Act 1995 (as amended).

³ Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, known as “Brussels I”. The Convention was implemented in Regulation 44/01 [2001] OJ L012/1, applicable in all Member States other than Denmark.

⁴ A. Moylan (assisted by H. Baker), “The European Court of Justice and Brussels II Revised” (2006) I.F.L. 188 (Lexis citation).

⁵ Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters [1998] OJ C221/1.

⁶ The competence conferred by the Treaty of Amsterdam is now found in art.81 of the Treaty on the Functioning of the European Union [2008] O.J. C115/47.

⁷ Regulation 1347/00 [2000] OJ L160/19.

and was replaced by a revised Regulation in 2003,⁸ known as Brussels II*bis*.⁹ Brussels II*bis* was implemented in Ireland by the European Communities (Judgments in Matrimonial Matters and Matters of Parental Responsibility) Regulations 2005.¹⁰ Similarly, the provisions of Brussels I regarding maintenance obligations have been replaced by the Maintenance Regulation,¹¹ to which Ireland has also acceded, and which has had direct effect in national law since June 18, 2011.

The essential aim of the Maintenance Regulation is to simplify the recognition and enforcement of maintenance claims. It does this by abolishing the *exequatur* procedure for judicial decisions given by a Member State of the EU that is bound by the Hague Protocol on the Law Applicable to Maintenance Obligations (including Ireland).¹² This means that judicial decisions of another Member State may be applied directly in Ireland,¹³ as if they were Irish decisions, without any need for a special application. This only applies so long as the Member State making the decision is bound by the Hague Protocol. If a Member State is not bound by the Hague Protocol,¹⁴ its decisions are only enforceable in Ireland if a declaration to that effect is made here.¹⁵ Assistance with such an application must be provided by the designated “Central Authority”¹⁶ (in Ireland, this is the Minister for Justice).¹⁷ Irish maintenance decisions are also directly enforceable in another Member State, irrespective of whether that State is bound by the Hague Protocol. However, from an Irish perspective, probably the most significant aspect of the Regulation is that decisions of foreign courts regarding appropriate maintenance are potentially automatically enforceable in Ireland, irrespective of whether Irish standards of appropriate provision on marital breakdown are met.

Under the Regulation, habitual residence replaces domicile as the basis for jurisdiction, and jurisdiction is normally determined by the habitual residence of the maintenance creditor.¹⁸ However, this will not apply if one spouse objects and another state has a closer connection to the marriage.¹⁹ Further, a court with jurisdiction in relation to divorce (or other marital status proceedings) also has jurisdiction over maintenance, where the maintenance claim is ancillary to the status proceedings.²⁰ The parties may generally agree that a particular Member State shall have jurisdiction

⁸ Council Regulation (E.C.) No. 2201/2003 [2003] OJ L338/1.

⁹ Also referred to as “Brussels II Revised”.

¹⁰ European Communities (Judgments in Matrimonial Matters and Matters of Parental Responsibility) Regulations 2005 (S.I. No. 112 of 2005), effective March, 2005.

¹¹ Council Regulation (E.C.) No. 4/2009 [2008] OJ L7/1, which has applied since June 18, 2011.

¹² Article 17 of the Maintenance Regulation.

¹³ Article 17 of the Maintenance Regulation.

¹⁴ At present, only the United Kingdom and Denmark have not acceded to the Protocol, which has been ratified by the EU: Council Decision 2009/941 E.C. [2009] O.J. L331/17.

¹⁵ Article 26 of the Maintenance Regulation.

¹⁶ Article 51 of the Maintenance Regulation.

¹⁷ Each Member State is required to designate a “Central Authority” for the purposes of the Maintenance Regulation (art.49(2)). The purposes of the Central Authority are set out in art.51(1). A list of the designated Central Authorities is available at:

http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_centralauthorities_ie_en.htm [last accessed January 31, 2012].

¹⁸ Article 3 of the Maintenance Regulation.

¹⁹ Article 5 of the Maintenance Regulation.

²⁰ Article 3 of the Maintenance Regulation.

(subject to criteria), which shall be exclusive unless the parties agree otherwise.²¹ As under Brussels IIbis (discussed below), jurisdiction is determined by the institution of proceedings,²² leading to a potential “rush to court”. This in turn leads to the potential separation of maintenance from other aspects of marital breakdown proceedings, such as the distribution of marital property and the granting of judicial separation and divorce orders. In practice, this may render it necessary to wait for maintenance proceedings to be concluded elsewhere before the Irish proceedings can be completed, as both divorce and judicial separation are legally contingent, in this jurisdiction, on proper provision being made.²³

The most controversial aspect of the original Maintenance Regulation proposal related to the introduction of a new code on applicable law, replacing the rules of individual Member States.²⁴ Under this proposal, maintenance obligations would generally be governed by the law of the country where the maintenance creditor was habitually resident, irrespective of where the case was heard (i.e. irrespective of which Member State has jurisdiction). This would apply even if the country of habitual residence was not itself a Member State. However, the law of the forum would apply if maintenance was not normally available in the country of habitual residence, or if the creditor requested that it should be applied and the respondent was habitually resident in that country. If maintenance is not available under the laws of either of those countries, but it appeared from the circumstances as a whole that the maintenance obligation had a close connection with a third country (particularly the country of the applicant and respondent’s common nationality), the law of that third country would apply. Alternatively, it was proposed that the parties could designate the law of the forum or of other defined countries as the governing legislation.²⁵ These provisions were not acceptable to the United Kingdom, which originally opted out of the proposed Regulation. Consequently, the applicable law provisions were significantly modified, and are now to be determined in accordance with the 2007 Hague Protocol²⁶ in those Member States bound by that instrument.²⁷ The UK subsequently adopted the Regulation.

“Maintenance” itself is not defined in the Regulation, though the Regulation is stated to cover all maintenance obligations “arising from a family relationship, parentage, marriage or affinity”,²⁸ and the Recitals state that “the term ‘maintenance obligation’ should be interpreted autonomously”.²⁹ Hence, both child and spousal support would be included, as would any payment based on a particular family relationship, even if that relationship is not recognised in Irish law (e.g. support payments arising out of a same-sex marriage, as opposed to a civil partnership, or support payments to siblings or grandparents). However, it should be noted that the obligation to enforce the payment in Ireland does not imply recognition by the Irish State of the underlying

²¹ Article 4 of the Maintenance Regulation.

²² Article 9 of the Maintenance Regulation.

²³ See above n.2.

²⁴ Proposal for a Council Regulation on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations COM (2005) 649 final.

²⁵ Articles 13–15 of the proposed Regulation.

²⁶ The Hague Protocol of November 23, 2007 on the Law Applicable to Maintenance Obligations.

²⁷ Article 15 of the Maintenance Regulation.

²⁸ Article 1 of the Maintenance Regulation.

²⁹ Recital 11 of the Maintenance Regulation.

family relationship or affinity.³⁰ The payments need not be court-ordered, as decisions of administrative authorities are also covered by the Regulation, so long as fair procedures are guaranteed.³¹ Court settlements and “authentic instruments”, as defined, are enforceable in the same way as judgments.³² Thus, maintenance provisions in a prenuptial agreement would have to be recognised and enforced in Ireland, if enforceable in the Member State of origin. This would clearly be a radical departure from existing Irish law, and could potentially undermine the “proper provision” standard.³³ Nor need the obligated payments be periodic, or even characterised as “maintenance” in the ordinary understanding of the term. This is because the European Court of Justice has interpreted maintenance extensively in the past as:

“a decision rendered in divorce proceedings ordering payment of a lump sum and transfer of ownership in certain property by one party to his or her former spouse ... if its purpose is to ensure the former spouse’s maintenance”.³⁴

Hence, what is important is the reason for the award, rather than the form it takes, necessitating an examination of the reasoning of the decision.³⁵

The Regulation is therefore extremely far reaching, and means that Ireland will be obliged both to implement foreign decisions and to apply foreign law in ancillary maintenance applications in appropriate cases. Obviously that law may not accord with Irish concepts of “proper” provision. However, other problems also arise. Although it is not possible to oppose recognition of the decision of another State,³⁶ save on very limited policy grounds,³⁷ a defendant who did not enter an appearance in the original proceedings may apply for a review of the decision in the State where that decision was made, in limited circumstances.³⁸ Both of these possibilities may add another layer of litigation, in another jurisdiction. It has also been argued that the proposed regulation could lead to “the proliferation of preliminary issues and expensive argument about foreign law”, leading to increased costs, uncertainty and delay, directly in contradiction of the Regulation’s core objectives of simplifying proceedings and increasing certainty.³⁹ Furthermore, the substantive law to be applied is not necessarily the law with the closest connection to the case; for instance, a maintenance creditor may deliberately acquire a new “habitual residence” in a country

³⁰ Article 22 of the Maintenance Regulation; see also Recitals 21 and 25.

³¹ Article 2.2 of the Maintenance Regulation.

³² Article 48 of the Maintenance Regulation.

³³ For a further discussion of the Irish approach to prenuptial agreements, see: L.A. Buckley, “‘Proper Provision’ and ‘Property Division’: Partnership in Irish Matrimonial Property Law in the Wake of *T v. T*” [2004] 3 I.J.F.L. 8.

³⁴ *Van den Boogard v Laumen* [1997] 2 F.L.R. 399 at para.27; see also the decision of the UK Court of Appeal in *Moore v Moore* [2007] EWCA Civ 361; [2007] 2 F.L.R. 339 at para.80 for a detailed summary of the relevant principles.

³⁵ As Harding notes, this is likely to prove difficult in practice, given that many Irish decisions lack both written judgments and any clear explanation or rationale for the awards made: M. Harding, “The Harmonisation of Private International Law in Europe: Taking the Character out of Family Law?” (2011) 7 J. Priv. Int’l L. 203 at 218 (“Harding”).

³⁶ Article 17 of the Maintenance Regulation.

³⁷ Article 24 of the Maintenance Regulation.

³⁸ Article 19 of the Maintenance Regulation.

³⁹ G. Smith, “The EU Commission’s Draft Regulation on Maintenance Obligations” (2006) I.F.L. 72 (Lexis citation).

with more favourable maintenance provisions. In this regard, no minimum period of residence is required under the Regulation, facilitating a “rush to court”. For all these reasons, the purported increase in legal certainty under the Regulation may be exaggerated.

The Irish approach to provision is potentially further undermined by Brussels *Ibis*. Although Brussels II initially appeared “relatively innocuous”, Shannon notes that its detailed workings radically altered the basis on which certain family law judgments would be recognised; this particularly applied to divorce decrees.⁴⁰ Brussels *Ibis* focuses on facilitating the recognition of divorces throughout the Community, and applies not only to court judgments but to agreements, so long as they are enforceable in the Member State where they were concluded. The new regime is one of “complete automatic enforcement”. Under art.3 of Brussels *Ibis*, a court has power or jurisdiction to hear a matter relating to divorce, legal separation or marriage annulment in a wide range of situations, including where the applicant has been “habitually resident” in the relevant territory for at least a year immediately prior to the application, or for six months prior to the application where the applicant is either a national of or domiciled in that state. Once a court in a particular Member State is seised of a case, it has exclusive jurisdiction and courts in other Member States may not entertain the same claim. The Irish courts generally consider themselves seised of a matter on the date proceedings are issued, provided the party takes the required steps to have service effected on the respondent.⁴¹

The jurisdictional rules have led to concern that Brussels *Ibis* encourages forum shopping, and rewards the spouse who litigates first, as it provides a clear incentive to take advantage of what might be considered more favourable marital property regimes in other Member States. As well as undermining certainty, this in turn undermines the emphasis in Irish law on the making of “proper” provision in the marital breakdown context, and undermines legislative, practitioner and judicial efforts to encourage mediation, negotiation and settlement. It also means that a divorce may be available much sooner than under Irish law, as other Member States generally have much shorter qualifying periods for divorce (a factor that also facilitates the choice of foreign law).⁴² Difficulties also arise where Irish law is to be applied by a foreign court, the more so, as Steenhoff notes, because continental courts are used to matrimonial property regimes with clearly defined sharing rules, rather than the discretionary approach applied in Ireland.⁴³ Such courts are likely to have great difficulty quantifying appropriate ancillary relief, especially as they will be unfamiliar

⁴⁰ G. Shannon, *Divorce Law and Practice* (Dublin: Thomson Round Hall, 2007), p.314 (“Shannon”).

⁴¹ See Shannon at pp.317–318 and 330–334 for an account of the jurisdictional and service requirements.

⁴² Ireland sought an amendment to Brussels II to permit refusal of recognition of foreign decrees if the jurisdiction on which a decision was founded was not based on a genuine link between the parties and the Member State in question. This request was rejected, although a compromise measure was implemented, whereby Irish courts could refuse recognition to a judgment if it was obtained as a result of deliberately misleading the foreign court in respect of jurisdictional requirements, and where such recognition would be incompatible with the Irish Constitution. However, this declaration was of little use following the transformation of Brussels II from Convention to Regulation.

⁴³ G. Steenhoff, “A Matrimonial Property System for the EU?” (2005) I.F.L. 74 (Lexis citation) (“Steenhoff”).

with the relevant case law.⁴⁴ Again, therefore, both certainty and the standard of provision are undermined.

Certainty is also undermined by the lack of any definition of “habitual residence” in Brussels *Ibis* (or indeed in the Maintenance Regulation), even though this is now the basis for jurisdiction. The Practice Guide for Brussels *Ibis* merely states that habitual residence is to be determined by the judge in each case on the basis of factual elements, and should be interpreted in accordance with the objectives and purposes of the Regulation rather than under national law. It appears that “habitual residence” is generally very broadly interpreted in European jurisprudence: for instance, in *Robin Swaddling v Adjudication Officer*,⁴⁵ the European Court of Justice held that length of residence in a Member State could not be regarded as an intrinsic element of the concept of residence for the purposes of assessing social security entitlements. It has also been held in the UK that absence will not prevent an individual from establishing habitual residence: in *C v FC*,⁴⁶ two children, of dual English/Portuguese nationality, were found to be habitually resident in England even though they had been living with their mother in Portugal for some time. In Ireland, habitual residence has been held to be a factual concept, based on residence for a reasonable length of time.⁴⁷ In *O’K v A*,⁴⁸ Sheehan J., in the context of judicial separation, held that the location of a party’s “centre of interest” is a “major factor” in determining his or her habitual residence.⁴⁹ An individual’s “centre of interest” in turn will be affected by where his or her “primary responsibility lies”.⁵⁰ In that case, Sheehan J. was particularly influenced by evidence that the parties had intended to settle and bring up their children in Ireland, that they had purchased a “substantial” family home in this jurisdiction,⁵¹ had participated in guardianship proceedings and access arrangements in Ireland, and that the respondent husband had independent means and was not employed outside the State, though travelling widely. Sheehan J. considered that these factors, particularly those relating to access arrangements, “far outweigh[ed]” the American citizenship of both spouses and of their children, the fact that the parties had signed a prenuptial agreement in the United States, the fact that most of the marital assets were in the United States and that the husband paid taxes in the State of Florida.⁵² There has, however, been no decision explicitly in the divorce context, so it is uncertain as yet how swiftly a spouse seeking divorce might be deemed to have acquired residence in a more favourable jurisdiction.

Brussels *Ibis* contains a number of exceptions, either to jurisdiction or to the enforcement of decisions. However, none of these appear likely to benefit a spouse seeking to avoid foreign jurisdiction, or the results thereof. Article 15, which permits a court with jurisdiction to hear a case to transfer the case to a court in another Member State, where that court is better placed to hear the case, does not deal with marital breakdown actions. Accordingly, speed will remain of the essence in initiating marital breakdown claims, leading to a “race to court”. While a court in a Member

⁴⁴ Steenhoff, above n.43.

⁴⁵ *Robin Swaddling v Adjudication Officer*, Case C90/97 [1999] E.C.R. I-1100.

⁴⁶ *C v FC* [2004] 1 F.L.R. 31.

⁴⁷ *CM and OM v Delegacion de Malaga and Others* [1999] 2 I.R. 363.

⁴⁸ *O’K v A* [2008] IEHC 243; [2008] 4 I.R. 801.

⁴⁹ [2008] 4 I.R. 801 at 808.

⁵⁰ [2008] 4 I.R. 801 at 808.

⁵¹ [2008] 4 I.R. 801 at 809.

⁵² [2008] 4 I.R. 801 at 809.

State shall not recognise any decision that is “manifestly contrary to the public policy” of that Member State,⁵³ Shannon notes that the conflict must be “extremely profound” to justify such a refusal.⁵⁴ It would therefore be insufficient if the decision was simply one that an Irish court could not or would not have made; for instance, because the ancillary financial relief was not sufficient by Irish standards. In this situation, a spouse might obtain ancillary relief under Pt III of the Family Law Act 1995, which permits applications in Ireland for ancillary relief where a marriage was dissolved or the spouses were separated outside Ireland. However, it appears that this jurisdiction will only be exercised in exceptional circumstances where the applicant can demonstrate hardship, injustice and the unavailability of a remedy in the foreign jurisdiction.⁵⁵

Brussels *Ibis* excludes marital property issues and ancillary relief from its ambit, as its focus is on jurisdiction.⁵⁶ However, as Shannon contends, “the reality is that choice of jurisdiction may well determine how the ancillary financial issues are disposed of”.⁵⁷ This is because divorce proceedings commonly include financial or property orders, and the nature of the available orders depends on the law applied, which in turn is usually (though not invariably) linked to jurisdiction.⁵⁸

Thus, in *YNR v MN*,⁵⁹ the applicant and respondent were both French, but had lived in Ireland for some years. The applicant returned to France but filed for divorce in Ireland, while the respondent, living in Ireland, filed for divorce in France a month previously. The applicant alleged, inter alia, that Brussels II was invalid under the Irish Constitution, which required that proper provision should be made for the parties as a precondition of divorce. This was rejected (obiter) by the High Court, as Brussels II arose out of the referendum accepting the Amsterdam Treaty. O’Higgins J. held that the High Court had no jurisdiction to hear the divorce, as the case was first brought in France, and it therefore fell to be determined in France, under French law. He stated that the fact that the “seat of the marriage” was in Ireland did not prevent the respondent from exercising his jurisdictional rights under the Brussels II Regulation. O’Higgins J. also rejected the applicant’s claim that the French court had no jurisdiction over property situate in Ireland, stating that it was not for the Irish courts to supervise the French courts in exercising their jurisdiction.

However, this is not to say that instigating proceedings abroad will always preclude proceedings in Ireland. In *DT v FL*,⁶⁰ the spouses both had an Irish domicile of origin, but had lived in the Netherlands for some years. The wife and children returned to Ireland, and the husband obtained a Dutch divorce, in which the wife was awarded maintenance. The wife subsequently sought a decree of judicial separation in Ireland, which was contested by the husband on the grounds that the parties were already divorced. However, it was held by the Supreme Court that the Dutch divorce was not valid in Irish law, as the respondent had never abandoned his Irish domicile. The

⁵³ Article 22(a) of Brussels *Ibis*.

⁵⁴ Shannon, above n.40 at p.323.

⁵⁵ *MR v PR* [2005] IEHC 228.

⁵⁶ Recital (8) of Brussels *Ibis*.

⁵⁷ Shannon, above n.40 at p.326.

⁵⁸ This may no longer be the case for Member States subscribing to Rome III, discussed below.

⁵⁹ *YNR v MN* [2005] IEHC 335.

⁶⁰ *DT v FL* [2006] IEHC 98.

husband subsequently argued that the wife's claim for a decree of judicial separation in Ireland was barred as to maintenance, as the maintenance element of the Dutch order was entitled to recognition in Ireland under Brussels I. He also pleaded that the Dutch court was seised of the matrimonial dispute between the parties, so that the Irish court had no jurisdiction to hear the matter under Brussels II. Again, these arguments were rejected by the High Court. McKechnie J. held that the maintenance aspect of the Dutch order was unenforceable in Ireland, as this would directly conflict with the Supreme Court's ruling that the divorce was invalid. Furthermore, Brussels II and Brussels II*bis* did not apply where there were no concurrent or pending proceedings in different jurisdictions.

In general, however, Brussels II*bis* has led to a serious change of practice in cases with any kind of international element. Effectively, the Irish practitioner is now faced with two conflicting requirements: under the marital breakdown legislation, it is mandatory to inform clients of conciliation mechanisms, such as mediation.⁶¹ However, from a professional negligence point of view, it is now vital to establish immediately whether jurisdictional requirements could potentially be satisfied in a different Member State. If so, it is imperative to advise a client seeking a divorce that any delay in initiating a claim may lead to the other spouse securing exclusive jurisdiction in the other Member State where the marital regime may be less favourable to the client—or indeed, to advise the client on the possibility of seeking more favourable jurisdiction elsewhere.

Rome III

Following Brussels II*bis*, jurisdictional issues continued to attract the attention of reformers in the EU, and were highlighted in the EU Commission's Green Paper on Applicable Law and Jurisdiction in Divorce Matters.⁶² The Green Paper cited shortcomings such as the lack of certainty and flexibility, insufficient party autonomy, the risk of results that do not correspond to citizens' legitimate expectations, and the so-called "rush to court" (outlined above). It also referred to the risk of difficulties for community citizens residing in a third Member State. The Green Paper suggested various ways of overcoming these difficulties; for example, that the parties should be able to agree on the law applicable to their divorce, irrespective of where the case is heard. Thus, a German couple residing in Ireland might opt to have their case heard by an Irish court, applying German law. The Green Paper also argued that where no choice of law is made by the parties, the extreme latitude of jurisdiction on matrimonial matters should be replaced by a hierarchy of governing factors, to increase certainty and fairness. Seven choices of jurisdiction exist under Brussels II*bis*, which promoted the "rush to court". The Green Paper proposed to restrict this, for instance, by allowing a court dealing with divorce proceedings to transfer the ancillary matters to be heard in the court of a more appropriate contracting state.

Arising out of the Green Paper, a new Regulation, known as Rome III, was proposed. The aim of the proposed regulation was to harmonise the laws applying to marital

⁶¹ Sections 5–6 of the Judicial Separation and Family Law (Reform) Act 1989 and ss.6–7 of the Family Law (Divorce) Act 1996.

⁶² Proposal for a Council Regulation amending Regulation (E.C.) No. 2201/2003 as Regards Jurisdiction and Introducing Rules Concerning Applicable Law in Matrimonial Matters COM (2006) 399 final.

status decisions, and to amend the Brussels *Ibis* jurisdictional rules accordingly. Hence, the original proposal permitted spouses to nominate both which court would have jurisdiction over their divorce and the law to be applied by that court. This would reduce forum shopping, as the law to be applied would be pre-determined and unvarying. However, the necessary unanimity required to adopt Rome III as a replacement for Brussels *Ibis* was not attained, with both Ireland and the UK opting out. Subsequently, a number of other Member States sought to establish enhanced co-operation between themselves regarding the laws applicable to matrimonial matters.⁶³ Enhanced co-operation was authorised by the Council on July 12, 2010 (the first time that a Regulation was permitted without the support of all Member States), on the grounds of legal certainty, predictability and the prevention of forum shopping.⁶⁴ The resultant Rome III Regulation⁶⁵ was adopted in December 2010 and will apply to the acceding Member States from June 21, 2012.

Rome III falls short of the initial proposals in several respects. Significantly, it relates only to applicable law, and does not affect jurisdiction. This was to avoid a clash with Brussels *Ibis*, which continues to apply. It also deals only with divorce and legal separation, rather than annulments.⁶⁶ Although the spouses may choose the applicable law (within prescribed limits),⁶⁷ in the absence of choice, the applicable law is mutable.⁶⁸ Hence, it may vary as the spouses change their habitual residence, irrespective of where they originally married.⁶⁹ Consequently, the applicable law may not in fact be that which the parties had originally implicitly envisaged when they married, and may be quite unrelated to the parties' domicile or nationality. This hardly appears to add the envisaged certainty, as much is effectively left to chance.

At present, 14 Member States have agreed to enhanced co-operation; the remaining 13, including Ireland, continue to apply their domestic rules on the conflicts of law to determine the law applicable to a particular case. It appears that Ireland's refusal to opt into Rome III, despite the problems perceived under Brussels *Ibis*, was due to fears that it would permit couples to obtain a divorce in Ireland on less stringent grounds than provided for in the Constitution.⁷⁰ Although Rome III deals with the law applicable to marital status, rather than financial provision, clearly the former affects the latter. For instance, Irish divorce is constitutionally conditional on "proper" provision being made for the spouses and any dependant children.⁷¹ Were Irish courts to be compelled to apply the law of another Member State, this precondition would not apply.

⁶³ The original Member States seeking enhanced co-operation (in 2008) were: Greece, Spain, Italy, Hungary, Slovenia, Luxembourg, Romania and Austria. By 2010, these were supplemented by Portugal, France, Bulgaria, Belgium, Germany, Latvia and Malta, although Greece withdrew its request in 2010.

⁶⁴ Council Decision of July 12, 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation 2010/405/EU [2010] OJ L189/12.

⁶⁵ Regulation 1259/2010 E.U. [2010] OJ L343/10.

⁶⁶ Article 1 of Rome III.

⁶⁷ Article 5 of Rome III. Choice-of-law agreements may only be concluded in those Member States party to Rome III, or if permitted by the national law of non-participating Member States.

⁶⁸ A scale of successive connecting factors is given in art.8 of Rome III. The presence of connecting factors is evaluated at the time the court is seized of the case.

⁶⁹ Article 8 of Rome III.

⁷⁰ See comments of the then Tánaiste and Minister for Justice, Equality and Law Reform, Mr Michael McDowell TD, cited in J. Bateman, "Brussels Bulletin" (2007) I.F.L. 35 (Lexis citation).

⁷¹ Article 41.3.2° of the Irish Constitution.

Even though Ireland has not (as yet) signed up to Rome III, the Regulation still has important consequences for Irish spouses. This is because the determination of jurisdiction under Brussels *Ibis* may in turn determine the application of Rome III, where the court seised of the case is in a Member State party to the enhanced co-operation. Hence, Irish nationals may avail of Rome III by instituting divorce or separation proceedings in a participating Member State. They may also conclude a choice-of-law agreement in a participating Member State.⁷² The race to court under Brussels *Ibis* therefore has additional implications. This is particularly vital because Rome III has so-called “universal” application. Hence, the applicable law, as determined under the Regulation, may not be the law of an EU Member State, but may be the law of any world jurisdiction. It is therefore quite possible that an application for divorce in, say, France, Germany or Spain, could lead to the application of, say, Chinese, Russian or Iranian law, with all the attendant difficulties of proof. Quite apart from the added level of complexity, Hodson notes the potential for discrimination and unfairness where the national law being applied falls below European standards (for example, by discriminating against women or non-nationals).⁷³ From an Irish perspective, it is quite possible therefore that Rome III might significantly undermine “proper” provision in relevant cases, though the presence of some potential saving provisions should also be noted. Article 10 of the Regulation has the potential to exclude a national law that deprives one sex of equal access to divorce (though it does not refer to equal property entitlements on divorce). Article 12 mandates the non-application of foreign law if it is “manifestly incompatible” with public policy in the applying Member State. However, as Hodson notes, this ground is rarely applied in practice in the EU.⁷⁴ Overall, the existence of Rome III, and its partial application within the EU, clearly adds considerably to the uncertainty applicable in the marital breakdown context, and is unlikely to reduce the rush to issue, as “forum shopping” becomes even more crucial (and arguably even less predictable) than before.

Rome IV

At the time of writing, yet another Regulation is proposed to deal with the division of matrimonial property on divorce. Known as Rome IV, the proposed Regulation arises out of a second Green Paper adopted by the Commission in 2006.⁷⁵ In the Green Paper, the Commission launched a consultation exercise concerning the conflict of laws in relation to matrimonial property regimes, including the question of jurisdiction and mutual recognition. The objective was to assess the difficulties arising in the European context for both married and unmarried couples when settling the property consequences of their relationship. The Green Paper particularly addressed the property rights and expectations of partners with different nationalities, or partners with the same nationality but who own property in another Member State. These are seen as important public issues, given the increased mobility of citizens

⁷² Formal requirements vary, depending on the parties’ habitual residence: see art.7 of Rome III. There are also requirements for material validity, given under Article 6.

⁷³ D. Hodson, “EU Approves European Divorce Enhanced Co-operation” [2011] I.F.L. 65 (March 2011).

⁷⁴ Hodson, above n.73 at 65.

⁷⁵ Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes, including the Question of Jurisdiction and Mutual Recognition (SEC(2006) 952) COM (2006) 400 final.

within the EU; a comparative study commissioned by the Commission established that, at the time of the Green Paper, there were approximately 170,000 international divorces in the EU each year (16 per cent of all divorces).⁷⁶ The Green Paper did not propose to harmonise the substantive law in Member States, but to address the rules of private international law that designate the law of the Member State with which the situation is most closely connected as the applicable law. In this way, it aimed to ensure a degree of foreseeability in the law for relevant couples, as they would be able to predict what law would apply to property issues arising on the divorce or death of spouses,⁷⁷ in the absence of choice. In addition, all divorce-related issues could be heard in the same court, thus overcoming the present fragmented jurisdiction (discussed below). It would also be easier to enforce judgments abroad.

Under the Rome IV proposal, the law applicable to matrimonial property issues would (in the absence of choice) be that of the common habitual residence of the spouses when they married.⁷⁸ This would be unvarying, and would not alter with subsequent changes in residence. Obviously, this would greatly add to certainty in dealing with property issues, though this might be counteracted by potential difficulties in applying foreign law. Clarkson, however, has contended that foreign law is routinely applied under conflicts of law rules, and that the difficulties in the family law context should not be insurmountable.⁷⁹ More significantly, Harding has noted that the Rome IV proposal is heavily premised on certainty for creditors and on spousal autonomy, but places little emphasis on issues of need and fairness.⁸⁰ Because of this, it is again highly likely that the Irish concern with proper provision could be undermined, if Ireland were to accede to the proposed Regulation, as Irish courts would be compelled to apply non-national law in relevant cases. This is particularly the case, as Harding notes, because the piecemeal nature of European regulation essentially favours legal systems where matrimonial property issues are dealt with separately from issues such as marital status and spousal support.⁸¹ This, of course, is not the case in Ireland, both constitutionally and because property and support issues are generally approached in tandem, with a view to reaching an overall “package”.⁸² At present, however, the issues of property, support and divorce might conceivably be dealt with in different jurisdictions or (if heard in the same jurisdiction) under different national laws: thus, the jurisdiction to grant divorce is determined under Brussels *Ibis*, with the applicable law to be determined under Rome III, if adopted by the relevant Member State and by national conflicts of law rules if not. The jurisdiction and applicable law for support issues will be determined by the Maintenance Regulation, which in turn depends on the Hague Protocol. Marital property issues (excluding support) will be governed by Rome IV, if adopted. The jurisdictional complexity (unless amended by Rome IV) is exacerbated by the internal options in the various Regulations, which will often in practice lead to a rush to court; furthermore, success in the race for

⁷⁶ Explanatory Memorandum MEMO/06/288, July 17, 2006, at 2.

⁷⁷ Cohabitation has not been included in the proposed regulation, and inter-spousal gifts and succession rights have also apparently been excluded: see Harding, above n.35 at 214.

⁷⁸ Harding, above n.35 at 220.

⁷⁹ C.M.V. Clarkson, “Matrimonial Property on Divorce: All Change in Europe” (2008) 4 J. Priv. Int’l L. 421 at 430 (“Clarkson”).

⁸⁰ Harding, above n.35 at 213.

⁸¹ Harding, above n.35 at 216. Harding explains the “atomisation” of the EU regime as the result of the need to achieve consensus; she contends that it was easier to deal with isolated issues than to reach agreement on a comprehensive package (at 221).

⁸² Harding, above n.35 at 216.

jurisdiction under Brussels *Ibis* will also determine whether Rome III applies. The overall result is a system of hideous complexity, which not only undermines certainty and foreseeability but effectively prevents a realistic overview of the overall outcome. This in turn precludes any real determination of whether the provision made was “proper”; indeed, in many cases, this would no longer be an issue.

A future European family law?

In terms of harmonising substantive family law (rather than the rules governing conflicts), relatively little has been done as yet. Indeed, given the widely differing approaches to matrimonial property, it is difficult to see how harmonisation in this area might be made acceptable to all Member States. At present, therefore, as Boele-Woelki comments, no real effort is being made to harmonise domestic substantive law, “because there is neither the political will nor any legislative competence for the EU to do this”.⁸³ Nevertheless, there have been some developments. A Commission on European Family Law (CEFL) was established in 2001,⁸⁴ with the objective of creating a set of principles of European family law that would be most suitable for harmonisation purposes. This is in line with the suggestion of Steenhoff, that difficulties in applying non-national law could be avoided if there existed a separate European marital property regime, that could be chosen by the parties in case of a marriage with cross-border elements.⁸⁵ At this stage, however, CEFL’s work remains academic and comparative only, although the material has been used by individual jurisdictions, such as Scotland, to assist in law reform.⁸⁶ Hence, Ireland’s approach to marital property is likely to continue to apply for the foreseeable future, except insofar as its application is excluded by the various measures enacted to date or outlined above as pending developments.

Conclusion

Much of the European intervention in family law is clearly well-intentioned. Prevailing themes in the various reforms outlined above include the enhancement of spousal autonomy by increasing freedom of choice, and the enhancement of certainty and foreseeability by clarifying the jurisdictional and applicable law rules in particular marital breakdown contexts. The enhancement of justice is also a key concern, as evidenced by the focus on the recognition and enforcement of judgments. In addition, it may be argued that more certain rules in family law remove potential barriers to the free movement of persons, a core European goal.⁸⁷

However, the fragmentation of attempts to deal with marital breakdown issues has, in practice, undermined and negated certainty, as have the highly complex jurisdictional rules. The fact that different aspects of the same relationship may be dealt with in different jurisdictions, or under the law of different Member States, increases rather than decreases confusion. The separation of marital status from marital property claims is not suited to a regime such as Ireland’s, where divorce is dependent on a

⁸³ K. Boele-Woelki, “The European Agenda: an Overview of the Current Situation in the Field of Private International Law and Substantive Law” (2006) I.F.L. 148 (Lexis citation) (“Boele-Woelki”).

⁸⁴ A. Akoto, “The Commission on European Family Law” [2005] I.F.L. 23.

⁸⁵ Steenhoff, above n.43.

⁸⁶ Boele-Woelki, above n.83.

⁸⁷ See, e.g. Clarkson, above n.79 at 425.

particular standard of provision. Furthermore, the separation of support and property issues appears highly artificial in the Irish context, given that Irish legislation makes no such distinction and seeks only an overall fair or “proper” outcome. Such an outcome will often depend on trading off various aspects of provision against one another—for instance, claims for spousal support or a share in pension rights or in the family business might be exchanged for an additional share of the family home or other property. This type of trade-off may prove highly dangerous under the new jurisdictional rules, as the court ruling on one aspect of provision may have no overview or understanding of what has been determined elsewhere. Indeed, under the relevant applicable law, such intended exchanges may be entirely irrelevant to the case at issue. This in turn undermines the overall standard of provision.

Finally, the constitutional and statutory requirement of “proper” provision is undermined where Irish courts may be required to apply foreign law, either in the granting of divorce or in making ancillary provision. This may be fair in terms of meeting the original expectations of a couple who married in a different Member State⁸⁸; it is also true that the constitutional standard will continue to prevail in most Irish divorces. Nevertheless, the fact that one spouse may manipulate jurisdictional rules in order to seek lower standards of provision abroad is also a concern; this danger is exacerbated by the lengthy waiting period for divorce under Irish law, which facilitates a “rush to court” elsewhere. Although all is not lost—Irish law has not yet been supplanted by pan-European family measures, and nor is this likely to happen in the foreseeable future—it is clear that the “proper” provision standard is no longer the bastion of family security that it was initially assumed and intended to be.

⁸⁸ See, e.g. Clarkson, above n.79 at 424.