EU approves European divorce enhanced co-operation

Overview

On Monday, 20 December, 2010, as family lawyers across Europe were looking forward to the last working week of the year, the EU Council passed a Regulation (1259/2010) about which country's laws should be applied on divorce and legal separation, the so-called applicable law regimes. The United Kingdom is specifically not a party. It is the historic first "enhanced cooperation" in the European Union. The EU allowed 14 member states to go it alone, without needing and having the support of all EU member states. It creates harmonised rules for determining on the divorce of an international couple which country's laws would be applied, rather than necessarily the local law of the country where the divorce occurs. It is a very important legislative measure for international families in those 14 countries, for those in the remaining EU countries where international families have a connection with the 14 countries and for all worldwide family lawyers having any EU connections in their cases.

Background

The EU had failed to gain unanimity for a draft regulation (Rome III) imposing so-called applicable law on all EU member states because of opposition from countries such as the UK and others who only apply their own local law and did not want to apply the law of other countries. Instead 14 countries which already operate the system of applicable law asked the EU to adopt harmonisation rules similar to Rome III.

Hitherto, the EU had only made Regulations with the support of all member states. This Regulation is a historic first as it applies only to some member states. For specialist lawyers in England and elsewhere outside the 14 member states and who are dealing regularly with international families, it is excellent news. Across the many countries in continental Europe which apply the law of other countries, the rules on when and how to do so were confusing, contradictory and uncertain. This new EU Regulation provides harmony, certainty and clarity. This Regulation is not just for those within those 14 signatory countries but for those lawyers across the world advising on European cross-border forum issues, of which there are now many cases.

However there are some real concerns about elements of the Regulation. This note deals only with the major aspects.

Universality of the Regulation

It is exceptionally broad in its application. It does not simply require one of the 14 signatory EU countries to apply the law of other 14, or even all other, EU countries. It requires the application of the laws of all countries across the world. This is even though those countries themselves are not signatory EU countries, may be entirely outside the EU and moreover would never themselves contemplate applying the law of any other country except their own.

It is a so-called universal regulation with universal application (Article 4: "*the law designated by this Regulation shall apply whether or not it is the law of a participating Member State*"). So France may apply Algerian law, Portugal apply Chinese law and Germany apply the law of Kazakhstan, no doubt with Borat as an expert witness! This universality raises public policy and human rights issues. There are some countries around the world where laws on divorce are directly gender discriminatory, clearly favourable towards nationals, censorious on sexual misdemeanours but not on violence, and other serious issues. Will the EU signatories to this enhanced cooperation apply these foreign laws as they would be applied in the other, home country, or will they sieve them through their own local perceptions of justice, equality and human rights? Of course it is likely to be the latter, however this will only confirm common law perceptions that applicable law is very often sacrificed to local perceptions under local, national law.

There are saving provisions. In Art 10, *if the law to be applied under Article 5 or Article 8 i.e. the law of the other country, makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the forum shall apply*. In other words, if the other law is gender discriminatory, the country dealing with the divorce does not have to apply the law of the other relevant country and instead can apply local, national law. There is a public policy exception in Art 12 whereby application of a foreign law "*may be refused only if such application is manifestly incompatible with the public policy of the forum*" i.e. of the country dealing with the divorce. These are valuable. However incompatibility with public policy is very serious and rarely found by EU member states. Moreover whilst the gender discrimination is important, there must be the worry that it will be narrowly interpreted. In any event, Art 10 is subservient to the public policy provision of Art 12 and the commentary (para 25) of the Regulation makes clear that member states should not apply the public policy exception to disregard the law of another country if to do so would be contrary to the Charter of Fundamental Rights of the European Union, especially Article 21, which prohibit all forms of discrimination. This seems to place one form of (gender) discrimination against another form.

There are many instances where the law of divorce of some non-EU countries appears very unfair. All lawyers will follow with much interest caselaw in which a signatory countries has refused to follow the relevant applicable law of a non-EU country.

Choice of applicable law by a couple

The heart of the Regulation allows a couple to choose in a marital agreement the law which will be applied (Art 5 (1)). To avoid so-called exotic choices, this must be in one of four categories namely

a. “the law of the state where the spouses are habitually resident at the time the agreement is concluded; or,

b. the law of the state where the spouses were last habitually resident, insofar as one of them still resides there at the time the agreement is concluded; or

c. the law of the state of nationality of either spouse at the time the agreement is concluded; or

d. the law of the forum”.

This is commendable in supporting personal autonomy for those couples from applicable law countries.

There are certain formalities. The agreement has to be in writing, dated and signed by both spouses. It can be by electronic means if that provides a durable record of the agreement equivalent to writing (Art 7(1)).

If the law of the member state in which they are both habitually resident has additional formal requirements for this type of agreement, they shall also apply (Art 7 (2)). If the couple are habitually resident in different member states when the agreement is concluded and those states have different formal requirements, the agreement is formally valid if it complies with the requirements of either of those laws (Art 7(3)): international family lawyers will quickly work out which countries have the less formal requirements to be satisfied! Finally if only one spouse is habitually resident in a participating member state when the agreement is concluded and that state has additional formal requirements, they shall apply (Art 7(4). Of course in time it is to be hoped that the national formal requirements themselves will be harmonised so these Art 7 distinctions will not be required.

The existence and validity of an agreement on choice of law shall be determined by the law which would govern it under the Regulation if the agreement were valid (Art 6 (1)) so if the parties chose Portuguese law, and a dispute arose regarding the agreement, Portugal would determine its validity. However if the issue is consent, then the party alleging the lack of consent may rely on the law of the country in which he was habitually resident at the time when the court considers the agreement if it would not be reasonable to consider it under the chosen applicable law (Art 6(2))

Predictably for continental European agreements, independent legal advice and/or disclosure is nowhere required in this Regulation as a constituent precondition of any marital agreement! Instead the commentary (para 17) says that the spouses should have access to up-to-date information concerning aspects of various national laws and of divorce procedures before entering into such agreements, and then goes on to say that that can be found through the European Union website! Many common law lawyers place much more weight on reliable and specifically applied independent legal advice than lay parties simply perusing a website which seeks to explain the family law of all EU countries! In this regard the UK Supreme Court in Radmacher (2010) UKSC 42 has emphasised the importance of independent legal advice to satisfy evidentially that an agreement has been fairly entered into with full knowledge of the implications.

The agreement can be varied and modified at any time up until the court dealing with the divorce or agreement is seized with the case. Even then, if local law, the law of the forum, provides, the spouses may designate the applicable law before the court during the course of the proceedings. (Art 5(2) and (3)). The latter gives rise to the very fanciful picture in court of a couple both thoroughly unhappy with the way the case is going and the law which is being applied and jointly deciding that another law should be applied instead, presuming there is the connections as set out in Art 5 (1). At which point the judge lays down his quill pen and starts the matter afresh on the basis of another country's law with its different burdens of proof, disclosure obligations, rules on termination of the matrimonial regime with starting points for division etc. It is anticipated that some judges might want to make certain comments about the costs of such exercises! Charles Dickens never contemplated this as a reason for the length and cost of the proceedings in Bleak House.

Applicable law in the absence of any marital agreement

Crucially if there is no marital agreement with choice of law under Art 5 above, divorce and legal separation shall be subject to the hierarchy of criteria in the following order so that they shall be subject to the law of the state (Art 8):

a. where the spouses are habitually resident at the time the court is seized; or failing that

b. where the spouses were last habitually resident, provided the period of residence did not end more than a year before the court is seized, insofar as one of the spouses still resides in that state at the time the court is seized; or, failing that

c. of which both spouses are nationals at the time the court is seized; or failing that

d. where the court is seized i.e. local law

This is of considerable importance across the EU including in England. It will vitally affect our consideration of the most beneficial forum for our clients, for several reasons.

Although countries such as England will maintain our exercise of local law in all cases before the English courts, we now have different elements in comparing favourable forum. For example if there is an Anglo French case with the parties now having separate short-term residencies in both countries and both England and France having jurisdiction under Brussels II, yet the parties are e.g. both Australian nationals, it may well be that France might apply Australian law. This possibility of a third country's law having to be considered may therefore affect our recommendations to clients on the best forum. In England and other local law countries, we will need to work through this hierarchy in any EU forum dispute involving one of the signatory countries to the Regulation. Suddenly our forum considerations, already frantically urgent because of the lis pendens, first to issue, principle in Brussels II have now become much more complicated with this additional layer.

Curiously the original commentary to the proposals for the Regulation says that the hierarchy, above, will mean that in the "*vast majority*" of cases, local law will be applied. It says the cases in which a foreign law is applicable will be "*very few in number*". But for these *very few cases*, the European Union has devoted a vast amount of time, energy, and political and legal goodwill in trying to force their own agenda on all countries across the European Union to adopt applicable law, most fundamentally on the United Kingdom and other local law countries. The European Union's own test of proportionality (Art 5 Treaty on European Union) would therefore fail these attempts, as the North Committee has already found.

What now for the rush to issue first?

However do we still have to worry about the rush to court under Brussels II? Not according to the EU press release coupled with the commentary to the Regulation. They say these new rules will prevent a rush to court. This is as likely as transparency and democracy in selecting World Cup hosts! There are several reasons for this despondency, given the rush to issue is so anti-family and anti-marriage and causes accelerated breakups of relationships in difficulties.

The Regulation relates only to *divorce and legal separation* (Art 1(2)). Article 1 (2) makes it clear that the Regulation does not apply to a number of matters "*even if they arise as a preliminary question within the context of divorce or legal separation*" proceedings. This includes legal capacity, existence, validity or recognition of marriage, annulment, names of spouses, property consequences of marriage, parental responsibility (which in the EU context is significantly wider than the technical meaning under the Children Act 1989), maintenance obligations and trusts or succession. In the English context this includes financial provision on divorce, technically relief ancillary to the divorce.

This is of paramount importance within England where divorce is the only foundation to deal

with maintenance and property consequences of marriage breakdown. English law has no freestanding divorce financial applications e.g. in contrast to Australia. England applies local, English law. Whoever gets the divorce first secures the court to deal with the ancillary financial aspects. So the race is still on for us. The EU is very aware that the first to issue principle in Brussels II is an incredible own goal. It has been unsuccessfully trying to equalise since 2000. For those countries still applying national, local law, this Regulation will have no or minimal impact on the race to issue first.

Amongst those 14 signatory countries, it might reduce the need for the race to issue because of the application of foreign law, in the absence of a marital agreement, under Article 8 above. The commentary (para 21) speaks rather optimistically that harmonised conflict of laws rules on the hierarchy of successive connecting factors based on the existence of a close connection between the spouses with the law concerned should overcome one party issuing first to gain a more favourable law, and therefore more favourable outcome. It goes on to refer to the divorce being governed by a law with which the spouses have a close connection. This is an open admission by the EU that Brussels II, with its very wide range of possible jurisdictions, has led to countries dealing with a divorce which have not had a close connection with the spouses. However the applicable law to be adopted by the divorce court as set out in Article 8 is distinctly narrower than the jurisdictional bases in Brussels II. Accordingly a spouse could issue in one country on the basis of it having jurisdiction under Brussels II for divorce and then find the application of law was distinctly different under this Regulation. The EU should have harmonised the hierarchy of applicable law with the jurisdictional grounds in Brussels II.

Indeed, some of us have over the past decade urged the EU to reform Brussels II jurisdiction to provide a hierarchy based on levels of close connection. This would then largely remove the race to issue. The EU has refused to do so, apparently because it was felt it would be difficult to create any EU wide consensus on that hierarchy. Yet they have managed to create a hierarchy of connectedness for applicable law. Yet again the perception is that EU family policy is directed towards civil law countries and not tackling the wider issues faced by common law countries.

Moreover the EU is kidding itself if it believes continental European family lawyers have confidence that their own laws will be applied the same in another country as they would at home. The anecdotal experience of family lawyers around Europe is of the bizarre, perverse application of their own laws in the courts of other countries. They will continue to forum shop to issue first to the benefit of their clients. Even though under this Regulation the same law may be applied both at home and in another country, the outcome of that application may be dramatically different! Hence it is still worthwhile to rush to issue.

If the European Union thinks that this Regulation will end the rush to court, it is showing that it is still completely out of step with the family law professions across Europe who will as before by tactically choosing the best forum, then rushing to court to secure the best country and outcome for their client. The real remedy which the EU adamantly refuses to

countenance would have been a hierarchy of jurisdiction in Brussels II, perhaps based on the hierarchy in the Regulation. This would have ended the racing. But the European Union was positive that it would not change the jurisdictional element. This is a huge pity.

A partial remedy would have been the power to transfer divorce proceedings to the more suitable, better connected country, within parameters and without unfettered discretion. The EU is understood to be sympathetic to adopting this in civil disputes, Rome II. It is available in children disputes in Brussels II bis. But not for divorce. Not for finance. Yet again it appears to be an agenda driven by the EU, not recognising pragmatic solutions.

States with more than one legal system

Several elements within the Regulation deal with applicable law in the context of a country which has more than one legal system, for example federal and state-based systems of family law. There are also provisions for interpersonal conflicts of laws. A number of countries across the world come into this category.

Into force

The regulation enters into force on the day following its publication in the Official Journal of the European Union, which was published on 29 December, 2010 i.e. the 30 December, 2010. It shall apply from 21 June, 2012 with the exception of Art 17 which relates to information provision by participating member states to the EU commission. It only applies to proceedings instituted from, and agreements concluded from 21 June, 2012. There are transitional arrangements for agreements before 21 June, 2012. There are special arrangements for proceedings already underway on 21 June, 2012.

Conclusion

This Regulation is a good development, a vital development for those countries presently adopting applicable law, important for those of us engaging in forum considerations for our clients but not the answer to the rush to court. The European Union still needs to grapple with the very antimarriage and anti-resolution impact of Brussels II, lis pendens. It has now embraced a hierarchy of connecting factors, in deciding which law will be applied. It should now go further and embrace connecting factors for jurisdiction and so abolish first to issue.

David Hodson is an English and Australian solicitor and mediator and part-time family court judge in London. He is a partner in The International Family Law Group (www.iflg.uk.com [2])

David Hodson
dh@davidhodson.com [3]
07973 890648

Source URL (modified on 04/04/2017 - 3:37pm): https://www.iflg.uk.com/guidance/eu-approves-european-divorce-enhanced-co-operation