

TABLE OF CONTENTS

Table of Contents	1
1. Introduction to the Research Study.....	3
Basis of the research study	3
Approaching and selecting respondents.....	3
The interviews.....	4
2. Responses to the Questionnaire.....	6
A. General questions	6
B. Possible advantages of harmonisation.....	8
The phenomenon of forum shopping.....	8
Measures to counter forum shopping.....	13
<i>Lex fori</i> as a solution to forum shopping.....	14
Legal certainty and predictability of result	17
Free movement of persons and the smooth functioning of the internal market	21
C. Possible effects of harmonisation	26
Increase and complication of proceedings	26
Effects on agreement between the parties and out of court settlement	30
The extent to which all related matters can be dealt with in the same proceedings, and applying the same law	34
D. Possible impediments and disadvantages.....	37
Other remarks	41
3. Main problems that were identified during the interviews	42
Divorce	42
Application of choice of law rules	42
The influence of internal substantive law	42
Forum shopping in divorce cases	43
Legal certainty, predictability of result	43
Free movement of persons	43
Parental responsibility.....	44
Choice of law rules	44
Forum shopping.....	44
Legal certainty, predictability of result	44
Free movement of persons	44
Maintenance of spouses	45
Content of choice of law rules	45
Forum shopping.....	45
Free movement of persons	45
Maintenance of children	45
Jurisdiction and forum shopping.....	45
Free movement of persons	46
Legal certainty	46
Matrimonial property.....	46
Forum shopping.....	46
Distribution of marital property.....	46
Free movement of persons	46
Location of assets	47
Public policy	47
Application of foreign law	47
Civil law systems v. common law systems	47
Specialization of judges and lawyers.....	48
Cultural differences	48
4. A few case studies	48
Divorce	48
Case 1. The unfortunate twins	48
Case 2. Divorce at the second attempt.....	49
Case 3. A look in the future.....	50
Children	52

Case 2. The divorce mother's international career.....	53
Matrimonial property.....	53
The enterprising couple.....	53
5. What issues need to be addressed.....	55
Divorce.....	55
Maintenance of spouses.....	55
Maintenance of children.....	55
Matrimonial property.....	55
Parental responsibility.....	56
Application of foreign law.....	56
6. Areas for which action should be considered.....	57
7. Final general remarks with regard to the unification of the choice of law rule for divorce.....	58
Contributors.....	60
Annex 1 Questionnaire international divorce practice in EU member states 2002.....	61
A. General questions.....	61
B. Possible advantages of harmonisation.....	61
C. Possible effects of harmonisation, either positive or negative.....	63
D. Possible impediments and disadvantages.....	64
E. Correlation between the topics discussed and jurisdiction or recognition and enforcement.....	65
F. Desirability of an instrument.....	65
G. Profile of a possible future instrument.....	66
CASE I.....	68
CASE II.....	69
Annex 2 List of interviewees.....	70
Austria.....	70
Belgium.....	70
Denmark.....	70
Finland.....	70
France.....	70
Germany.....	71
Greece.....	71
Ireland.....	71
Italy.....	71
Luxembourg.....	71
Netherlands.....	72
Portugal.....	72
Spain.....	72
Sweden.....	72
United Kingdom.....	72

1. INTRODUCTION TO THE RESEARCH STUDY

Basis of the research study

The objective of this research study is to identify the possible practical problems that result from the differences in national choice of law rules with respect to divorce and other forms of dissolution of marriage. In order to identify these problems, on the spot interviews have been held with legal practitioners in all EU member states. The interviews have been based on an elaborate questionnaire, which was drafted to meet the objectives of this research study and which is set out in an Annex to this report.

Approaching and selecting respondents

Several approaches have been followed in order to locate and select legal practitioners as candidates for the interviews. One approach made use of the existing international network of T.M.C. Asser Instituut. This network consists for a large part of academic lawyers, a category that was not to be targeted as respondents for the interviews. However, in a number of member states academic lawyers were able to point us to practitioners who proved to be suitable candidates for interviews, notably in Italy and in Greece. In some member states, contact with practitioners was made by contacting professional organisations, such as the national bar association or a national association of judges. Examples of countries in which this approach led to suitable candidates are Denmark, Sweden, Luxembourg, Spain and Portugal. In other member states, contact was made directly with a court of which it could be expected that it regularly handled international divorce cases. This approach proved to be successful in France (Tribunal de Grande Instance in Paris), in Luxembourg (Cour Supérieure) and in Ireland (High Court and Dublin Circuit Court). In some member states, candidates were found with the help of judges who had participated in a seminar on child abduction that had been organised by the Hague Conference. Either these judges themselves were available for an interview (e.g. Italy), or these judges helped us in locating colleagues who regularly deal with cross-border divorce cases (this was notably the case for Germany). Finally, in some member states, officials of the Ministry of Justice pointed us to suitable practitioners, as was the case in Austria and Finland.

We presumed that either of the approaches set out above would lead us to suitable candidates. Nevertheless, the final decision for an interview would depend on the actual candidate, who would have to decide himself whether he (or she) had sufficient experience in handling international divorce cases. In a number of cases, candidates to whom we had been pointed by others declined an interview. This was notably the case in Sweden. In this member state, several judges to whom we had been pointed by professional associations felt they had too little experience in handling international divorce cases. For this reason, in Sweden the only legal practitioner with whom an interview could be arranged was a lawyer, not a judge.

We tried to select candidates of interviews (judges and ‘lawyers’¹) who deal with international cases on a regular basis. An aspect that should be taken into account is that, especially with regard to the judiciary, the experience of the candidate depends to a large extent on the organisation of the courts in the member state. The organisation of the courts may support that certain judges handle a substantial number of international cases, but this appears to be an exceptional situation. In most member states, courts appear not to be

¹ Hereafter, the expression ‘lawyer’ will be used to designate a legal practitioner who is not a judge and acts in the interest of one of the parties to judicial proceedings. Such a practitioner will in his member state be known under another title, such as ‘abogado’, ‘advocaat’, ‘advogado’, ‘advokat’, ‘avocat’, ‘barrister’ or ‘solicitor’.

organised in a way that supports specialisation of judges in dealing with international cases. With regard to the legal profession, it seems safe to say that in all member states professional lawyers who handle domestic divorce cases are from time to time confronted with an international case. However, it appears that in most member states the members of the legal profession who specialise in and have gained considerable experience with handling international divorce cases focus on 'paying' clients for whom considerable financial interests are at stake. This group appears to be small in number and is often organised on the international level in the 'International Association of Matrimonial Lawyers' (IAML), an association that has its roots in the United States. Although we did not specifically target this group of professionals when selecting lawyers for interviews, we did target lawyers who handle international divorce cases on a regular basis. As a result, we were often pointed to lawyers who at a later stage, sometimes during the interview, turned out to be members of this international association.

While selecting candidates, we tried to ensure that in all member states only legal practitioners would be interviewed, preferably at least one lawyer and one judge. In the Netherlands, one interview was held with an Advocate-General at the Supreme Court. Although an advocate-general with the Netherlands Supreme Court is not a judge, his role is comparable to that of an advocate-general with the ECJ, the respondent had served as a judge during an earlier stage of his career and is recognized as an expert on private international law. By way of exception, in Sweden an interview was held with an academic lawyer who regularly counsels practising lawyers who handle international divorce cases. Furthermore, the arrangements that had been made for our visit to Portugal, which envisaged three separate meetings with judges and lawyers, fell through at the very last moment, while our expert was already making her journey to Portugal. For this reason, in Portugal only an interview with two members of the bar has taken place. Finally, in England, we had planned to meet with a High Court judge. Upon arrival in London, it turned out that the judge had fallen ill and was no longer able to see one of our experts. As a result, in England interviews have taken place with two barristers and a solicitor. We further tried to meet with candidates from different regions of one member state. However, in a number of member states the organisation of the judiciary is such that suitable respondents could only be found at the capital or seat of government of the member state. The budget also imposed restrictions on the number of places that could be visited in certain member states.

The interviews.

The respondents were without exception very helpful in accommodating us during our visits. Most interviews have taken place at the respondent's office. In a few member states, separate interviews could be carried out at one single place, e.g. a court office or the premises of a law firm. No respondents have been paid for the time they spent for being interviewed. The duration of the interviews varied between minimum two hours to maximum five hours. One interview had to be cut short after an hour and a quarter because the respondent was called away for urgent professional duties and could not return later that day. Some interviews were held with more than one respondent at once. Interviews have been held in four languages, Dutch, English, French and German. One interview was partly held in Italian, with translation being provided by the other respondent participating in this interview. The original plan was to tape all interviews, but this plan was discarded as it quickly transpired that some respondents, notably judges, objected to the taping of the interview. Notes have since been made by hand during all interviews.

The questionnaire, in English or French, has been made available to the respondent prior to the interview. In general, the questionnaire proved a valuable basis for the interview. In most cases the respondents understood the questions and were able to give answers. However, in common law jurisdictions, notably England, the approach taken by the questionnaire received comment from the respondents, as the respondents were unfamiliar with application of a foreign law to family law matters. On the other hand, the approach of the questionnaire, which takes as point of departure that in general a court has to decide which law (whether the law of the court or a foreign law) governs a family law issue and that the court disposes over a set of rules (whether laid down in treaty law, national legislation or in other court decisions) was familiar to the respondents in continental and Nordic jurisdictions.

During the actual interview, the questionnaire sometimes turned out to be too detailed and repetitive. Some questions, addressing specific issues, would often already be answered in reply to more general questions. Also, at the beginning of the interview some respondents immediately raised matters or cases they had been involved in that would span various issues covered by the questionnaire. The summary of the interviews will therefore not set out the replies that were given to each individual question, but will instead summarize the responses that were given to the various categories of questions that are contained in the questionnaire. In an initial version, the questionnaire also contained a few questions dealing with policy matters, such as what organisation or authority would be most suited to further harmonisation. These questions have been discarded at a later stage, as the commissioner of the research felt this was outside the scope of the research.

2. RESPONSES TO THE QUESTIONNAIRE

A. General questions

Respondents were in general unable to indicate the number of international divorce cases that is handled each year by the courts of their Member States. Most respondents merely pointed out that national statistics were not available. Some respondents attributed the lack of statistics to a non-discrimination policy. Some respondents were able to give a very rough indication of the number of international cases that would probably be handled by their courts.

The respondents were much more able to indicate the number of international cases that they themselves, or their court or law firm, would handle per year. From the answers that were given it becomes apparent that an important distinction exists between the proportion of cases that are handled by judges on the one hand and lawyers who represent parties to proceedings on the other.

According to the responses, the proportion of international cases handled by a judge per year will in most member states not exceed 10% of his yearly case load and will often be much lower. A judge in Rome assessed the number of cases handled per year by the Tribunale Civile of Rome on 2 to 5%, a judge in Vienna, Austria, assessed the number of international cases at less than 10%, in Ireland judges conceded that 99% of all cases would be based on domestic jurisdiction, the number of international cases they had handled themselves could be counted on the fingers of one hand. A judge in Paris estimated that the number of potentially international cases in the Parisian courts (i.e. where at least one of the parties would be of foreign nationality or domiciled abroad) might be as high as 25%, but the actual number of cases in which private international law issues have to be addressed would be less than 1%. In Austria, a judge estimated that on 20,000 divorce cases handled by the Austrian court per year perhaps 200 cases would entail the application of a foreign law. A Belgian judge remarked that on the national level the proportion of international cases in Belgium would be around 10%, but that in his court, the Cour d'Appel in Brussels, the proportion would be between 15-20%, because of the high number of foreigners living in and around Brussels.

The proportion of international cases some judges may handle appears to be higher than 10% in at least three member states, Finland, Luxembourg and Germany.

Finnish judges estimated that of the 20,000 divorce cases a year, approximately 25-30% of cases arise in the international context (there are no records kept about the exact number, but it is an estimate of the judges interviewed). The cases involving international elements are mainly connected to Russia and Estonia and some cases involving US citizens. There are a number of cases involving citizens of the EU countries, but no particular problems have been noticed concerning the private international law issues.

In Luxembourg, the judges of the appeal court (Cour Supérieure) were unable to give exact figures but did point out that because of the high proportion of foreigners living in Luxembourg (40% of the population), the number of international cases handled by the Luxembourg courts would be considerable. In Germany, a respondent who was now presiding judge of a court in first instance ('Landgericht') but until recently was a judge in an appeal court ('Oberlandesgericht') explained that the considerable proportion of international cases he had handled resulted from the internal organisation of the appeal court. In this specific appeal court, two chambers would handle international cases (one dealing with family law cases, the other with other civil and commercial cases). The yearly workload of these chambers would be less than that of the other chambers in the same appeal court that did not

handle international cases. The German respondent assessed the proportion of international family law cases he had handled during the time he had served with the appeal court from 1995 to 2002 at about one third. The respondent did however point out that other appeal courts in Germany are not necessarily organised in the same way. Also, to the respondent's experience such a division does not exist on the level of the courts of first instance in Germany.

An approach such as that of the German appeal court, where the organisation of the court leads to specialization of judges in international cases, appears to be unknown in other member states. The remarks of the German respondent can be contrasted to the reply of an Austrian judge in first instance. This judge explained that in her court the cases were distributed on the basis of the first letter of the family name of the applicant party. As this Austrian judge would deal with, amongst others, family names starting with a K, she was often confronted with parties of Yugoslav origin. Specialization in international cases may sometimes occur in a few other member states. In Paris, some specialization exists in the field of international child abduction, as one judge always decides international child abduction cases (under the 1980 Hague Convention). In England, a lawyer thought that if the English County Courts would be required to apply foreign law, such a court would probably refer the case to a higher court. Nevertheless, in other member states the judges amongst the respondents were unable to attribute the number of international cases they handled to the internal organisation of their court. The proportion of international cases was generally linked to the number of foreigners in the population living within the territory over which the court has jurisdiction.

The position of the judges in most member states can be contrasted to that of the lawyers who were interviewed. In general, the lawyers who have been interviewed dealt with a higher proportion of international cases than judges from the same member state. The following proportions were quoted by lawyers: Denmark 10%, Spain 10%, Austria 10%; UK 25% (solicitors)²/10% (barrister); Germany 30%; Belgium 40%; Luxembourg 50%; France 50-60%; Sweden 70%.

A possible explanation for the discrepancy between the proportion of international cases handled by lawyers on the one hand and by judges on the other is that lawyers – whether out of personal interest or for commercial reasons – are able to specialize in international cases, whereas this opportunity does not exist to the same extent for judges.

The ratio quoted between international cases with or without a link to another member states varied. With regard to the lawyers, the ratio often depended on the personal background of the lawyer or on the nature of the client base of his law firm. The fact that most of the lawyers who were interviewed concentrated on cases involving 'paying' clients probably explains why cases with a link to non-member states often involved states from affluent regions, such as North America and South East Asia (including Japan). In international cases, some lawyers would mainly deal with clients from non-member states; other lawyers would chiefly represent clients from other member states. The high proportion of immigrants from certain Mediterranean or Asian countries living in some member states (e.g. Turkey, Morocco, India, Pakistan) was not reflected in the practice of the lawyers who have been interviewed.

In principle, the structure of the population of the member state should be reflected in the number of international cases handled by judges. However, not all potentially international

²One solicitor only has been interviewed in the United Kingdom. However, one of the barristers who were interviewed had made enquiries with three other solicitors prior to the interview. These solicitors all estimated the proportion of international cases they handled at about 25%.

cases are indeed treated as such by the judicature. This can already be deduced from the remarks made by French and Austrian judges quoted above. Furthermore, some lawyers candidly pointed out that judges might turn a blind eye to the potentially international character of a case, especially when the lawyers involved do not raise the point during legal proceedings. Whether such a practice is legitimate or not under the private international law rules of the member state concerned has not become clear. In Finland, judges pointed out that the majority of divorce cases are undisputed. No judge will hear these undisputed divorce cases. The person who is in Finland responsible for handling such cases, a 'trainee judge', would probably be unaware of the international element in a particular case.

Efforts to contact lawyers who often handle international cases involving large minority population groups from Africa or Asia failed. The impression is that in most member states commercial legal practice does not (yet) attempt to specialize in such cases, as members of these population groups are – rightly or wrongly - not considered commercially viable. A comment to that effect was in any case made by one of the English respondents. One of the few respondents who pointed to a structural problem with regard to minority groups from Africa or Asia was a Danish lawyer. This lawyer pointed out that first of all, most international cases in Denmark have a link to Sweden or Norway. However, within this group there was important number of cases that had to do with immigrants from Turkey who might have retained Turkish nationality or who might have obtained the Danish or Norwegian nationality. These immigrants were often involved in two types of cases. First of all, if they were married the validity of the marriage was often questionable. Often the marriage that had been concluded would be a marriage of convenience that had only been celebrated in order to obtain a residence permit. Secondly, whether they were married or not, the (unauthorised) cross-border removal of children often was an issue that led to court proceedings.

When confronted with an international case, money may indeed matter more than anything else. A German lawyer made the general comment that a lawyer who is qualified in dealing with private international matters cannot be found at discount prices. This lawyer also pointed out that the fees paid in Germany for dealing with legal aid cases were too low to attract competent lawyers, who would focus on representing private 'paying' clients. A Portuguese lawyer made a comment to similar effect with regard to legal aid cases, which in his opinion did not attract lawyers competent to deal with international cases. A Swedish lawyer also remarked that the fees paid in legal aid cases were too low for his practice. The same German lawyer further thought that money might play an even greater role in states outside the EU. In his words, a client without money would be 'verraten und verkauft' (betrayed and sold) in the United States.

B. Possible advantages of harmonisation.

The phenomenon of forum shopping

With respect to the phenomenon of 'forum shopping', several stages should be distinguished. At the initial level, one or both parties could consider to which court they should turn for adjudicating their case. The phenomenon of forum shopping may never go further than this stage. After (one of) the parties has brought his case in the court that in his consideration offers the best chance of realising his objectives, the matter may well be decided finally by this court, without it ever becoming clear that this court has been selected with a purpose. The selection of the court may have been supported by both parties, or at least been accepted by the other party. The phenomenon of forum shopping will be more in the open when more than one proceeding on the same issue has been initiated. Obviously, as long as the phenomenon of

forum shopping remains at the first stage, it will be apparent to lawyers and their clients, but not to judges.

Lawyers often remarked that the question, what forum would be the most appropriate for my client, would be considered in the initial stage, before the case was brought to court. However, a number of lawyers pointed out that under the Brussels II Regulation, it has also become necessary to bring the case to court without delay, as under Brussels II the principle applies that 'only the first strike counts'. Thus, a French lawyer explained that before Brussels II the French courts would in general hear a case that was brought before them and would disregard proceedings that had been commenced earlier before a court of another member state. Now, under Brussels II, this practice has become impossible. Judges would chiefly comment on the phenomenon of forum shopping when they had had experience with cases of *lis pendens*. An Austrian judge however, thought that the impact of Brussels II in this respect ('the run to the court') should not be overestimated. The judge pointed out that the threat of bringing the proceedings elsewhere was as much alive today as it was before Brussels II. The fact that – in the opinion of the Austrian judge -lawyers were still unaware of the impact of Brussels II also played a role.

Austrian judges also remarked that before Brussels II, the Austrian rule on *lis pendens* often did not function, as the cases that are pending in different jurisdictions would have to be truly identical. E.g. the husband first brought a petition for divorce because of breakdown of the marriage under German law in Germany, the wife would later file for divorce because of breakdown of the marriage due to the fault of the husband under Austrian law in Austria. Austrian courts have allowed the case which was brought later in Austria to go ahead, because the issue which was in dispute between parties was not the same, as the question as to the guilt to the divorce, including the possible payment of damages, still had to be decided.

An Austrian lawyer referred to a case he had been involved with recently. Two Austrian nationals lived in England, the husband filed for divorce in Austria, the wife later applied for a divorce in England. In Austria, Austrian law would have been applicable to the divorce, maintenance and property of spouses; in England English law would have governed these questions. Spouses finally agreed to divorce by mutual consent in Austria; a solution still has to be found with respect to the children residing in England.

A Belgian lawyer remarked that forum shopping remained still important for cases outside the European Union. According to the Belgian lawyer, the possibility to bring the case in several courts in several jurisdictions had diminished under Brussels II, as it rarely happened that more than one ground for jurisdiction under Brussels II was fulfilled. This remark was linked to the observation that spouses often have to wait before they could file for divorce in another member state, since the internal law of many member states requires a period of actual separation before divorce proceedings can commence. Problems with forum shopping were in the experience of the Belgian lawyer encountered notably in relation to courts in England, because of the important differences that exist between the continental jurisdictions and the common law jurisdictions.

A Belgian judge had had little experience with forum shopping. Only one recent case, concerning Swedish nationals, could be mentioned. In Belgium the spouses were litigating on the ground for divorce, in Sweden on maintenance and custody over the children.

A Danish lawyer indicated that forum shopping would often be an issue with respect to maintenance. Under Danish law, the wife would in many circumstances not have a right to

maintenance after the divorce. This situation could be contrasted with the experiences in Germany, where a wife who was working herself but had a child that was younger than 8 years old would be granted maintenance for herself. As a rule, the Danish lawyer would recommend the wife to bring proceedings outside Denmark, because of the more generous attitude to maintenance for former wives. Another aspect that the Danish lawyer mentioned was the cost of legal proceedings. Recently the lawyer had been involved in a case where proceedings in the United Kingdom had started just two days before proceedings had been introduced in Denmark. The possible cost of the proceedings in the United Kingdom was estimated at 30,000 GBP (approx. 48,000 EUR) whereas the proceedings in Denmark would cost spouses only a maximum of 10,000 DKK (approx. 1350 EUR).

The Dutch Advocate-General thought that forum shopping does occur, but not frequently. As a possible reason, the connected issues, such as maintenance and property, not the divorce itself was put forward. In his opinion, forum shopping would also require financial means of some sort and would hence not be an option for everyone.

An Irish judge explained that there was a concern in Ireland that proceedings would be brought in another member state in order to block Irish jurisdiction. Ireland has a strong tradition of family provision, and the Irish courts would extend a favourable treatment towards a deserted spouse or a child. A divorce will not be granted until the court is satisfied of the property arrangements that have been made with respect to spouses and children; also the court may amend these arrangements at any moment following the divorce (the 'sting in the tail' of the Irish divorce law, as an Irish barrister³ put it). Divorce proceedings in another member state could undermine this policy. Furthermore, under Irish law, the conditions that must be fulfilled before an application for divorce can be made are heavy; there must have been four years of separation in the previous five years before the application is made. In this context, it seems appropriate to remark that during one of the interviews in Ireland, reference was made to an opinion that is apparently advocated by a high profile Irish judge, viz., that a divorce decree granted in another member state involving Irish spouses would not be recognised in Ireland if the jurisdiction of the court of the other member state was not based on the 'domicile' (in the concept of Irish law) in that member state of one of the spouses. The remark was taken for granted during the interview, but if the opinion is indeed to be understood in the way it is has been set out here, it raises serious questions in the light of Article 17 of Brussels II.⁴

In Finland, a judge referred to a case decided many years ago. Spouses had lived in France (Finnish wife and a French husband), the husband filed a suit for divorce in France first and subsequently the wife brought a suit before the Helsinki district court. The husband argued that the Finnish courts could not deal with the case because the suit had already been filed in France, the proceedings were still pending in France and were in a rather advanced stage while the family lived in France. The Finnish court decided not to accept the case, considering the proceedings pending in France and the inappropriateness of having two decisions in the same case. According to the judge, the most important lesson of this case is the idea that pervaded all the time when the case was decided, namely that when a case concerns children the case should be dealt with at the place where the family really has lived. The judges who

³ An Irish barrister was not interviewed on the basis of the questionnaire but provided valuable background information during a conversation with one of our experts.

⁴ In a letter of 29th October 2002 to TMC Asser Instituut, Mrs Justice Catherine McGuinness (Supreme Court), to whom this interpretation had been attributed, clarified that she did not support such an opinion at all.

were interviewed could not think of other cases that were brought in two countries at once and where one of the parties expected some benefit from the court in the other country.

Finnish judges further remarked that Finnish nationals, who are married to a foreigner and have lived for a long time in another country, often petition for divorce in Finland, in view of the few requirements that Finnish law sets for the granting of a divorce.

In the experience of Finnish judges, forum shopping would occur most frequently with respect to child maintenance. Most frequently Russian and Estonian women, who have children with Finnish citizens would bring the claim for child maintenance in Finland, as under the applicable Finnish law, the maintenance that is granted by the Finnish courts is usually higher than that granted in Russia or Estonia. According to the judges, the actual problem would reside in the Finnish rules on jurisdiction, not in the applicable law (since the Finnish courts apply their own law).

The Finnish judges further conceded that with respect to Finnish nationals living abroad and married to foreigner, Finnish courts had – prior to Brussels II - been generous in assuming jurisdiction. Although the “connecting factor” for determining jurisdiction of the Finnish courts should be, according to Finnish law prior to Brussels II, habitual residence and not the nationality of a claimant, Finnish courts had sometimes accepted jurisdiction even when the claimant was a Finnish national having a habitual residence abroad.

A French judge felt that since Brussels II had entered into force, there had been few cases where jurisdiction was contested or where proceedings had been commenced elsewhere. The judge was unsure whether this was due to a wish of parties who just wanted a rapid court decision, or whether lawyers were still unfamiliar with the different options that might be available under Brussels II.

A German lawyer related of a case that had involved a German captain of industry and his German wife. In this case, the wife, who lived and worked in Germany, had moved to New York and filed for divorce when the breakdown of the marriage was unavoidable. The husband, at that time working and residing in the US, subsequently filed for divorce in Germany. In the end, the US court could be convinced that it was not the appropriate forum for this case (case dismissed on the ground of ‘forum non conveniens’) and the case was tried in Germany. The wife’s action was clearly inspired by financial considerations, in view of her initial claims in the New York court. In New York, the wife had brought an exceptionally high claim for maintenance (even in relation to the sizeable income of the husband) and with regard to property a claim had been brought for annulment of the marriage contract that the German spouses had entered into in Germany.

A German judge estimated that forum shopping was not so much a problem with respect to divorce, but much more with respect to connected matters, e.g. maintenance and property. A problem with respect to divorce will however exist in case there is a possibility to divorce under the national law of one of the spouses, whereas this option is not available under the state of habitual residence of the spouse(s). According to the German judge, problems with respect to the granting of a divorce mainly exist in cases involving Turkish people. One aspect is that the social status of a Turkish wife who lives separated from her husband is higher than that of a wife who has divorced. Another aspect is that a divorce procedure in Turkey will be cheaper than in Germany.

The rule of Brussels II on *lis pendens* was similar to the German rule before Brussels II (applicable in all international cases, cf. the case set out above that was discussed by the German lawyer) and did not pose problems. The German judge still saw problems with respect to the question as to at what moment a court has been seised of a matter. Whether in his opinion Article 11 sub article 4 of Brussels II brought an adequate solution was not made clear during the interview.

Luxembourg judges thought there was in general no financial interest for commencing proceedings in another jurisdiction. A reason for commencing proceedings in another jurisdiction would be that it would be easier to divide and liquidate property, if this was situated in that jurisdiction. A Luxembourg lawyer had had only two cases involving forum shopping, one case with Belgium, the other with Yugoslavia. The reasons for forum shopping, according to the Luxembourg lawyer, were the connected issues, not the divorce. Forum shopping would often occur when one of the spouses returned to his home country. The lawyer gave as a possible reason for forum shopping the position of a German spouse who returns on his own to Germany and finds that the Luxembourg courts will apply German law but not in the way German courts would apply their own law.

A Portuguese lawyer thought that the option of forum shopping would mainly be available for rich, affluent people, who could bear the cost involved. However, in his opinion forum shopping would not occur frequently in respect to divorce as the divorce laws of other countries would not differ much from the Portuguese law and Portuguese law would anyhow lead to an acceptable solution. The Portuguese lawyer further remarked that foreigners living in Portugal, notably of British origin, appeared to have little faith in the Portuguese courts and would prefer to have their divorce case handled in the United Kingdom.

Spanish lawyers, practising in Madrid, did not consider forum shopping as a major problem. One Spanish lawyer did not rule out that the problem would come up more often in areas of Spain frequented by wealthy foreigners, such as Marbella or Mallorca. Another Spanish lawyer remarked that as a rule couples would think it better to litigate in the country where the children resided. One example of forum shopping in a recent case was mentioned, involving US citizens, the wife living in Paris, France, the husband in the Dominican Republic. The wife's house in Paris contained a large collection of valuable paintings. The husband started proceedings in Paris, the wife in Madrid, relying on an official residence in Spain. The Spanish courts refused jurisdiction, as the domicile in Madrid was not real for jurisdiction.

In Italy judges are confronted with forum shopping. An Italian judge gave an example of a case that was decided under Brussels II. In Germany, one of the spouses had requested a German court to recognise that between spouses there was in effect a situation of '*Trennung*' (separation). In Italy, the other spouse had requested for a '*separazione*' in accordance with Italian law. Although the Italian court case had been initiated later than the German court, the Italian court decided that it had jurisdiction in accordance with Brussels II, as it considered that only the request for '*separazione*' that had been made in Italy could have an impact on the civil status ('*état civil*') of the spouses. Outside the scope of Brussels II, proceedings had been brought in Italy and in Switzerland; in Italy, the object of proceedings was separation ('*separazione*'), in Switzerland the object of proceedings was divorce. Both proceedings were allowed to continue, although the divorce that may eventually be issued in Switzerland would be entitled to recognition in Italy, notwithstanding that the waiting period of three years of '*separazione*', which is mandatory under Italian law, might not have lapsed.

An Italian judge and an Italian lawyer concurred that from the Italian perspective, the main reason for forum shopping in divorce cases rests in the Italian divorce law, which requires a minimum period of three years separation before a divorce can be granted. An Italian lawyer pointed out that in the past forum shopping mainly was an issue in relation to Latin American states, when divorce was unknown in Italian law. Following Brussels II, forum shopping now concerned courts of other EU member states, that do not require a three-year separation period. Another Italian judge pointed out that Italian spouses might have an interest in obtaining an annulment of marriage by authorities of the Roman Catholic Church. Such an annulment will be recognised in Italy under a treaty between Italy and the Holy See. In case of annulment, the parties would be treated in Italy as if they had never married.

In England, lawyers agreed that forum shopping occurred regularly. Various reasons were mentioned. One English lawyer mentioned the fear of not getting the divorce as a reason for forum shopping. Another English lawyer pointed out that many of these cases involved Irish people who used to come, and even after the introduction of divorce law in Ireland, still come to the UK to be divorced. Another case involved an Italian wife, married to a Dutchman who could not get a divorce in Italy and was divorced in England. In that case, maintenance and property could not be decided in England (jurisdiction in England refused on the ground of *forum non conveniens*) and these issues were moved to Italy.

All English lawyers were able to give examples of cases where forum shopping was driven by money (maintenance, property, financial settlements). One English lawyer pointed out that the people concerned do not think of the option of addressing the most favourable court, but lawyers will always ask the question.

A Swedish lawyer remarked that forum shopping was a fact and was always considered. The main reasons for forum shopping would be maintenance and property. With regard to property, the mutability of the matrimonial property regime in Swedish private international law posed a specific problem, which could be an incentive for forum shopping.

Measures to counter forum shopping

As to a possible solution to forum shopping, the questionnaire puts forward the solution of harmonisation of choice of law rules to end the phenomenon of forum shopping. Most respondents stuck to this problem and did not embark upon other solutions to the phenomenon. Harmonisation of private international law was clearly seen as a solution to forum shopping by German and Luxembourg judges and in France by a judge and a lawyer.

An English lawyer thought forum shopping was unacceptable and that Brussels II was invidious. The first thing that would happen under the regime of Brussels II was to get an opinion from a lawyer in the other member state, followed by a run to the court. This did not further reconciliation between spouses and would increase aggression.

An Austrian judge saw another solution. In case spouses would be given the opportunity to choose the applicable law at the time of getting married (a choice which could extend also to other issues, such as maintenance and property), the main reason for forum shopping would be eliminated. However, the Austrian judge thought that there should also be more specialization of judges, who were now often unfamiliar with applying foreign law.

A Luxembourg lawyer accepted that harmonization of choice of law rules would end forum shopping, but added that such harmonisation would not solve the problem of how to apply a foreign law.

A Belgian lawyer pointed out that in the area of parental responsibility and maintenance for children there already existed a degree of de facto approximation of choice of law in the EU. On the other hand, important differences existed with regard to property and maintenance obligations between spouses. A Belgian judge also thought that with regard to divorce, the differences between the substantive laws of the member states were not such that these would lead to forum shopping. With regard to parental responsibility, the judge thought that judges would exercise a fair amount of discretion in considering what will most serve the interest of the child. Even if the choice of law rules were unified, judges should have a wide discretion in this area. The judge was unable to comment whether property was a reason for forum shopping.

Finnish judges and a Finnish lawyer further thought that with respect to nationals of EU member states there were no serious problems of forum shopping or, generally, problems arising in connection with the applicable substantive law. Accordingly, there seem to be no substantial problems that have to be solved by unification of choice of law rules on the level of the EU. As the greatest number of family law cases involve foreign elements connected to the countries outside the EU, the solution of the problems may be found either in accommodating the rules on jurisdiction of Finnish courts or in the unification of choice of law rules on a broader scale (e.g., within the Hague Conference). In any case, the judges who have been interviewed were of the opinion that application of *lex fori* should be maintained in all cases (i.e., in cases involving citizens from EU and non-EU countries).

An Italian lawyer remarked that forum shopping should not be a reason for transformation of national laws. The transformation of national laws was, in the lawyer's words, bypassed by forum shopping. In the Italian lawyer's opinion, it would be utopian not to take into account religious and ideological influences.

Lex fori as a solution to forum shopping

The question prompted a wide range of remarks on the pros and cons of application of the *lex fori*. Not all remarks were related or limited to the effect application of the *lex fori* would have on forum shopping. Remarks on the usefulness of applying the *lex fori* were also made during other parts of the interviews, notably when dealing with legal certainty and predictability of result.

A French lawyer remarked that in many countries the application of foreign law is unknown. It may be known in continental Europe, but the French lawyer had had experience with highly respected lawyers from other parts of the world who did not understand the issue at all. A global unification of choice of law rules would mean that the rest of the world was given a European solution that did not fit in with the tradition of other legal systems. The question was much more whether (in Europe) the system of conflicts rules should subsist. For certain issues, notably child protection and the grounds for divorce, there was no need for a conflicts rule. The situation would be different with regard to money matters.

The French lawyer also pointed out that one should be aware of the different issues that will come up during a divorce. First of all, the grounds for divorce, secondly, whether the divorce gives a right to financial compensation between one spouse to the other, because of the dissolution of the marriage (known under various names, e.g., '*pension alimentaire*', '*prestation compensatoire*'), thirdly, what will happen to the children, finally, the liquidation and distribution of assets. In France, the second issue, the right to compensation is linked to the granting of divorce, a decision has to be taken when the divorce is granted, whereas

liquidation can be decided at a later stage. The French lawyer felt harmonization of choice of law rules in the EU might help, but that it would only be possible for divorce, not for separation or annulment of marriage, in view of the important differences between the laws of the member states. With respect to parental responsibility the problems would be much less. The French lawyer did nevertheless point to the political debate concerning parental *authority* in France, which focuses on the question whether children can be imprisoned and whether parents can be sentenced for offences committed by their children. More problematic however, to the opinion of the French lawyer, was the important differences that exist within Europe on the position of women. In France, a divorcée is expected to go to work and has only limited rights to maintenance after the divorce. In other member states, e.g. Germany and England, wives were not expected to work when they had to raise a family and this would be taken into account when granting maintenance.

According to the French lawyer, harmonisation of choice of law rules would in general counter the phenomenon of forum shopping. In a certain fashion, the Hague Convention on child abduction of 1980 had already undermined the conflicts of laws and of jurisdiction that existed before. Previously, courts in various states, e.g. France and Germany, would be prepared to take a decision with respect to parental authority, founding their jurisdiction on the nationality of the child. This would lead to a situation where both the court of the habitual residence and the court of the nationality of the child had taken a decision on parental responsibility. Under the influence of the Hague Abduction Convention, the decision of the court of the habitual residence of the child had become the dominating decision. The French lawyer further remarked that 'in her dreams' the Hague Abduction Convention would be turned into a regulation, but with an important modification of Article 16 of the Hague Abduction Convention. The court of habitual residence should be the court with jurisdiction to decide on parental responsibility. The reality that was ill understood by academic lawyers was that parents would make use of their children to find a court in another country.

The Dutch Advocate-General thought that the solution should be found in rules on international procedure (formal private international law), not in choice of law rules. Finnish respondents, who favoured application of the *lex fori*, put forward the same view; the solution should come from clear rules on jurisdiction.

Other respondents recognized that application of the *lex fori*, without any other measures, will not end the phenomenon of forum shopping. This point was clearly expressed by an English lawyer who thought that a uniform choice of law rule based on application of the *lex fori* would not make sense, it would mean going back to where you started. However, this English lawyer saw other approaches that would be better than harmonisation of choice of law rules. The lawyer would prefer application of the forum non conveniens approach and a hierarchy of the rules on jurisdiction (nationality first, followed by residence). Therefore, like the Finnish and Dutch respondents, a solution was seen in rules of international procedural law.

An Irish judge thought that harmonization of choice of law rules would prevent forum shopping but that the harmonization should also extend to the remedies.

A German judge thought that application of the *lex fori* would lead to a run to the court. Also, the laziness of a judge ('Faulheit des Richters') unwilling to dig into the peculiarities of a foreign legal system should not be a reason to apply the *lex fori*. What matters is the interest of the person who is seeking a decision from the court ('Interesse des Rechtssuchers'), independent of at what court the case is brought. To satisfy foreign parties it was important that it could be explained to them that, e.g., the result of the proceedings followed from their national law that had been applied to the case.

An Italian judge and an Italian lawyer again referred to the main reason for forum shopping from the Italian perspective, the minimum three year period of waiting before a divorce can be granted during the 'separazione'.⁵ In case the choice of law rules were unified, it should not make a difference whether divorce proceedings between a Dutch-Italian couple were brought in Italy or in the Netherlands. An Italian judge further said that application of the *lex fori* should be avoided. Instead, the judge felt it should be possible to come to an agreement to certain basic principles on the substantive level with the EU, which would allay the debate between applying the *lex fori* or a (foreign) law designated by choice-of-law rules. On the other hand, another Italian lawyer thought that the *lex fori* approach would be the most rational approach because the court will have deeper and better knowledge of the law of the state the court belongs to.

[An Italian judge and an Italian lawyer considered that the most serious problems existed in relation to, mainly, Arab or Islamic countries. Two issues were brought forward. First of all, there was a fear that children would not return from such countries, e.g. while visitation rights were being enforced. Secondly, the celebration of marriages involving nationals of Islamic countries posed a problem. The necessary certificate from the authorities of the home state, showing that there were no objections against the marriage, do not issue such a certificate when the intended marriage is with a foreign spouse who is not of Islamic religion.]

A Luxembourg lawyer remarked that in case parties would not require application of foreign law, the lawyer's experience was that the Luxembourg courts would apply Luxembourg law.

A German lawyer thought application of the *lex fori* was 'problematic'. He noted, however, that in practice someone who turns to the jurisdiction of habitual residence runs the risk that the law of that jurisdiction is applied.

A Swedish lawyer thought that harmonization would be unfeasible, as each state would consider its own choice of law system better than that of other states. Also, the slightest difference in application of such harmonized choice of law rules would in the opinion of the Swedish lawyer be a reason for filing in another state.

A Portuguese lawyer thought that problems existed mainly with regard to matrimonial property and maintenance. Also, a problem existed with respect to the various concepts of matrimonial property, especially the trust of the common law. Harmonization of choice of law rules would not solve this; the solution would be harmonization of the substantive law. The Portuguese respondent also felt that in case the choice of law rules were nevertheless harmonised, application of the *lex fori* should be preferred. The *lex fori* did not pose problems as far as application was concerned and would also promote integration as, in his opinion, people have to submit to the laws of the state where they lived.

The Swedish professor also felt that application of the *lex fori* was acceptable, as it would be predictable for the parties.

⁵ Another Italian judge pointed out that it is not unusual in practice for the 'separazione' stage to last much longer than three years.

Legal certainty and predictability of result

An Austrian lawyer thought unification of choice of law rules would increase legal certainty and predictability of result. The lawyer was however not convinced that application of the *lex fori* would be the best solution and preferred the usual multilateral choice of law rules.

An Austrian judge remarked that the application of foreign law often posed organizational problems. E.g. when Irish law had to be applied, the court and the Austrian ministry of Justice were unable to provide information on the content of Irish law, information was eventually obtained through the Austrian embassy in Dublin. Another Austrian judge thought that harmonisation of choice of law rules was important to further legal certainty and predictability of result. Such harmonisation should offer spouses the option to designate the applicable law that would govern certain issues, such as the matrimonial property regime and possibly the divorce law. Especially with respect to immovable property, there was a clear need for more predictability of result. The wish to keep immovable property within the family often led to fierce disputes in Austrian divorce cases

An English lawyer pointed out that in England there was no choice of law rule with respect to dissolution of marriage and English law would be applied. The lawyer further doubted that the English court usually dealing with divorce cases, the County Court, would be able to apply foreign law. The case would probably be directed to a court of a higher level, e.g. to the High Court. As yet, there were no difficulties with legal certainty and predictability in respect of marriage dissolution. The lawyer further wondered whether it would be socially desirable to be living as a divorced person in a EU member state on grounds other than those provided by that state. Unification of choice of law rules would be a risky business, as it would lead to disputes as to what the applicable law says. Application of conflicts rules in family law was a recent phenomenon and was difficult to deal with. An example of a situation in which the English courts would apply foreign law would be a child abduction case. When a mother brought a child from Spain to the United Kingdom, the question whether the father who remained in Spain had custody over the child would have to be answered in accordance with Spanish law (including the Spanish private international law rules). Other examples of application of foreign law were found in status decisions (recognition of a marriage or of an adoption).

Another English lawyer (a solicitor) saw as a problem of a system of choice of law rules (such as known in continental EU member states) that a court is unable to genuinely apply a foreign law. Also, the question arises as to how the foreign law, e.g. English law, should be interpreted by a court outside England and what influence parties could exercise thereon. This English lawyer also pointed to the sophisticated system of discovery and disclosure in English procedure, which was useful in, e.g., locating the assets of parties and which is unknown in continental jurisdictions. Similar problems existed with respect to trusts. Trusts were considered an asset in England, while continental courts, in the experience of the English solicitor, had disregarded property in trust. Continental courts would perhaps apply English law, but would not demand full and frank disclosure and would disregard or misunderstand the meaning of property in trust. The English lawyer was prepared to accept a system of multilateral choice of law rules but was afraid these would not lead to a fair and just result.

Another fundamental issue brought up by the English solicitor was that on the substantive level, there appeared to be common ground as to the right principles that should be applied to the property of spouses in case of breakdown of a marriage. The English courts were in his opinion now getting close to an acceptable solution, cf. the *White v. White* decision. A natural concept of a fair answer for settlement would now be in reach of English law. There seemed a

potential for a system of settlement that could be accepted very broadly (also outside the UK), on the basis of sharing the capital gained during the marriage.

According to the solicitor, it was sometimes difficult to forecast what law a foreign court would apply. Other lawyers in England who have been interviewed, barristers, had never encountered problems in that respect. The solicitor wondered whether a solution would be for a foreign court to redirect the case to English courts, if English law were applicable.

Yet another English lawyer referred to a case in which the French courts had applied English law to the property of spouses but had not considered the most valuable asset of one of the spouses, a house in trust located in London. The effect that the trust would have under English law was not recognized.

A Belgian judge had little experience with the application of private international law by foreign courts. With respect to the application of choice of law rules in Belgium, the judge remarked that it was clear what law would govern the divorce. However, with respect to maintenance following divorce, the Belgian rule was unclear. A case is however now pending before the Belgian Cour de Cassation and may lead to more certainty. The judge was unable to make any comments on the application of substantive foreign law by the Belgian courts, as this scarcely happened in practice. From the perspective of Belgian private international law, legal certainty would be the most important reason for harmonisation of private international law. The judge emphasized the lack of legal certainty with regard to maintenance following divorce. With respect to possible connecting factors for an objective choice of law rule, the Belgian judge felt that domicile (habitual residence) was unsuitable, as parties can easily change their residence, which would influence the result. Also, the concepts, domicile or habitual residence, are variously interpreted. The judge also rejected the national law as a connecting factor, as it was rather easy to acquire Belgian nationality. The last common domicile (habitual residence) would be an option for divorce cases. As far as legal certainty and predictability of result are concerned, the *lex fori* would be preferable. However, the *lex fori* is however often deemed to be a harsh rule that has insufficient eye for the peculiarities of the legal relation in question.

A Belgian lawyer had problems with legal certainty and predictability of result in the application of Belgian private international law. Belgium had ratified few Hague Conventions and except for divorce (a law dating from 1960) there was no legislation on choice of law rules for family matters. With regard to parental responsibility, most problems in practice arose when parents had divorced outside Belgium and were now living in Belgium. Jurisdiction and the applicable law would be a problem. With respect to maintenance between spouses after divorce there was no clear rule. Also, the matrimonial property regime raised problems, even if the divorce was granted in Belgium. The law of the first domicile of spouses would be applicable, whereas in practice the divorce would often be decided at the court of the last domicile of spouses. The distribution of property between spouses would in all probability be subject to Belgian law, if the divorce was granted in Belgium. Problems would come up in the distribution phase, if the first domicile of spouses was in Teheran, Iran, and the main asset was a house in France, should a Belgian notary be nominated to handle the distribution of property?

The Belgian lawyer sometimes encountered problems with the substantive law of other states. Problems chiefly occurred with enforcement of decisions. In Belgium, in practice a lawyer will have to prove the content of the foreign law, even though in theory a Belgian judge also has to find out the content of (the applicable) foreign law. Sometimes a court procedure will turn on the content of the applicable foreign law (e.g. Texan law).

The Belgian lawyer was not convinced of the feasibility of harmonization of choice of law rules. To the lawyer's impression, and speaking from the vantage point of a country that in

(legal) culture is often subject to French and Dutch influences, but also to those of other member states, the cultural differences would be too great. However, harmonization of choice of law rules (not substantive law), although difficult to conceive, was considered important and desirable.

In France, a judge remarked that harmonised choice of law rules should be rather strict and should not leave too much room for interpretation. In case a set of rules is well defined and does not leave too much scope for interpretation, it will be easier for a judge to apply these rules. The application of the *lex fori*, although easier for the judge, was probably not the most just solution. An example of a set of rules that functioned rather well because of

In Finland, judges and lawyer felt that *lex fori* would serve legal certainty and predictability of result. Application of foreign law was undesirable.

A French judge remarked that in relation to countries outside the European Union, it was difficult to predict the result. The judge thought that parties often suspected that a judge would favour nationals of his own country. Although application of the *lex fori* would ease the task of the judge, the French judge wondered whether the rule would render most justice.

A French lawyer pointed out that not all lawyers know what they are doing when handling international cases. The French lawyer was not proud of it, but in practice she (and her client) had profited from the fact that the lawyer representing the other party (spouse) had not seen the implications of the French private international law rules.

A German judge thought that lawyers abroad often misguided parties. In his experience, there had been many cases in which a foreign lawyer had given bad advice (e.g. in abduction cases). In other countries there should be (improved) capacity to predict ('Vorhersehbarkeit') what the application of a foreign law will entail. There is a fair chance that a German court will apply a foreign law reasonably well. On the other hand, a German couple that requests a divorce in, e.g., Italy, should have the opportunity to be divorced in proper accordance with German law.

The German judge recognised that application of the *lex fori* would lead to predictability of result. However, the proper application of a foreign law on the basis of multilateral choice of law rules also means that there is predictability of result.

A German lawyer thought that in Germany the result was 'relatively speaking' predictable. In England the situation was different, in view of the great discretion of the judge. In Germany, every eurocent would count, which was often detrimental for the rich party. The German lawyer had difficulties in pronouncing himself on the inherent advantage or disadvantage of the *lex fori* rule. In his own practice, the considerable number of international contacts was a clear advantage when a foreign law was applicable.

In Ireland, few comments were made to the issue of legal certainty and predictability of result. One judge did remark that the application of the 'domicile' rule was complicated and unpredictable.

In Italy, one judge was sceptic about legal certainty, which would be impossible to achieve (and that was in itself not something to be very sorry about). Another Italian judge and an Italian lawyer felt on the other that legal certainty and predictability would be served by uniform choice of law rules. For sure, application of the *lex fori* would not be the best choice.

Although it is true that a court will know its own law best, application of the *lex fori* could lead to discrimination.

A Luxembourg lawyer had no problems in predicting what (foreign) law would be applied in Luxembourg courts. In some circumstances, the lawyer would be aware of advantages that might exist if a proceeding was brought in another country (e.g. a French wife divorcing her Luxembourg husband would have an interest in bringing proceedings in France, as in Luxembourg there would not be a claim for compensation or for settlement of pension rights). Courts and lawyers would feel more comfortable with application of the *lex fori*, but this would not necessarily do justice to the interests of parties.

The Dutch Advocate -General acknowledged that increasing legal certainty and predictability of result was an argument for harmonisation of choice of law rules. From the Netherlands perspective, however, the Advocate-General feared that such harmonised rules would probably be less attractive than the existing Netherlands choice of law rules. The current choice-of-law rule in the Netherlands is based on the idea that divorce must be favoured (the 'favor divortii') and in practice frequently leads to application of Netherlands law. In the future, it is expected that new legislation will provide for a choice of law rule for divorce that will always require application of the *lex fori*. The concept of 'favor divortii' in Netherlands private international law is linked to notions of internal (domestic) Netherlands civil law, which favours the granting of a divorce. Such a link can also be found in other private international law systems. In general, in matters that are at issue here, such as divorce, children and maintenance, the national private international law rules tend to reflect the opinions found in internal, domestic law and thus favour a solution applying the *lex fori*, or at least a solution that mirrors the approach of the domestic law. In case choice of law rules are harmonised within the EU, a harmonised rule that leads to application of the *lex fori*, although not impossible, could hardly be considered a truly harmonised rule. The solution to the problem would fully depend on which court has jurisdiction. In case a 'truly' harmonised choice of law rule were adopted in the EU, it seems probable that such a rule would not be as favourable to the granting of a divorce as the present and future rules of Netherlands private international law. Therefore, in all probability, Netherlands private international would lose in case of harmonisation of choice of law rules for matters such as divorce. Legal certainty and predictability of result is important, but the solution is not to be found in harmonisation of choice of law rules. The trend on the national level towards choice of law rules that favour a certain solution is also witnessed also in other areas, e.g. paternity. This trend probably does not tie in very well with harmonisation or unification of choice of law rules.

A Netherlands judge remarked that harmonisation of choice of law rules would probably not enhance legal certainty and predictability of result. Legal certainty and predictability of result would be better served by unification of choice of law rules, e.g., *lex domicili*, than by the application of *lex fori*.

A Spanish lawyer thought that presently legal certainty was not assured and that a system was necessary to prevent forum shopping. The ideal would be that only one court has jurisdiction, not two or three. The application of the *lex fori* would 'simplify' legal certainty. Legal certainty would however also be improved if there was a system that gave access to the laws of other member states. Another Spanish lawyer remarked that problems existed in relation to common law jurisdictions. In the Spanish courts, when a foreign law is applicable, the lawyer must demonstrate the court what the foreign law says. In case French law is applicable, it will already be difficult but still possible to explain to the court information that has to be obtained

on French law from, e.g., the French consulate in Madrid. However, when, e.g., English law is applicable, it is almost impossible to explain rules that rely on precedent and are not laid down in legislation and that differ to a great extent from the continental legal system (e.g. by not having the concept of matrimonial property regime). Another facet that is difficult for a Spanish court to understand is the discretionary power that under English law is available to the court.

A Swedish lawyer felt that the question, what law is applicable, in general poses less problems than jurisdiction. In his opinion, problems did however exist in relation to England, as the English courts would always apply English law. The Swedish professor remarked that predictability is important for issues such as matrimonial property. Unification in that area was uncontroversial. In case there would not be predictability in the area of matrimonial property, it would be a restriction to move from one country to another.

A Portuguese lawyer explained that in divorce and legal separation foreign law will be applied if both spouses have a common foreign national law. Portuguese judges are engaged to apply foreign law, but will ask the lawyer for a print of the civil code from the foreign law. Especially application of English law is difficult. Most difficulties experienced by the Portuguese respondent arose in matrimonial cases.

Portuguese lawyers thought that legal certainty and predictability of result would be served better by harmonisation of the substantive law. In case of harmonisation of choice of law rules, application of the *lex fori* would be the best solution. In case someone decides to go and live in another country then he or she will have to accept that the law of that country will be applicable. Application of the *lex fori* would also further integration, people submit to the law of the country where they live and would alleviate the task of lawyers.

Free movement of persons and the smooth functioning of the internal market

In Denmark, a lawyer pointed to the long experience that the Scandinavian countries have had with free movement of persons within Scandinavia. There is some relations between free movement on the one hand and harmonisation of choice of law rules on the other, and the influences between the two work in both directions.

In Sweden, a lawyer explained that the free movement of persons did pose problems that were often overlooked. Employers tend to ignore the problems that may face families of expatriates, e.g., in case a Swedish company proposes to one of its employees to go and work in another EU member state. The employer would prefer not to inform the employee and his family of the possible consequences this could have for the legal relations within the family. Some problems were typical of Swedish private international law, as the matrimonial property regime of a Swedish couple that leaves Sweden to live in Greece, will according to Swedish private international law after a certain period be governed by Greek law. The Swedish lawyer also criticized the system of the Hague Abduction Convention. Taking as an example the Swedish couple that moves to Greece, the system of the Abduction Convention often carries unpleasant surprises. It is not unusual that the marriage will be under pressure after the family has moved abroad for the work of one of the spouses. It is also not unusual that in case the marriage breaks down, the spouse who did not move abroad at the request of an employer, usually the wife, returns to Sweden. If the wife would wish return to Sweden accompanied by the children, the husband, who probably will want to remain in Greece for his career, can make use of Hague Abduction Convention to demand that the children are returned to Greece or are prevented from leaving Greece with their mother. From that moment on, the husband will be in a much stronger position than wife as far as the custody over the children is

concerned. The Swedish lawyer further pointed out that Swedish courts do not place restrictions on the movement of persons who have custody over children. Sometimes there will be a limitation because of visiting rights.

A Swedish law professor remarked that Swedish citizens are aware that foreign courts are less willing to grant a divorce than Swedish courts. Few people calculate beforehand as to what a foreign court will decide, unless a great deal of money is involved.

A Spanish lawyer also immediately linked the problem of free movement of persons to custody of children. In the lawyer's view, there was still much uncertainty with regard to parental responsibility, as some member states assume that there are geographical limits to the parental responsibility. Thus, when following the divorce custody has been awarded to one of the parents, the custody decree may mean that such a parent is not be free to move with the child under his custody from one member state to another member state. The law and attitude of the member states differ in this respect. In Spain, there were many problems concerning the movement of children to another country. A current case the lawyer was dealing with involved a German mother living in Spain who ran into problems when, following the divorce, she wanted to return to Germany with her children. In an older case, a Dutch mother had been granted custody by the Spanish courts, but had been forced to stay in Spain to ensure that the father could exercise his visiting rights. In the same case, a psychological report had demonstrated that the society in the Netherlands was very different from that in Spain and that this could be harmful for the child.

Another Spanish lawyer remarked the free movement of persons would be a reason for harmonisation or unification. In a case that involved a non-member state, a situation had now come up where one parent had custody according to the Spanish courts and the other parents had custody according to the Argentine courts. Problems often arose with visiting rights, but solutions were often found in function of the interest of the child. Recourse to a court was not always necessary.

In the discussion with a French lawyer, reference was made to French cases, in which English parents, who had obtained custody after divorce under an English court decision, had moved to France. In these cases, the custody decisions of the English courts entailed that the other parent to whom custody had not been granted, could nevertheless veto the move of the child to another country. The French lawyer remarked that in her consideration such a restriction would not be contrary to the free movement of persons as a minor was involved. Nevertheless, the French lawyer was worried about the future in this respect. Following a divorce, parents would more and more wish to move within Europe, in order to pursue their career. The traditional attitude of the courts appeared to be that the child should remain in its social environment and not follow the parent who was taking up employment elsewhere. In case parents had obtained joint custody following the divorce, the parent who would want to make use of the right to circulate in the EU would probably be deprived of the custody over the child, although society demands employees more and more to be mobile. All over the world, judges think that movement of the child is detrimental, even in the EU few judges accept that it might be good for a child to live in another member state for a couple of years. A judge would hardly consider the position that in case spouses had never divorced, the family would at some stage have moved to another country anyway to further the career of (one of) the parents. The French lawyer further thought that even if the substantive law in this area was harmonised or unified, this would not end all problems. What the law says is one problem, the way of applying it is another. Cases always turn on 'the interest of the child'. The interest of a child was an empty bag into which everyone places his own culture.

A French judge first remarked that in general there were more and more couples that crossed borders. With respect to distribution of matrimonial property, there were problems because it was almost impossible to obtain information on property located abroad. Fortunes could be hidden in a bank account, sometimes there would be some proof of this but the actual number of the accounts could remain unknown. There should be more powers to investigate this in a civil procedure, at the moment one was in the 'brouillard total'. With respect to custody, when parents kept joint custody after the divorce one parent could be prevented by the other parent to take the child from France to another country. When one of the parents had sole custody, the other parent might apply for revision of the custody decision in case the parent who had sole custody wanted to leave France. This kind of case often posed a dilemma for the judge. Certainly it would make a big difference whether the child would be taken from France to Belgium or from France to Australia. Nevertheless, even within Europe such a case would be difficult to decide, because of the emotional dimension.

A Belgian judge had had no experience with cases where the free movement of persons led to a conflict with private international law rules. A Belgian lawyer thought that free movement was not a problem for spouses, but was a problem in respect of children. The Belgian lawyer often had to deal with relocation cases, exercising visiting rights proved problematic.

The Dutch Advocate-General had no practical experience, but thought that the free movement of goods was better served with a liberal rule on recognition. The solution should be found in formal private international law, not in choice of law rules.

A Netherlands judge had experience in connection with a child custody, e.g., when a parent, that has been given a custody of a child, wants to move to another country. The free movement of persons and the smooth functioning of the internal market would be better served by the application of a choice of law rule other than *lex fori* (such as, *lex domicilii* of the spouse or of a child in cases involving custody). In other words, *lex fori* should not be a prevailing connecting factor, but should rather be of a supplementary character.

Portuguese lawyers did not think that the absence of harmonisation of private international law rules influenced the free movement of persons and thought that the free movement of persons and the functioning of the internal market should not be a reason for harmonisation or unification of choice of law rules. The problems should be solved at another level, especially on the level of social security.

Finnish judges and lawyer had no experience in this respect, but thought the free movement of goods and the smooth functioning of the internal market would be better served by application of the *lex fori*.

An English lawyer thought there would not be a problem, as far as the relation between free movement of persons and choice of law was concerned. As far as there would be problems, the solution should come from rules on recognition, not from choice of law rules. An example given was the Dutch homosexual marriage. It would be impossible to have a European Union where status would differ from one member state to the other. Another example of a situation where the solution depended on rules of recognition was a case under the 1980 Luxembourg Convention in which French grandparents had sought to enforce visiting rights to their grandchild under a French contact order. Yet another example where the solution was to be found in recognition was the so-called 'registered partnership' found in certain member states. Another English lawyer had no practical experience, but acknowledged that the free movement meant that the international dimension came in more and more.

An Irish judge remarked that custody orders tended to be rather detailed and that it would often be included in the custody order that the parent with custody would need to ask permission of the court to go and live with the child in another country. The Irish court would consider the interest of the child paramount and would take a pragmatic approach.

Another Irish judge mentioned the following case. Unmarried parents had a five-year old child. The mother had custody over the child. The child was attending primary school in Ireland, the paternal grandmother was child-minder during part of the working day, enabling the father to see his child everyday in his mother's home. The mother accepted a job in Strasbourg, France, and was going to move the child there to live there (without applying to the court for leave to do so). The father applied for a court order, the judge decided that the child should not move until the end of the school term. The mother appealed, the appeal court decided that the mother could go straight away, but the child should go back to Ireland every three months in order to maintain the access rights of the father. The judge remarked that there had been other cases where parents had been prevented to go and live abroad. The judge further remarked that the attitude of the Irish courts is influenced by American cases, more than by English cases. Irish and US court decisions had in common that they were influenced by a constitution.

Italian judges found it difficult to answer the questions on free movement and the internal market. An Italian lawyer thought the principle of free movement should prevail over the principle of custody. The parent with custody should not be 'taken prisoner'. An Italian judge did not agree with this point of view and particularly stressed the problems that such an approach would have in relation to countries outside the EU, notably Islamic countries. The Italian judge referred to a number of recent cases in which visiting rights and movement to another country had been at issue. In one case an American mother had been granted custody in Italy and wanted to move back to the US. The Italian court had allowed the mother to return to the US, but had tried to make sure that the visiting rights of the other parent would be respected. In another case, the parents had agreed that one child would remain with the mother in Italy, the other child would remain with the father who would take the child to Kenya. The Italian court had allowed this agreement, but now it had turned out that the child in Kenya had no contact anymore with the father; the Italian court has granted custody to the mother.

The Italian judge thought that with respect to children the principle of stability was paramount. A child that is raised 'in the same house', will suffer less damage than a child that is moved to other surroundings. The principle of stability was in danger when freedom of movement was granted.

Another Italian lawyer mentioned the following case. Spouses of Italian and Peruvian nationality live in Belgium when the marriage breaks down. The wife prefers to proceed for divorce in Belgium because Belgian law provides for divorce by fault in case of adultery without the need for a previous separation and allows for a speedy and easy acquisition of proof of the adultery. In order to commence proceedings in Belgium, the wife is compelled to go on living in Belgium, although her family lives in Italy, she has a house in Italy and she has been offered a good job in Italy. The husband would prefer that proceedings take place in Italy, because Italian law is more favourable to (adulterous) husbands, since Italian law requires the previous separation. Also, in Italy it takes longer to acquire proof of the adultery and adultery is less relevant for the courts when it concerns husbands.

A German judge had no experience with cases where private international law rules were in conflict with free movement of persons. Neither did a Luxembourg lawyer see problems in connection with free movement.

A Greek lawyer had had no experience with cases where free movement of persons or the smooth functioning of the internal market played a role. Unification of choice of law rules in respect of marriage contracts and divorce agreements may have a beneficial effect on the free movement. Presently, there would be too many restrictions on the contents of such agreements and harmonisation or unification could remedy the situation. Furthermore, the effect of a general unification or harmonisation might be that the public policy will be applied more restrictively, i.e. that the exception of the public policy will be less influenced by concepts of the national law of the court. Harmonisation or unification should not lead to a rule that refers to the *lex fori*. A rule should be developed that refers to the law of the closest connection but that is also adaptable to the circumstances of the case.

An Austrian lawyer pointed out several cases in which free movement of persons had clearly made the proceedings more difficult, without there being a conflict between the right of free movement and the application of choice of law rules. The most exceptional case involved a Frenchwoman who, while living in the UK, had married an Austrian husband. The couple moved to Portugal, where the husband got involved with another woman. The Frenchwoman started divorce proceedings in Portugal and she herself moved to France. The divorce proceedings in Portugal were struck because of immunity of jurisdiction, the husband went to live in Austria and filed for divorce. The Frenchwoman, living in France, received a writ ('Klage') in German, a language she did not understand and replied in English that proceedings were still pending in Portugal. The Austrian court answered in German, the wife had meanwhile moved again within France and never received following court documents that should have been served upon her. Finally, service of process took place through an 'agent for service of process' in Austria.

An Austrian judge remarked that a parent who had been granted custody had always been considered free to leave Austria. Only in exceptional circumstances would custody be taken from the parent. Return to the country of origin would not be an exceptional circumstance. However, in case the child was integrated into Austrian society, the courts might have a different view of the case. Another judge pointed out that the freedom of movement would be different when parents had been granted joint custody following the divorce, although the child would live in the house of one of the parents. In that case parents would have to agree that one parent would move abroad with the other parent. However, joint custody after divorce was the exception, not the normal rule.

In connection with the freedom of movement, the Austrian judge related of a remarkable case that had taken place less than two years ago. The father, living with the child in Vienna, had had custody since long. The mother lived in Germany, near Munich, not far from the Austrian border. The mother obtained a decision from a German court saying that the father was no longer authorised to decide where the child would live. When the child went to Germany to visit the mother in Germany in accordance with the regular arrangement that had been established between parents, the mother refused to return the child, relying on the decision from the German court. In Austria, proceedings were started under the Hague Abduction Convention. It took months before the child was returned to Austria.

Austrian judges doubted that homosexual spouses who had married in the Netherlands and who moved to Austria would be able to start divorce proceedings. One judge thought that

such a marriage would not be an obstacle to the celebration of a heterosexual marriage in Austria.

C. Possible effects of harmonisation

Increase and complication of proceedings

A French lawyer referred as a general example to a case where the French or the English courts would have jurisdiction. In a standard case, where the husband earns the money and the wife looks after the home, the wife may have a benefit by proceeding in France because of the 'prestation compensatoire' that is available under French law. On the other hand, the wife could also benefit from proceedings in England following the *White v. White* decision, that grants her a substantial part of the property accumulated during marriage. The problem with the new regulation Brussels II is that a lawyer must now be aware what direction the case would take if proceedings were initiated in another member state. From the French perspective, Brussels II was a revolution, because there was no longer the possibility to start proceeding in France after proceedings had commenced elsewhere. The question is now which party will knock on the judge's door first. Another consequence is that there is also no room any more for negotiation or mediation between spouses, the case must be brought to court quickly. This does not fit in very well with the legal tradition in some member states, e.g. England, where 90% of the divorces are negotiated. Another big problem was that most lawyers do not have knowledge of the content of legal systems of other member states. Access to information should be improved, e.g. with respect to the financial consequences.

The French lawyer further remarked that her practice did not handle legal aid cases, with the exception of child abduction cases. These cases would always demand a lot of time, in the region of 100 hours, time that was not covered at all by the money paid under legal aid.

A further problem that was not covered by Brussel II was encountered in cases concerning common law jurisdictions. The English courts may have jurisdiction over the divorce and the children, but not with respect to property, e.g. when the property is situated in France. The English court may in equity render a decision in respect of property, but will send the case to the French courts for the liquidation will have to take place in France.

The French lawyer finally remarked that the application of foreign law complicates cases. A regulation on choice of law rules was one thing, application of foreign law another thing. Although French courts were beginning to apply foreign law, the lawyer was rather cynic on the way this was carried out. An example was given of a case that involved US law. An American client had a child with a French woman. The father did not know that in France he would have to recognize the child at the mayor's office. The child was born in France while the father was in the USA. The father came to France and took the mother and child with him to Atlanta, Georgia, where the unmarried couple had a second child. The mother decided she had seen enough of Atlanta and returned to France, taking the children with her. In Atlanta apparently no lawyer is familiar with the Hague Abduction Convention, that could have been invoked by the father. After three months waiting the father gets angry and goes to France for the Christmas holiday. The mother says he can have the children for a day and the father takes the children back to the USA. The mother goes to the French police and deposes a criminal complaint for kidnapping. Under a French/US convention, an international warrant is drawn up. Fifty armed US marshals turn up at the father's house when he is playing with his children. The father is put in prison for extradition to France. At this point the French lawyer gets involved. In the French courts the lawyer asks how this excessive display of force could have been used, considering the father is the legal parent of the children. The French court disagree that the father is the legal parent, as under Georgian law the subsequent marriage of

parents only legitimises the child when the father has recognised the child. As the father has never recognised the child in France, the French courts think that he cannot be the father. However, according to Georgian case-law a father also recognises the child when he conducts himself as the father of the child. The French court did look for the Georgian legislation on paternity but never examined the concept of recognition of children under Georgian case-law and the impact that may have had in this case. Presently, for obtaining information on foreign law, use can be made of French 'magistrats de liaison' abroad, however such magistrates would generally look for legislation but not for case law. Perhaps within Europe a database with identical questions that would be updated regularly would help to solve the problem of obtaining information on the law other member states. Judges would be able to consult the database and would know what, e.g., the applicable Spanish law would say. The lawyer further remarked that within her own profession, a large gap existed between commercial lawyers and family lawyers. Commercial lawyers had 'opened up' but not so in family law, where European lawyers still made terrible errors.

A Belgian judge explained that international proceedings were getting complicated as a consequence of the non-harmonisation of private international law rules. A clear example was a recent divorce case that the judge had handled involving Swedish spouses. During the proceedings in Belgium, one spouse had started proceedings in Sweden with respect to maintenance and custody, partly because of advantages that would be available under Swedish private international law. The proceedings led to important delay of proceedings in Belgium. As a rule, Belgian courts will apply Belgian law to custody matters. Maintenance is traditionally linked to the divorce, because of the rule on fault of one of the spouses in domestic divorce law. The Belgian judge had also encountered many cases where parents were disputing the custody of their children in various countries. Such proceedings could not really be considered as examples of forum shopping. The reason that proceedings are started in various countries is that judges have different opinions as to what is to be understood by 'the interest of the child'. This also leads to further complications and delay of proceedings. Harmonisation or unification would neither have a positive nor a negative effect with respect to issues such as the complicated nature or delay of proceedings. Also, even in case such harmonisation or unification was achieved at the level of choice of law rules, this would not lead to a uniform solution of the problem what action is in 'the best interest of the child'. The only solution would be to introduce uniform rules on jurisdiction in custody matters. Nevertheless, from the perspective of Belgian private international law, that did not contain clear rules for these issues, harmonisation or unification of choice of law rules would be desirable. Such rules should not adopt the blunt rule of the *lex fori*.

A Belgian lawyer considered obtaining information on the applicable law as the main problem. More information on the content of foreign law was desirable, e.g. a website with reliable information, where the source could be verified.

A German judge did not refer to specific problems he had encountered. The judge remarked that harmonisation or unification of choice of law rules would increase the predictability of result in legal proceedings. The judge refuted the suggestion that application of the *lex fori* would make legal proceedings less complicated. A judge who has experience in dealing with foreign law is able to decide according to the foreign law. Knowledge of judges should be concentrated, not every judge should be in a position that he may also have to deal with international cases.

A Spanish lawyer, referring to the extent of complication of legal proceedings, explained that in Spanish courts international divorce proceedings were most of the time subject to Spanish

law. Spanish law entails that a period of separation is necessary before the divorce can be granted. In case the national law of spouses would allow to divorce forthwith (e.g. as is the case in the Netherlands), the Spanish courts would probably not allow this. In a recent case, spouses of Swedish and Ukrainian origin were unable to divorce straightaway and had to live separated first. Complications also arise with respect to Islamic countries, e.g. Iran, where the wife has no position at all. In such cases Spanish courts would apply the public policy exception.

Another Spanish lawyer pointed out that in Spain special family courts have been created in 1981. These courts only exist in the big Spanish towns and their jurisdiction does not extend outside these towns. Many people now live in suburbs that are close to a big town but outside the district of the family court in that town. For those people, family law cases had to be tried in general courts of smaller towns that consist of judges who do not always have the necessary expertise. Although this is in itself a problem of the organisation of the judiciary in Spain, the Spanish lawyer thought that the Spanish situation demonstrates that there is a need for further specialisation of the courts. To the lawyer's opinion, the argument that the court that has jurisdiction should be situated in a geographical sense close to one of the parties, did not count in international cases, as the other party would often be living in another country. Also, the issue at stake is of such importance that the parties concerned should be prepared to travel a bit further to have the case tried. Specialization of judges in international cases was necessary, to avoid complication of legal proceedings. In case international jurisdiction in family matters would be granted only to a number of the family courts in Spain, that would improve sensitivity of judges to international cases.

The Dutch Advocate-General thought that international cases were clearly more complicated than internal cases, particularly because foreign law has to be applied in many cases, not so much because private international law rules have not been harmonised. On the other hand, harmonisation of choice of law rules that lead to application of the law of domicile or nationality will mean that foreign law will have to be applied in more cases than under the present Dutch private international law rules, that often lead to application of the *lex fori* in divorce cases. Because the *lex fori* was applicable in many cases (an estimate of 95% was made), there were not that many cases where the applicable foreign law complicated matters. An example of a complicated case would be a case in which the law of one of the US states was applicable. In view of the present system of Netherlands private international law, harmonisation would lead to more, not less complicated cases, because the harmonised choice of law rules will much more frequently lead to the application of foreign law.

A Dutch judge has never been involved in an international divorce case in which proceedings were complicated as a result of the non-harmonisation of conflict rules. A harmonisation, in general, would be positive.

A Luxembourg lawyer remarked that the procedural aspect of international proceedings was not more or less complicated than that of national proceedings. Liquidation of the matrimonial property regime when property was situated abroad might pose problems. However, in practice the property was often already located in Luxembourg. The lawyer did not think that the proceedings would be more complicated when foreign law had to be applied. International proceedings however would last longer, also because the content of foreign law would need to be ascertained.

Portuguese lawyers had had few cases where proceedings could be described as difficult as a consequence of non-harmonisation of conflict of law rules. Such cases occurred much more frequently in commercial matters (under Brussels I). The lawyers thought that the final

solution would be harmonisation or unification of substantive law. They did not think that harmonisation would have a negative effect as a result of a more frequent application of foreign law, as the Portuguese court already often apply foreign law in family matters.

A Swedish professor remarked that complications often arose with respect to ancillary issues. Harmonisation for ancillary issues would mean progress, as it would be more foreseeable what law would be applied. A general problem was that judges were often influenced by the domestic approach when solving an international problem. A Swedish lawyer gave as example of a complicated case a case where a Swedish woman who had custody over a child, was unable to leave the US because that would violate the visiting rights of the American father. Further complications that might arise in international proceedings were of cultural origin, leading to different approaches of the problem. Sometimes parties would try to delay enforcement of a decision, in order to create jurisdiction for a new case.

An English lawyer acknowledged that presently international divorce cases were complicated, but did not occur frequently. Other problems that did arise from time to time were adoption cases. Harmonisation would be detrimental, not beneficial. The English courts would have great difficulties in dealing with conflict rules that direct to a foreign law. Presently, the English courts will make use of the forum non conveniens rules (for matters beyond the scope of Brussels II), in case it is faced with a case that has many links with a foreign jurisdiction. An argument for declaring forum non conveniens would be that the English courts (or the parties to the English proceedings) will have to bring in lawyers from another jurisdiction to explain the foreign law in the English court.

Another English lawyer remarked that before Brussels II the jurisdiction rules were different, hence the approach to apply English law in family law matters. Proliferation of suits was considered as a negative development. Prevention of proliferation is having the same law, then it would not matter. Unifying the concepts of substantive law seems however impossible. With respect to children only one rule for jurisdiction is accepted, that the court of habitual residence has jurisdiction. Perhaps a solution would be that the jurisdiction for other matters would follow the jurisdiction over the children.

Yet another English lawyer was unable to pronounce himself on the issue whether non-harmonisation of choice of law rules complicated proceedings, as English courts would apply English law in family cases. Application of English law made cases easier, application of a foreign law would lead to more complication. The lawyer further remarked that because of Brussels II there were less stays of jurisdiction than under the traditional rules on jurisdiction. Harmonisation of choice of law rules, leading to rules that would oblige the English courts to apply a foreign law in certain international cases, would increase the cost of proceedings.

An Irish judge explained that presently, in application of conflict of laws, Ireland would conduct a preliminary investigation as to the applicable law (legal argument, not factual dispute). The judge further discussed a complicated case that was settled. An Irish woman was married to an Englishman and the marriage broke down. The couple divorced in the UK and the mother returned to Ireland with the two children (custody had been granted by the English courts). The former husband married a German wife and went to live in Germany. The former Irish wife had a breakdown and left care of the children to her former husband. The children went to live in Germany. The father later took the children on holiday to England. The mother picked them up in England, brought them to Ireland and decided she wanted to keep them and asked for custody from the Irish courts. The father contested this and sought application of German law, as law of the habitual residence of the children. The husband also initiated a request for the return of the children under the Hague Abduction

Convention in Germany The Irish judge decided to conduct a preliminary hearing. Following the preliminary hearing the case was settled.

As examples of complicated cases an Italian judge referred to cases that had been mentioned while answering previous questions. The application of the *lex fori* would be easier for the judge, but would not always suit people who came to Italy. Particular problems had been encountered in relation to employees of international organisations, e.g., when a decision on maintenance had to be enforced. Especially the enforcement of maintenance decisions against Italians working for international organizations proved to be very difficult. The judge further remarked that it was difficult to find a balance between two principles, the freedom of movement and the responsibility towards children.

Another Italian lawyer remarked that cases that were complicated as a result of the non-harmonisation of choice of law rules only occurred between wealthy parties. In those cases, harmonisation would help. Other types of cases that led to complications involved Islamic spouses, where traditional values might hamper the decisions.

An Austrian lawyer thought that there were too many complicated cases. The lawyer remembered a case where Austrian and French courts had taken contrary decisions. In general, there was much more disagreement leading to legal battles between spouses in international cases than in domestic cases. In relation to the US, specific problems existed with regard to child abduction cases under the Hague Abduction Convention. The Austrian courts would not order the return of the children to the US in case it was clear that in the US the 'abducting' mother would be prosecuted. Public policy would be relied upon to refuse the return of the child. Unification or harmonisation would have a positive effect, legal proceedings would not become (over)complicated when the courts would have to apply foreign law. The *lex fori* would really lead to forum shopping.

An Austrian judge thought that international cases were always complicated because it was difficult to find the content of the applicable law. Furthermore, there were still problems with the notification abroad, the claim that the person who had been notified no longer lived at the address abroad could not be checked. This problem could not be solved by unification of choice of law rules. Finally, the judge had the impression that parties were often surprised by the contents of Austrian private international law. Another Austrian judge thought that the number of international cases would only increase in the future. Harmonisation of choice of law rules would have a positive effect. A negative aspect however is that the application of foreign law poses problems to the judge. The Austrian judge further remarked that a choice of law rule should adopt the following order: designation of the applicable law by the parties, application of the law of common nationality and finally the law of residence, in case there was a sufficient link with the place of residence.

Effects on agreement between the parties and out of court settlement

A Belgian judge expected that harmonisation of private international law rules would be beneficial for party autonomy in certain areas. Assuming that the harmonised rules would allow party autonomy to a certain extent, spouses would be better able to predict what law would be applicable to their situation if they did not designate the applicable law. This in itself would induce many spouses to designate the applicable law themselves. The Belgian judge was unable to comment on the effect harmonisation of choice of law rules would have on the substantive content of agreements between spouses. The positive effect that harmonisation would have on party autonomy was not a compelling reason to harmonise

choice of law rules. However, in combination with the free movement of persons and the need for legal certainty it did contribute to the need for an instrument.

A Belgian lawyer also expressed a preference for allowing party autonomy; a future choice of law rule should give way to party autonomy between spouses.

A Danish lawyer explained that it was not customary to enter into an agreement on the applicable law. Danish law would always govern the divorce itself. In an agreement a choice might be made with respect to the distribution of the marital property. Mainly, a choice would be made in favour of Danish law, a choice for the application of a foreign law might lead to difficulties as there may not be information available on the content of the applicable law. Harmonisation of choice of law rules would have a positive effect on the freedom of spouses to decide upon certain substantive aspects of their dispute. However, the final solution would be a harmonisation or unification of substantive law, not of choice of law. Harmonisation of choice of law rules was nevertheless desirable, but such harmonised choice of law rules should not support a situation where, e.g., a Danish wife would obtain a divorce in Germany, for the simple reason that the legal proceedings in Germany would have a more favourable result than when she had applied for a divorce in Denmark.

A Spanish lawyer thought that harmonisation of choice of law rules would not influence out of court settlements. Law was not very much used in these discussions. Once an agreement was reached between the parties, his practical experience was that the contents of such an agreement would be such that the agreement would either be enforceable anywhere, or that it would not be enforceable at all.

The Dutch Advocate-General remarked that a number of European countries were less favourable to divorce than the Netherlands. These countries would be less willing to allow choice of law in divorce proceedings. This difference in attitude would become apparent when choice of law rules would be harmonised in the EU, probably leading to a system that would be less benevolent towards party autonomy. The substantive aspects of an agreement between spouses would not be influenced by harmonisation of choice of law rules. These would depend on the content of the applicable law.

A Dutch judge thought that a rule on party autonomy would have, generally, a positive effect. The right of the parties to agree on the applicable law should make part of such harmonisation, i.e., such possibility (such conflict of law rule) should be provided in a possible harmonisation instrument. Indeed, the choice of law by the parties should be limited to the laws that have some connection with the case.

Portuguese lawyers thought that harmonisation of choice of law rules would not affect out of court settlements. Presently parties would not be allowed to designate a foreign law as the applicable law. The lawyers who were interviewed clearly did not anticipate that harmonised rules would allow parties to designate the applicable law. The Portuguese lawyer further remarked that they were unsure whether certain divorces, such as a divorce that had been agreed upon out of court or divorce pronounced by administrative authorities, would be enforceable under Brussels II.

A French lawyer was very sceptic about the party autonomy or party regulation between divorcing spouses. In the lawyer's view, during the negotiations between divorcing spouses things happened that were beyond the control of their legal counsellors. The lawyer had often dealt with wives who said that 'if I accept that he has the children for so much time, he will

give me so much money', or, 'he is going to accept that I shall have the children, but until what age'. There are hidden powers in the relation between spouses that make negotiations very difficult. The French lawyer remarked that the situation was even more difficult in countries where spouses could divorce without interference of a lawyer. In cases where there had been mediation between spouses, the lawyer had noticed that one of the spouses is often able to manipulate the other. Therefore, if there is going to be a rule on party autonomy and a possibility for a separation agreement, a judge should have a duty to investigate whether parties really agree to the agreement and fully understand the consequences thereof. The judge should be superior. The danger is that a judge will assume that there is balance of power between the spouses. The lawyer, having twenty years of experience, thought that when a divorce is being negotiated, there are always situations where spouses are unequal and one has power over other, either because of the children or because of money. These powers can be extremely powerful. Nowadays, judges have less and less time and send more and more cases to non-lawyers, such as mediators. If one of the spouses is a pervert, or a manipulator, it is quite easy to manipulate the mediator, as the French lawyer had witnessed a number of times. In view of that experience, the lawyer was extremely cautious towards the suggestion that in international cases spouses, e.g. from Ireland, would be given the opportunity to quickly divorce in another country. The French lawyer recognised that in (almost) all EU member states there is a possibility to divorce by mutual consent. With respect to such a divorce by mutual consent, the question, which law is applicable, was also of lesser importance, as the result would be similar under the law of most member states. The problem remained that judges had less and less time to deal with divorce cases, that there was a danger that judges could no longer guarantee the balance of power between spouses.

Finnish judges thought parties should be allowed to come to an agreement in certain matters, e.g. divorce, possibly as well the maintenance of former spouses. With regard to children, especially child custody, spouses should not be allowed autonomy. Presently, Finnish private international law might allow spouses to agree on the applicable law in cases involving matrimonial property, but not in other types of cases. The Finnish lawyer was much more in favour of party autonomy, which should be allowed in all matters.

The Swedish professor thought that party autonomy was desirable, but that it should be restricted to certain legal systems that were connected to spouses. The respondent was not yet sure whether choice of law rules should be universal or restricted to EU cases only.

An English lawyer remarked that the English system incites to settle. Not settling will cost more money in legal costs. An agreement would also have input from both parties. Choice of law rules might endanger settlement. Sometimes settlement was induced when a judge would state what the probable outcome of a court case would be.

Another English lawyer remarked that 95% of cases are settled. In situations where there was 'a race for jurisdiction', the climate would be favourable for settlement in the period during which both parties were contesting jurisdiction (80% of the cases handled by this lawyer were UK/US cases, where jurisdiction would not always be incontestable). It would never be a problem to make a settlement under English law if parties so wished. The lawyer further pointed out that one form of agreement between parties, the ante nuptial contract (the continental 'marriage contract'), was invalid under English law (contrary to public policy).

Yet another English lawyer thought that if foreign law was to be applicable, spouses should have the case decided in the country of the applicable law. In case an agreement is made between parties, like a divorce settlement or a deed of separation, the English court does not have to enforce the agreement. Likewise if the agreement were made under foreign law, the

enforcement would depend on English law. The lawyer thought that in an English court case the ground for divorce would have to be a ground available under English law. Hence, the divorce could not be based on consent.

An Italian judge was not in favour of party autonomy, as this would only function when things were going well between parties. Under Italian law, there was little room for party autonomy. Anyhow, party autonomy of spouses should not harm the interests of children especially the psychological and spiritual needs of the child. Party autonomy was not a compelling reason to unify or harmonise choice of law rules.

Another Italian judge did not believe that harmonisation of choice of law rules would have a negative effect on party autonomy. An Italian lawyer thought that harmonisation of choice of law rules would have a positive effect on party autonomy.

An Austrian lawyer in general thought that party autonomy in choice of law was a positive development. The danger was however that party autonomy would have negative effects for one of the parties. Party autonomy was also desirable on the substantive level, an agreement between spouses was always better than a court decision. An exception should be made for children, party autonomy should not be allowed.

An Austrian judge remarked that under the present Austrian choice of law rules party autonomy was only possible in matrimonial property, not with respect to divorce of maintenance. With respect to issues that did not concern the children the judge thought that spouses might be offered the possibility to choose the applicable law; such a choice should be restricted to certain legal systems, such as that of nationality and habitual residence. In case the substantive laws of these legal systems would not allow spouses to enter into an agreement, spouses should not be allowed to designate the law of a third country, that would allow party autonomy. Furthermore, a choice would always be open for correction if the foreign law were incompatible with certain fundamental rules of Austrian law. Another Austrian judge, who had already expressed a preference for a choice of law rule that would recognize party autonomy as the primary connecting factor for all relations between spouses, remarked that all agreements between spouses concerning custody and visiting rights would always be reviewed by the court.

An Irish judge explained that under Irish substantive law spouses could draw up a separation agreement. Such document is subject to the requirement of 'proper provision' of Irish law. It could be a concern when such a document is drawn up under a foreign law that does not guarantee proper provision.

A German judge thought that in case of harmonisation of choice of law rules parties would have less interest to designate the law applicable to the divorce. A choice for German law was often not in the interest of (one of) the parties, as under Article 8 of the 1973 Hague Convention on the law applicable to maintenance, German law would then also apply to the maintenance obligations of former spouses. The fact that under German private international law a choice of law for the divorce (*Ehescheidung*) was impossible (see Articles 17 and 14 of the German code on private international law (EGBGB)), had in practice never led to problems.

A Luxembourg lawyer expressed that in general there were no problems with a designation of the applicable law. Party autonomy would help in finding a solution that was acceptable to both spouses.

The extent to which all related matters can be dealt with in the same proceedings, and applying the same law

A Belgian judge remarked that quite often issues connected to the divorce were decided in various states. An example was the Swedish case the judge had discussed in a previous answer. Other, perhaps atypical examples involved Moroccan spouses, where a termination of the marriage by a unilateral declaration in front of Moroccan authorities, would lead to subsequent proceedings in Belgium. Such a divergence is often caused by objective, geographic factors, e.g., when proceedings relating to divorce and division of marital property take place in Belgium and summary proceedings relating to real estate located in Ireland have been initiated before the Irish courts. Other examples are that proceedings with respect to divorce, custody and child maintenance are commenced in Belgium but that proceedings with respect to custody and child maintenance are also commenced in another state because the child is habitually resident in that state. According to the Belgian judge, in this type of case, concerning children, the parties should not be kept from bringing the case in another country. The court of habitual residence of the child would be better suited to deal with that type of case. However for other types of cases, proceedings in other countries that would only serve to block proceedings that had been initiated earlier in Belgium should be prevented. It would not make sense if following the divorce related matters, e.g. maintenance, would have to be brought before the same court as the court that issued the divorce decree. As far as concerns the scope of application of the law that is applicable to the divorce, the Belgian lawyer felt that the law that governs the divorce should also govern the maintenance obligations of spouses. The reason was the relation that existed in substantive law between the right to maintenance and the question whether a spouse had fault to the divorce. With respect to other issues it was impossible to apply the same law as the one that had been applied to the divorce. Custody (parental responsibility) was a wholly different matter that was not linked to the divorce. The same applied for matrimonial property law.

A Belgian lawyer had had little cases of divergence since Brussels II. Divergence would in most cases concern the distribution of property, e.g. of an immovable located in another country.

Irish judges were unable to comment to this problem.

A German judge remarked that in Germany the courts are always prepared to apply different (foreign) laws to the various legal problems. Also, there is not a necessity to deal with all connected matters in the same proceedings. Thus, maintenance could well be decided at the place of residence of the maintenance creditor.

A Spanish lawyer remarked that in Spanish proceedings full concentration was customary. It would be difficult to separate certain issues, like parental responsibility and marital property) from the divorce proceedings. The Spanish lawyer further pointed out that difficulties would arise in international situations because the law applicable to certain issues at the beginning of the marriage is at the time of termination of the marriage often replaced by another law. This should be remedied, e.g. the law that parties have declared applicable to their matrimonial property regime should always remain applicable. e the law at the end of a marriage another law thought that there should not be mutability of the applicable law. One law should apply from beginning to the end of the marriage.

A Dutch Advocate-General thought that divergence of proceeding (e.g. divorce proceedings in one country, custody proceedings in another) did occur but not very often. Brussels II already offered a solution to counter such divergence. A further solution should be found in

rules on international jurisdiction, leading to a better distribution of the jurisdiction of the court of the EU member states. Harmonisation of choice of law rules would not lead to progress. The fact that some issues cannot be decided in the divorce proceedings because the court does not have jurisdiction or that some issues need to be decided following the divorce did not pose practical problems. The Advocate-General rejected the suggestion to have all related issues governed by the same law as the law that governs the divorce. Parental responsibility, maintenance of spouses and children and matrimonial property were totally different issues that should not be governed by the same choice of law rule. Indeed, according to Article 8 of the Hague Maintenance Convention maintenance between former spouses is governed by the same law as the divorce. However, this rule is now under discussion. The Advocate-General pointed out that according to jurisprudence of the Dutch Supreme Court Article 8 of the Hague Maintenance Convention does not prevent (former) spouses to agree on the application of another law than the law that has been applied to the divorce.

Portuguese lawyers acknowledged that they had experience with cases in which e.g. the divorce was granted in Germany and maintenance was decided in Portugal. This did not pose problems. The Portuguese lawyers thought that some matters, e.g., division of property, should be decided in the country where the property was situated. The law that applies to the divorce should also be applied to related or connected matters, when the related issues are decided together with the divorce. When connected matters come up long after the divorce has been granted, it would not be desirable to apply the law that has been applied to the divorce.

In Finland, judges had had experience with cases where related issues were brought in one country and the divorce was decided in another country. For the main part, these cases arise in relation to Russia or Estonia. For instance, divorce in Russia and child maintenance in Finland. Legal problems do not arise in such cases. Furthermore it is desirable that some issues concerning children, such as child maintenance and custody are decided in the country where the family has been living and not by a divorce court in another country. In this respect, parties should be discouraged from bringing proceedings concerning children in another country than that where the family has been living. In any case matters concerning children should be decided in that country, applying the *lex fori*. Matters concerning spouses can be decided in another country.

A Finnish lawyer remarked that one court should decide all matters connected to the divorce. However, it should be possible to separate the issues that concern the child; the court that deals with the divorce should not necessarily decide on child custody and or maintenance (particularly not when the child is residing in another country).

A French lawyer referred to a case involving the USA where a father had commenced divorce proceedings in France (including demands with respect to the children who were living in New York) and the wife in New York. The father subsequently demanded a protection order for the children from the New York courts. The American courts were willing to deal with his request for a protection order, on condition that he would drop his demands with respect to the children in France. The lawyer further remarked that in principle the French courts would have to apply foreign law to a divorce if that would result from the application of the choice of law rules, but that the lower courts would in most international cases would overlook the effect of these rules. It had to be said though, that in most cases the choice of law rules would lead to application of French law to the divorce.

A Swedish professor wondered why matters concerning children should be brought in the court that handled the divorce of the parents. Combination of these issues was not such a good idea. A Swedish attorney however remarked that divergence was not justified, a major problem was that two jurisdictions were dealing with the same or similar issues.

An English lawyer remarked that in general it would be difficult to split proceedings, e.g. that the divorce would be pronounced in France and that other issues were tried in England. Nevertheless, the lawyer did know of cases where the divorce had been granted in England and other issues were decided in another country.. This lawyer, a barrister, also saw problems with obtaining information on foreign law in a procedure in England. Serious reservations were made to the suggestion that an English judge would, e.g., be given the opportunity to contact a judge in another member state to make enquiries on the content of the law of that member state. Grave problems concerning 'evidence' were expected, if parties would be unable to exercise control over such enquiries.

An Italian judge remarked that the main issue concerned the custody of children. This should be concentrated with one authority to avoid confusion. A problem of harmonisation was that standards might be lowered in order to achieve harmonisation. In case a person would displace himself to another country, it would be a good idea to apply the same law as before. This provision could also be applied to couples. The suggestion that all related issues would be decided by the same choice of law rules was rejected, especially with regard to children.

An Austrian lawyer remarked that divergence of proceedings did not happen often. Most issues were dealt with in the same proceedings, with the exception of matters concerning children. Application of one choice of law rule to all issues was in most cases not justified, unless the case has strong links with only one country.

An Austrian judge had little experience with divergence of proceedings. Divergence – in cases between spouses - could be justified when immovable property was located abroad. With regard to children, divergence would be necessary when the child was habitually resident in another state than that of the divorce proceedings. Also, divergence of proceedings was possible in domestic proceedings as well. The proceedings concern different issues that are not too much connected. There was no need for concentration, certainly not after the divorce had been granted. There was no advantage in having one choice of law rule for all issues. Another Austrian judge remarked that divergence of proceedings happened regularly. Especially in matrimonial property proceedings concerning an immovable located abroad, the Austrian courts would decline jurisdiction. This judge thought that divergence was not a desirable solution, but accepted that it was unavoidable. Possibly a designation of the applicable law by the spouses would prevent divergence. The rule of Austrian private international law on '*Näherberechtigung*' might play a role to remedy the negative effects of divergence of proceedings. The spouse might have a right to be compensated if in the proceedings abroad the private international law rules of the foreign court would have a different result (e.g. with respect to the distribution of an immovable situated abroad) than the Austrian private international law rules. The Austrian judge thought that it would not be impossible to decide all or most related issues by the same law as the divorce. With respect to children however, such a rule would be unacceptable. The judge further pointed out that there was an unclear division between matrimonial property and maintenance. Sometimes the right to maintenance would be capitalized and paid out of the marital property.

D. Possible impediments and disadvantages

A Belgian judge remarked that with respect to divorce and parental responsibility Belgian law would almost always be applicable. The exception would be, for divorce, that the national law of the defendant spouse would not allow spouses at all to divorce (Argentina, Malta). With respect to annulment of marriage, foreign law would perhaps be applicable more often. With respect to maintenance, the choice of law rule for maintenance between spouses was under discussion. Public policy would not play a role in divorce cases, as Belgian law was almost always applicable. Public policy did play a role in recognition of foreign divorces, especially when the husband had divorced the wife by unilateral declaration. With respect to maintenance, public policy might play a role when the applicable foreign law would lead to a result that was totally different from Belgian law, e.g. when the spouse who was not at fault to the divorce had no right to maintenance or when there was inequality between man and woman. None of the examples mentioned in question 27 of the questionnaire would lead to evasive action.

A Belgian lawyer remarked that public policy did play a significant role when recognition of a foreign decision was sought. In case the public policy argument was raised successfully, the whole decision would fall. With respect to application of foreign law, application of public policy exception would be much more refined, leading only to the non-application of certain provisions of the applicable law, not to disregarding entirely the applicable foreign law.

A Dutch Advocate-General remarked that the public policy exception was seldom applied in custody, maintenance or matrimonial property decisions. With respect to divorce, public policy would play a role when Islamic law was applicable, as the grounds for divorce under Islamic law could be discriminatory. However, in many cases a solution would be found that would make it possible to circumvent application of the public policy rule. Thus, when the national law of spouses would be Moroccan law, application of the – potentially discriminatory – provisions of Moroccan law would be evaded; the national law would not be applied if (one of) the spouses no longer had a genuine link with the law of common nationality.

Portuguese lawyers remarked that Portuguese choice of law rules often lead to application of foreign law. The applicability of foreign law is not often reviewed because of public policy considerations.

Finnish respondents pointed out that because of the application of *lex fori* in Finland, the application of foreign law and the non-application of foreign law because of public policy considerations do not play a role. Finnish judges emphasized that choice of law rules that would require the application of foreign law in family matters should absolutely be avoided. They reiterated that it would then be necessary to know well not only the statutory foreign law, its interpretation and relevant case law to be able to bring about a decision in family matters, but also the culture of a particular country. In contrast to some other fields of law (e.g., commercial matters), in which no particular problems arise in applying a foreign law, in family matters no judge can so well understand a foreign family law (due to both legal and cultural differences between the countries) to apply it correctly and to bring about a right decision. This is a situation that should be avoided absolutely. The Finnish judges thought that the courts in Finland would often try to evade or even refuse the application of foreign law, either by invoking public policy or by other private international law techniques. However, none of the examples given in question 27 would constitute a reason to refuse the application of a foreign law.

A Finnish lawyer remarked that if foreign law were to be applied to a divorce (as would not be the case under the current Finnish choice of law rules, that would refer the Finnish law of

the court), the application of a foreign law that restricted the possibility to divorce would be in conflict with public policy.

A German judge pointed out that foreign law was frequently applied in the German courts, with respect to all issues mentioned, dissolution of the marriage, maintenance, matrimonial property and parental responsibility. The public policy argument seldom played a role, with exception of North African states. However, the number of people living in Germany who originated from, e.g., Morocco, was limited.

With respect to the examples given in question 27, a foreign law that would display any of the characteristics mentioned would not be contrary to public policy. The judge in particular remarked that a divorce by consent of spouses as known in certain North African states would be allowed.

An Irish judge remarked that foreign law would be seldom applied. Presently, if foreign law would have to be applied, the lawyers would be required to explain the foreign law in the Irish courts. If the applicable law would be the law of a member state, the judge would welcome a situation where he would be able to contact a judge of that member state to discuss the case and the implications the applicable law would have. Presently there was no system to do so. If a system were developed within the EU, the judge thought this would not come into conflict with Irish procedural law, as long as the contact was made with another judge, not with a government official.

Another Irish judge remarked that he had no experience with cases where foreign law had to be applied. The judge was not convinced of the concept of applying foreign law in an Irish court and wondered whether in an actual case the (European) laws would lead to very different results.

A Swedish lawyer pointed out that application of foreign law only occurred with respect to maintenance obligations or matrimonial property. Cases in which foreign law was applied were however rare. Inside the EU the public policy argument would never be raised. With respect to the application of foreign law to marriage dissolution, the Swedish lawyer pointed out that court will always apply Swedish law, otherwise they do not have jurisdiction. The Swedish professor corroborated this statement, adding that Swedish law does not know the concepts of legal separation or marriage annulment.

An English lawyer (a solicitor) pointed out that the English courts would never apply a foreign law in family matters. The public policy argument would be raised successfully in relation to ante nuptial contracts, such as the continental marriage contract. Although this does not directly concern application of foreign law, the English lawyer referred in this context also to the Matrimonial and Family Proceedings Act 1986, Part III, that says that in case a foreign court has made a breakdown of the financial award, the English courts can make a further financial award, in case there is a link with the United Kingdom.

Another English lawyer (a barrister) confirmed that foreign law would never be applicable in family law matters. The public policy argument mainly concerned recognition and enforcement of foreign judgments. A problem was that transfer of property between spouses could not be enforced and there should be a solution to that problem. If a Dutch court would order a transfer, under a prenuptial agreement that had been made between spouses, the English courts should enforce such an order. At present, enforcement of such an order would be difficult if not impossible, in view of the rule of English law that prenuptial agreements are against public policy. If there were harmonisation of private international law rules, pretty fundamental changes – in respect of divorce – would be necessary. Presently, divorcing

French people by consent would not happen in English courts. The public policy argument might also be raised in relation to certain phenomena, such as the homosexual marriage.

An Italian judge remarked that concerning the dissolution of the marriage, especially the annulment of a marriage will take place under 'foreign' law, as such an annulment will be pronounced by authorities of the catholic church applying ecclesiastical law. Another Italian judge pointed out that with respect to dissolution of the marriage, parental responsibility and maintenance obligation public policy plays an important role. A foreign law can only be applied with respect to these issues when it is compatible with Italian law.

A Luxembourg lawyer remarked that Luxembourg law was often applicable to international divorces. Portuguese law was also frequently applied, because of the high number of Portuguese nationals living in Luxembourg. Occasionally, foreign law would be applied to parental responsibility. With respect to maintenance, application of foreign law might ensue from Article 8 of the Hague Maintenance (Applicable law) Convention 1973. In matrimonial property, application of foreign law was possible (e.g. when the first joint domicile of spouses was abroad). The role of public policy was diminishing and the lawyer had never been involved in a case where the applicable foreign law created fundamental differences between men and women.

Luxembourg judges remarked that foreign law was often applied, especially to the divorce and to the maintenance between spouses. The public policy argument was often raised but failed in most cases. However, in certain areas Luxembourg public policy had in the past been a bar to application of foreign law (reference was made to certain forms of damages that under Belgian or French law are due, in case of a divorce by fault, to the spouse who was not at fault to a divorce).

An Austrian lawyer remarked that with respect to all issues mentioned, dissolution of the marriage, maintenance, parental responsibility and matrimonial property, foreign law is often applied. As an example of the application of a foreign law the lawyer referred to the dissolution of a marriage between spouses from (former) Yugoslavia. Application of the foreign law would sometimes be sought when the foreign law did not contain provisions on 'guilt' of the spouses (Austrian law still has a rule on guilt to the divorce). The Austrian lawyer remarked that public policy seldom played a role. An Austrian judge also declared that there was little scope for application of public policy, with the exception of parental responsibility decisions, especially in regard to children from Turkey or former Yugoslavia.

A Spanish lawyer commented that in Spain foreign law is applied rather often. Public policy would play a role for Islamic legal systems, not for European legal systems. In general, the lawyer remarked that when both spouses would be of Dutch nationality, the separation period required under Spanish domestic law would not be necessary. When spouses were of different nationality, Spanish law would always be applicable to the divorce and a separation period would be necessary. Another Spanish lawyer pointed out that Spain was rather progressive with respect to relations between partners of the same sex. Although the lawyer had not yet had any experience with this kind of problem, this might have a positive influence when the courts would be faced with dissolution of a same sex marriage.

Correlation with choice of law rules and international procedural law (jurisdiction, recognition and enforcement)

This issue prompted few comments.

A Belgian judge mentioned that problems could arise in relation to recognition of decisions of non-member states, when the choice of law rule would lead to application of another law than the law that had been applied in the foreign decision. It was not yet possible to say whether the recently introduced rules on jurisdiction of regulation Brussels II should lead to a change of the choice of law rules. A Belgian lawyer pointed out that jurisdiction and choice of law were completely different issues.

A Dutch Advocate-General remarked that there could be a link between the choice of law rules and the recognition of a foreign decision. Finnish lawyers did not rule out the possibility of correlation, but were unsure to answer the question. A German judge had difficulties in answering the question, as had an Irish judge.

An Italian judge remarked that there was a correlation, as harmonisation of choice of law rules would end forumshopping.

A Luxembourg lawyer found it difficult to comment on this correlation. Nevertheless, the idea of harmonisation of choice of law rules appealed to the Luxembourg lawyer, provided the rules would give room for party autonomy in inter-spousal relations. Luxembourg judges remarked that with respect to maintenance of children the law of habitual residence is almost always applied (see Articles 46 of the Hague Convention on Maintenance (applicable law) 1973, that require application of the law of habitual residence in case this law gives a right to maintenance). In case a child would habitually reside in, e.g. Poland, the almost compulsory application of the law of habitual residence of the child to the maintenance question would be an argument in favour of giving exclusive jurisdiction to the court of habitual residence of the child.

An Austrian lawyer thought that the mechanism of Brussels II for recognition of foreign divorce decrees was functioning well, in view a recent case involving two Italians who had been living for twenty years in Austria. With some hesitation, the Austrian lawyer was prepared to say that in its present form Brussels II might require harmonisation of choice of law rules. Austrian judges also thought that the new rules on jurisdiction made a change of choice of law rules more necessary.

Profile of a future instrument

With respect to the profile of a future instrument, a deep gap exists between respondents from the continental legal systems and respondents from Ireland and the United Kingdom. The British and Irish respondents, having no experience at all with the use of choice of law rules in family law matters, declined to answer the questions relating to the profile of a future instrument.

A Dutch Advocate General pointed out that a new instrument with a wide scope would conflict with a number of instruments that had already been established, notably by the Hague Conference on Private International Law. A unifying or harmonizing instrument should be restricted in scope, limited to divorce and not extending to other issues such as maintenance of matrimonial property. A French lawyer, on the other hand, remarked that the Hague Conference had drafted made too many conventions that had been ratified by too few countries. Nevertheless, the lawyer stated that the EU should not ignore the work that had been achieved by the Hague Conference.

Most respondents appeared to support the idea of an instrument with a wide geographical scope, dealing with all family law matters and which, if possible would apply to international cases concerning EU member states and to international cases concerning third states. To quote an Italian judge, 'the wider, the better'. An Austrian judge commented that it would not be feasible to restrict an instrument to cases that only had a link to other EU member states. However, a Netherlands judge and a Danish judge thought that for the time being, an

instrument should be restricted to cases that have only connections with other EU member states. Other respondents did not issue such reservations

Some respondents thought that restrictions would be necessary with respect to the substantive scope of the instrument. Thus, a Belgian judge remarked that the instrument should not deal with parental responsibility, as this matter would not be considered as connected to the divorce. A Greek lawyer thought that the instrument should be limited to inter-spousal relations (dissolution of marriage, matrimonial property and maintenance).

A French lawyer pointed out that difficulties would exist if an instrument were created for dissolution of marriage. Under French law dissolution of the primary regime created rights for financial compensation that were subject to the choice of law rules of the Hague Maintenance (applicable law) Convention 1973. The right for financial compensation was considered to be a rule of public policy that was applicable to all couples residing in France. The strong link that existed under French internal law between the dissolution of the marriage and a right for financial compensation also confirmed the logic of the rule of Article 8 Hague Maintenance (applicable law) Convention 1973, that applies the law that has been applied to the divorce also to the maintenance obligations of spouses.

Other remarks

The questionnaire spurred few additional remarks. One Italian judge advocated the creation of a supranational court, a “European Court on Family Law”. A number of lawyers put forward the need for specialization of judges in international cases (France, Spain). An English lawyer wondered whether it would be possible to have cases that were subject to a foreign law decided by the court of the country whose law was applicable.

3. MAIN PROBLEMS THAT WERE IDENTIFIED DURING THE INTERVIEWS

Divorce

Application of choice of law rules

Respondents declared to have little problems in applying the national choice of law rules for divorce. The impression is that in all member states and in the majority of cases the national choice of law rules lead to the application of the law of the court. The application of the law of the court is not necessarily based on a choice of law that directs to the *lex fori*. However, other choice of law rules such as the rule that directs to the last common domicile of spouses, also frequently lead to the law of the court.

In case the law of the court is applicable to the divorce, judges and lawyers have not put forward any problems in applying the law of the court to an international divorce. The fact that the law of the court is applicable to the divorce may have consequences for other issues and may for that reason create problems, as will be set out hereunder. In case the law of common nationality is applicable, this may create problems when spouses are of foreign nationality and a foreign law has to be applied. The application of foreign law is a general problem that follows from choice of law rules that direct to foreign law. The impact of this general problem to divorce proceedings and to other proceedings that are connected to divorce will be discussed further hereunder.

The influence of internal substantive law

There are important differences between the member states as to the possibility to grant a divorce. On one side of the spectrum would be the Netherlands, where substantive law would allow spouses to marry on Monday and to institute divorce proceedings the following Tuesday. The Netherlands court would, when the law of the court is applicable, have no option but to grant the divorce following the statement of one of the spouses that the marriage had broken down irretrievably. It would not be necessary to give proof of this statement, nor would the other spouse be in a position to refute the statement. The speed at which a divorce can be obtained would depend more of the speed at which lawyers and court would be able to process the petition to divorce than on anything else. Spouses who are in agreement on the dissolution of the marriage and who wish to ascertain that the process only takes a few weeks could decide to transform their marriage into a registered partnership and then mutually agree to dissolve the registered partnership. On the other side of the spectrum would be Ireland. In Ireland, the internal law carries heavy conditions that must be met before a divorce can be granted and when granting a divorce, the court gives great importance to the idea of 'family provision'. This idea is so important that even after the divorce has been granted, the conditions may be altered in order to provide for the disunited family.

The difference in attitude of substantive internal law is sometimes reflected in the choice of law rules. In the Netherlands, the current choice of law rule is said to favour divorce (an approach that is often described with the Latin expression '*favor divortii*'). A similar attitude as in the Netherlands was also encountered in Scandinavia. During the interviews, respondents from Scandinavian member state also made clear that there was a link between application of the *lex fori* and the benevolent attitude to divorce in the domestic law. In Ireland, one of the respondent judges made clear that in an international case the courts would give great weight to the Irish tradition of family provision and would not grant a divorce until they were satisfied of the property arrangements that have been made with respect to spouses and children. This attitude reflects the concept of family provision of Irish domestic law. In

other member states, the choice of law rules are not always so clearly modelled on values of the internal law. Choice of law rules appear to be modelled on the desire to designate the 'most closely connected law' in many Continental member states. Such rules try to identify a connecting factor that is common to spouses, such as their common nationality or their common habitual residence.

Forum shopping in divorce cases

Most respondents thought that forum shopping was not an issue as far as the actual decision to grant a divorce was concerned. The exception formed respondents from Ireland and Italy, two member states with legislation that makes it difficult to divorce. Thus Italian respondents pointed out that the minimum three-year period of separation would be a reason for spouses to try to obtain a divorce in another state. Irish respondents pointed out that Irish spouses often try to obtain a divorce in the United Kingdom. This remark was supported by comments of English respondents, who also pointed to the phenomenon of Irish spouses who used to come and even after the introduction of divorce law in Ireland still come to the United Kingdom to obtain a divorce. Although the substantive law in Italy and Ireland may be said to induce forum shopping, the remarks of respondents give the impression that there is a major difference in attitude towards this phenomenon in the two member states. In Italy the courts accepted the phenomenon as such and appeared also prepared to accept the consequences thereof. Italian respondents appeared willing to recognize a divorce decree that had been issued abroad. In Ireland, judges not only appeared to be reluctant to accept the phenomenon itself, but also reluctant to accept the consequences. Irish respondents were hesitant towards recognition. It should be noted that in their reaction the respondents paid relatively little attention to actual cases that had been decided under Brussels II but referred in a large extent to the situation that had subsisted before Brussels II entered into force. Also, during one of the interviews in Ireland the impression was created that the Irish judiciary had not yet fully confronted the impact of Brussels II.

Legal certainty, predictability of result

With regard to the law that according to the national private international law rules would be applicable to the divorce, there were no problems with legal certainty or predictability of result. With regard to the internal, domestic law that is applicable to the decision to grant a divorce, the law of the court will often govern this decision. In that case, the respondents made clear that legal certainty and predictability of result are not threatened. In case a foreign law is applicable (e.g. because spouses share the same foreign nationality), there may be a problem because the content of the applicable law is hard to determine. As there appears to be a general problem with regard to application of foreign law, this issue will be discussed more extensively hereunder. Nevertheless, it seems appropriate to remark that problems arise in practice even with respect to the question as to what does the foreign divorce law say.

Free movement of persons

Few remarks touched upon the relation between divorce and the free movement of persons. In general, respondents accepted that the free movement of persons would increase the number of international cases. An example given by an Austrian judge demonstrates that international (divorce) proceedings may become more complicated because the defendant party may move from one member state to another member state in the period that proceedings are commenced, making it more difficult to serve the documents that initiate proceedings upon the defendant. This complication however, does not seem to be a complication that will only arise in divorce proceedings. The other issue that was raised with respect to divorce as being linked to the free movement of persons and that would be a complication that can only arise

in divorce proceedings, was the recognition of a same-sex marriage celebrated in the Netherlands. This recent phenomenon was not included as a standard question in the questionnaire but it did prompt a few remarks during some of the interviews. Austrian judges doubted that such a marriage would be an obstacle to a heterosexual marriage in Austria. An English lawyer thought such a marriage might be considered contrary to public policy. On the other hand, Luxembourg judges appeared prepared to recognize such a marriage as a legal act that had been validly carried out in another EU member state. Limited to divorce proceedings, this raises the inevitable question whether the homosexual marriage will be recognized in other EU member states so that the spouses in a homosexual marriage who have married in the Netherlands will be able to divorce in another member state when the grounds for jurisdiction of Brussels II are met.

Parental responsibility

Choice of law rules

Respondents indicated few problems that could be attributed to the divergence of choice of law rules. Some respondents (in Luxembourg, Germany and Austria) pointed out that the choice of law rule for parental responsibility might lead to application of a foreign law. Respondents in other continental member states pointed out that the law of the habitual residence of the child now is the main choice of law rule for parental responsibility.

Forum shopping

Parental responsibility was seldom mentioned as a factor in forum shopping. Nevertheless, children appear to play a role in the decision where to litigate and may even be used in order to create jurisdiction. Some respondents indicated that the decision of (one of the) spouses where to initiate divorce proceedings, would be influenced by the child. Some respondents indicated that the spouses would often focus on the habitual residence of the child. The place of habitual residence of the child would often be considered as the most appropriate place to commence divorce proceedings. A lawyer from France suggested that parents would in practice make use of the children to find a court in another country.

The example given by an Austrian judge, where a German court had given an order with respect to a child that was habitually resident in Austria might be categorized as forum shopping with respect to child custody.

Legal certainty, predictability of result

Few comments were made in relation to custody and legal certainty. An English respondent indicated that although foreign law would almost never be applied in family cases, the need to apply foreign law could exist in abduction cases. The question whether the abductor had custody over the child that was brought from e.g. Spain to the United Kingdom would have to be decided in accordance with Spanish law (including Spanish private international law rules).

Free movement of persons

Respondents raised a number of problems in respect of custody over children that they associated with the principle of free movement of persons. Certain respondents (in Sweden, Ireland, France and Spain) indicated that the cross border movement of children poses problems. These problems may come up under various circumstances. Sometimes problems will come up while the parents are still married. The main example given by a Swedish lawyer was that of the Swedish family that moves to another member state, e.g. Greece, because of the career of one of the parents. Parents are not aware that under the Hague Abduction Convention, a parent will need to obtain permission of the Greek authorities in

order to return with the children to Sweden against the will of the other parent. *[Although the system of the Hague Abduction Convention has found wide support all over the world,⁶ there might be some truth in the criticism of the Swedish lawyer. The solutions of the Hague Abduction Convention may lead to certain dilemmas that, although acceptable in the global context, could perhaps be avoided in the relations between the EU member states. Some possible dilemmas will be put forward in the cases that will be discussed hereunder.]* A problem that was identified more frequently will arise after the parents have divorced and custody has been granted to both parents or to one of them. In case of single parent custody, the problem is whether the parent can move with the child to another member state, e.g. to take up employment there. In some member states, there may be a restriction on the single parent custody that will prevent the parent from moving with the child to another member state. Such move would require the approval of a court, sometimes even of the other parent who does not have custody. In case parents have retained joint custody after the divorce, the problem would be even more manifest, as the parents will need to agree that the child will move with the parent who wishes to take up employment in another member state. A final example of a case that has some link with the free movement of persons was already mentioned above as an example of forum shopping, i.e. the case where a child habitually resident in Austria was retained in Germany on the basis of a custody order of the German courts. In paragraph 4, two cases will be presented that try to illustrate the dilemmas that may arise under the system of the Hague Abduction Convention, in view of the solutions that this convention has adopted and in view of the remarks that were made by the respondents.

Maintenance of spouses

Content of choice of law rules

Respondents from Belgium and the Netherlands pointed to problems concerning the content or the interpretation of the choice of law rules for maintenance between spouses. Respondents in Belgium referred to the incertitude that currently exists in Belgian private international law, as there is no clear written rule on maintenance between spouses. A decision of the Belgian Supreme Court is expected in near future. In the Netherlands, a respondent pointed out that the rule of Article 8 of the Hague Maintenance Convention is under discussion.

Forum shopping

Maintenance, especially of spouses, was, together with (the distribution of) marital property, by most respondents mentioned as the main reason for forum shopping. Respondents made clear that the divergence of both the choice of law rules and the internal laws is such that there is an advantage in bringing proceedings in certain jurisdictions.

Free movement of persons

Respondents did not associate problems concerning the maintenance of spouses with the free movement of persons.

Maintenance of children

Few problems concerning the application of the choice of law rules were put forward.

Jurisdiction and forum shopping

A few remarks were made with respect to jurisdictional issues concerning claims for child maintenance. A Finnish respondent pointed out that claims for maintenance for children

⁶There are currently 73 contracting states to the Hague Abduction Convention.

residing in third states (Estonia, Russia) would be brought against the parent (in most cases the father) residing in Finland in order to obtain a favourable maintenance award. A Luxembourg respondent, dealing with a case for maintenance for a child residing in a third state, Poland, remarked that it would be preferable to give jurisdiction to the court of the habitual residence of the child, as the law of habitual residence would almost always be applicable to the right to maintenance.

Free movement of persons

The cross-border movement of children posed problems, as set out above. These problems did not have a special bearing in relation to maintenance of children.

Legal certainty

The law of the habitual residence of the child is of paramount interest. As a consequence, few problems appear to exist in determining the applicable law.

Matrimonial property

Respondents did not identify problems with regard to the application or interpretation of the national choice of law rules for matrimonial property. Three member states are a party to the 1978 Hague Matrimonial Property Convention: respondents from these member states did not point out serious problems that existed with regard to the application or interpretation of the rules of this convention.

Respondents from certain member states did point out that the result of the choice of law rules causes concern. A respondent from Sweden pointed to the rapid mutability of the applicable matrimonial property regime under Swedish private international law. Respondents from England pointed to the conclusion of an ante-nuptial contract, which is possible in continental legal systems, but is considered to be contrary to public policy under English law. The prohibition under domestic law affects the validity of an ante-nuptial contract in the international context: respondents stated that an ante-nuptial contract concluded abroad would always be considered invalid.

Forum shopping

Matrimonial property was considered the main reason for forum shopping, together with maintenance between former spouses. The important differences between the private international law rules of the EU member states and the differences between the substantive laws of the EU member states make that the result of proceedings is much dependent on the court that has decided the case.

Distribution of marital property

A few respondents (notably in Belgium and Austria) pointed to problems that can arise at the time of distribution of marital property. Remarks were made with respect to the competent authority (e.g. would a Belgian notary be the most proper authority to handle the distribution of immovable property located in France)

Free movement of persons

Most respondents did not associate particular problems of matrimonial property with the free movement of goods. One respondent in Sweden thought that the rule of Swedish private international law on mutability of the applicable matrimonial property regime posed problems in the light of free movement.

Location of assets

A particular problem is the location of assets of spouses in other countries. Respondents pointed out that during international divorce proceedings it was difficult to gain insight in the property and income of spouses. Spouses would be able to hide certain property or income for one another. English respondents pointed to their rules of procedure (full and frank disclosure), which would make it much easier to gain such insight. This aspect is relevant for all money matters, not only for matrimonial property but also for maintenance.

Public policy

Respondents in general thought that public policy would not play a role in international cases when the law of another EU member state was applicable. Public policy would chiefly play a role in relation to third states. A number of respondents remarked that certain rules of a foreign law based on Islamic principles might be considered as contrary to public policy. In respect to the laws of other member states, two situations were mentioned where public policy could play a role. In England the prohibition of ante-nuptial contracts under English domestic law made that such contracts, although validly concluded under the law of another member state, would be considered to be contrary to public policy. The Dutch same-sex marriage was mentioned in a few member states (Austria, England) as a phenomenon that the courts would in all probability consider to be contrary to public policy. A final issue for which public policy apparently may play a role are certain forms of maintenance, that are awarded

Application of foreign law

A problem that was put forward as a serious problem in many interviews was the application of foreign law. Both judges and lawyers made clear that obtaining information on the content of the applicable foreign law proved difficult. Respondents on the continent, who were accustomed to applying foreign law, advocated various solutions to this problem. One solution that was often mentioned was the establishment of a database on foreign law. Another solution that was sometimes mentioned was the creation of a system that would make it possible for judges to consult judges of other member states. Only one respondent judge in Luxembourg pointed out that the London Convention⁷ was sometimes used to obtain information on foreign law.

A particular problem exists in common law jurisdictions, particularly England. English respondents considered the possible application of foreign law as one of the main reasons to reject the introduction of a system of choice of law rules. The requirements of English procedural law would make the application of foreign law extremely expensive. The suggestion to give judges the opportunity to consult judges in other member states was received with extreme caution by English respondents. Such a solution would according to an English lawyer only be acceptable in case parties can exercise control over the inquiries that are made between judges. Judges and lawyers from continental states, but also judges from Ireland, did not issue such reservations towards the application of foreign law and the consultation between judges in different member states.

Civil law systems v. common law systems

With respect to the application of foreign law, a number of respondents pointed to particular problems that would arise in case a court of a civil law system would have to apply English law. In practice it would be difficult to explain a system based on precedent and that contained phenomena to a judge who was familiar with applying law that was laid down in a

⁷ European Convention on Information on Foreign Law, London, 7 June 1968, ETS no. 062.

civil code. The situation where a judge of a common law country would have to apply the law of a civil law system would hardly occur in family law cases. In England the courts would not apply a foreign law in family law matters, in Ireland the courts had little experience with international cases. However, the prohibition of ante-nuptial contracts of English law would invalidate the marriage contract known in civil law systems.

Another issue that demonstrates the gap that exists in approach was the rules on discovery of English procedural law. One English respondent thought it would be impossible to apply English law without 'full and frank disclosure'. See also the comments in respect of matrimonial property.

Specialization of judges and lawyers

There appears to be an important gap of experience in handling international cases between judges and lawyers. Most judges who were interviewed did not have the possibility to specialize in international cases. The impression is that in most member states the organization of the courts is such that international cases will only be a small proportion of a judge's caseload. Most lawyers who were interviewed had chosen to specialize in international cases. A number of lawyers among the respondents propagated specialization of the courts. The introduction of 'international chambers' was mentioned as an option to increase the quality of decisions in international cases.

Cultural differences

Respondents often pointed out that in family law cases cultural differences played a much more important role than in civil or commercial cases. The cultural difference could play a role when a foreign law was applied (as the court applying the law would not be familiar with the culture that lies behind the rule). Cultural differences would also play a role when courts had to find a solution in an international situation. Cultural differences were also mentioned as an obstacle to unification of internal law.

4. A FEW CASE STUDIES

On the basis of the information that was collected during the interviews a number of problems have been identified. Hereunder, an effort will be made to present the problems that have been identified in case studies, that make more clear the dilemma's that under the present circumstances, face judges and lawyers. In view of the subject-matter of this research study, divorce and family law, inhabitants of the EU member states may well be confronted with these dilemma's themselves. The case studies are chiefly inspired by cases presented or comments made by the respondents. Some cases have been invented on the basis of general comments that were made during the interviews. The function of the cases is to clarify the dilemma's that must be solved in practice, not to comment on the domestic law that is currently in force in the EU member states. In as far the case studies contain remarks on the content of the national law of the EU member states these remarks are based on comments made during the interviews or on information contained in Document JUSTCIV 67 and are for that reason only tentative in nature.

Divorce

Case 1. The unfortunate twins

During an exchange programme, two twin sisters from Finland meet two brothers from Italy. The twins fall in love with the brothers and a double wedding is celebrated in Italy. One of happy couples remains in Italy, as the older brother must take care of the family business in

Milan. The other happy couple settles in Finland. After a few years both twins go through a bad period following the abrupt consecutive deaths of both their parents. Both twins feel they have married the wrong man and wish to divorce. The twin living in Finland seeks counsel from a Finnish lawyer, who tells her that a divorce is possible. A consideration period of six months must be respected, but in principle the divorce will be obtained within a year. The twin living in Italy seeks counsel from an Italian lawyer, who explains that getting divorce in Italy will be a lengthy affair. The Finnish lawyer of her twin sister suggests a return to Finland; after six months of habitual residence in Finland the Finnish courts will have jurisdiction to deal with a request for divorce in Finland. The twin sister is reluctant to leave Milan, as she has found a career in the Milan fashion industry. She also worries that her Italian husband may start divorce proceedings during the period she has to spend in Finland before she commences divorce proceedings there. The Finnish lawyer allays her fears, as he thinks that during that period the Italian husband can only start proceedings for separation, not for dissolution of the marriage in Italy. Such proceedings would not block proceedings for divorce in Finland.

Comment:

The example means to demonstrate the consequences of the differences in choice of law rules and in the substantive laws of the member states. Four very similar people, twin sisters and two brothers, find themselves in very different circumstances. At present, the choice of law rules are not unified. In Finland, Finnish law will be applied as the *lex fori*. In Italy, Italian law will be applied as the law where the married life is principally based. In case a decision were made to harmonize choice of law rules within the EU, it is doubtful whether the outcome of the cases would be different. In case a choice of law rule were adopted on the basis of traditional approaches of private international law, e.g. a rule based on application of the law that is most closely connected to the case, such a choice of law rule will probably refer to the law of common nationality, or, in the absence thereof, to the law of the center of gravity of the married life of spouses (such as the Italian choice of law rules). In case a choice of law rule would be based on certain values, the impression is that it will be difficult to find agreement between the member states as to what value should be expressed in the choice of law rule. Although the purpose of this research study is not to examine in detail the content of the substantive law of the member states, the interviews demonstrate that there are considerable, if not insurmountable differences in opinion as to what values are paramount. Some member states favour a rapid divorce of spouses who no longer are willing to live together; other member states wish to keep the marriage intact as long as possible. The argument in favour of harmonisation would be the element that is also contained in the example given above. Spouses may try to escape the consequences of certain national private international law rules by moving to another country. In case a choice of law rule were unified that tries to designate the law that is most closely connected to the marriage, e.g. the law of the last common domicile of spouses, such action would be to no avail. The next two cases will try to put forward whether that argument, unification to prevent forum shopping, should carry so much weight.

Case 2. Divorce at the second attempt

A couple, husband of French nationality, wife of Dutch nationality, has lived in France for a long period. The marriage breaks down and the wife starts divorce proceedings in France. The French courts refuse to grant a divorce, as the conditions for a divorce under French law have not been fulfilled. The wife leaves France and settles down in her native country, the Netherlands. After six months of habitual residence in the Netherlands she commences divorce proceedings in the Dutch courts. The Dutch courts have jurisdiction, in view of

Article 2(a) Brussels II Regulation. The action for divorce will be subject to Netherlands law according to Dutch private international law rules. Under Dutch law, there is no obstacle to the application for divorce. The French husband however claims that the divorce cannot be granted, as the French decision refusing the divorce must be recognised in The Netherlands.

Comment:

The case is entirely based on a decision of the Netherlands Supreme Court.⁸ In that decision, the argument of the French husband was rejected and the divorce was granted under Netherlands law. In case of unification of choice of law rules, it could be that such an outcome would be impossible in the future, as the court in the Netherlands would also have to apply French law.

The example has two elements. First of all, it may illustrate the phenomenon of forum shopping in family law cases, a phenomenon that can be countered by harmonisation of choice of law rules. Secondly, it may illustrate the case of a rule on recognition of the 'negative' divorce decree. Although one may indeed find both elements in this case, the case should not be taken as a prime example of the need to harmonise choice of law rules and to develop a rule on the recognition of the 'negative' divorce decree. The case could also be seen as a case that sets limits on the value of such rules.

Under the Brussels Convention (the present Brussels I Regulation 44/2001) prevention of forum shopping has always been an important factor in the case law of the European Court of Justice. However, forum shopping in the civil and commercial cases of the Brussels Convention is an entirely different phenomenon. In those cases, parties may try to bring a case to a court that will render the most advantageous decision. Parties will in generally not move their habitual residence or their statutory seat (or central administration or principal place of business) just to improve their chances in a future court case.

Brussels II (Regulation 1347/2000) allows a spouse who leaves the marital home in one member state and who settles in another member state to commence divorce proceedings in the state of the new habitual residence, after a certain period (six months or one year, depending on the circumstances) has lapsed. Indeed, the very fact that Brussels II offers the possibility to commence divorce proceedings in another member state under these conditions may mean that a divorce can be obtained that is unobtainable in the member state of the last common domicile. However, such a result would only be possible after the spouse has moved his or her habitual residence to another member state.

In the following case, further comments will be made with respect to harmonisation, forum shopping and negative divorce decrees.

Case 3. A look in the future

It is 2009 and a Regulation on the law applicable to divorce has been adopted. According to the choice of law rules of this regulation, the divorce is subject to the law of common nationality of spouses, in the absence thereof, by the law of the centre of the married life of spouses and in the absence thereof, by the law of the court. Furthermore, spouses may designate as the applicable law (if they mutually so agree) the law of habitual residence or nationality of either spouse. Finally Brussels II has been amended: a decision denying a divorce decree must be recognised in all member states.

Two years earlier, in 2007, an English husband and his Belgian wife, who both have lived in France shortly after they were born in the early 1960's, had started to live in separate towns during the week. The wife had been offered a position for at least five years in Amsterdam;

⁸ Hoge Raad 26 januari 1996, Nederlandse Jurisprudentie 1997, 258 (T hMdB); Netherlands International Law Review 1996 p. 266-274 (summary and case note in English).

the husband will continue his job in France. As the children of the couple are already going to university, spouses felt they would be able to look after themselves during the week and that they can meet during the weekends, alternating between Paris and Amsterdam using the high-speed train. Money is not a problem; spouses are well off, the wife more so than the husband, although both are not extremely rich.

In 2009, the marriage is breaking down. There is no adultery or anything like that at hand. The wife has simply discovered she wants to continue her life on her own, she prefers her life in that way. Although the wife intends to settle definitely in the Netherlands, she commences divorce proceedings in France. The French lawyer handling the case has no experience in handling international cases, does not (and is also professionally unable to) consider whether the wife may better options when she starts proceedings in Amsterdam and simply sees the case as an opportunity to earn a much-needed fee. Spouses have both lived in France for almost fifty years of their lives but do not have a common nationality. Nor is there anymore a centre of the married life, as spouses have lived separately for more than two years. Therefore under the new choice of law rules, French law as the law of the court is applicable. Under French law the conditions for divorce are not met as the husband opposes the divorce, mainly for financial reasons. The wife then commences proceedings in Amsterdam, but these proceedings fail because of the rule on recognition of negative divorce decrees.

Comment:

The case takes a very one-sided view of a possible outcome of unification of choice of law rules. It could well be that a unification of choice of law rules is possible that takes a much more liberal attitude and enable the application of a law that is connected to the case and that favours divorce. E.g., it could well be that future unified choice of law rules give prevalence to the fact that the couple in question has spent the best part of their lives in the Netherlands. The main function of the case is to put into question the wisdom of (possible) rules. At first sight, the future unified rules that are put forward in the case appear to be neutral as they rely on a notion of applying the law of closest connection. However, in combination with the rule of recognition of a 'negative' divorce decree, the rules are not so neutral anymore, as the rule on recognition gives higher value to the protection of the marriage.

The obvious solution would be to remove the rule on recognition of a negative divorce decree, as this rule takes position in a debate that appears to be insurmountable. Neutral and objective choice of law rules, such as the ones that are mentioned in the case, could then be adopted in a regulation. However, this solution would in the example of the case lead to more or less useless proceedings in France, followed by successful divorce proceedings in the Netherlands. The point could be made that in this case French law should anyhow be of overriding importance as the spouses have lived in that country for the better part of their lives and the centre of gravity of their married life has been in that country. If that law is applicable and that law does not allow a divorce, a divorce should not be granted. Other legal systems that are connected, such as the law of the new habitual residence of spouses, should not play a role and there should not be scope for application of the *lex fori*. Therefore, it would be pointless to take the case to the Netherlands, as the court in the Netherlands would also have to apply French law.

An argument against that point could be that the application of such a rule would mean that the choice of law rules would give predominance to a situation that existed in the past and would disregard the situation that will subsist in the future. Once the habitual residence as a single spouse has been established in another member state, the case becomes different from a case where spouses split up but remain in one member state. Spouses who live separated in the same member state, are legally and socially still under the influence of one single system. Hence it would be accepted by their mutual environment that it may take some time before

the divorce comes through. Spouses who live separately in different member states are subject to different legal and cultural systems. The single spouse will in a certain fashion become integrated in the member state of the new habitual residence. Hence, it must be accepted that the environment of one of the spouses finds it hard to accept a situation where divorce cannot be obtained because of the law of the country where spouses once used to live together. Admittedly, this argument, like previous arguments, is not entirely free of values.

Children

Case 1. The Swedish child abduction

A Swedish family of four moves to Athens in August 2002. The employer of the husband, a Swedish telecommunication company, has offered the husband a position for three years. The children are still very young, too young to go to school. The husband is away until late in the evening. One day in September 2003, the wife finds out that her husband has a relation with another woman. She is heartbroken but tries to keep her marriage intact. A week before the beginning of the festivities for Christmas 2003 mother and children go to Sweden. The husband who would follow his family a few days later, suddenly announces that he cannot come in view of urgent business. In Sweden, the wife has a long discussion with her mother and her mother-in-law. Even the mother-in-law agrees that the marriage is over and that the wife should commence divorce proceedings in Sweden. There is no reason to back to Athens. The oldest child is about to go to school and there seems little point in sending the child to the international school in Athens. Furthermore, the husband would return to Sweden anyhow in August 2005.

The husband reacts furiously to the decision of the wife to stay with the children in Sweden. He reacts even more furiously when he is notified of the divorce action that the wife has commenced in Sweden. In March 2004, he goes to see a lawyer in Greece, who informs him that there is a way to get the children back to Greece. Relying on the Hague Abduction Convention he demands the return of the children to Greece. The wife argues that such a return is pointless. The husband will not be able to look after the children himself during the day. In view of the oncoming divorce decision, a decision on custody will be necessary. What sense would it make to return the children to Greece under the Hague Abduction Convention to await a decision on custody by the Greek courts? The future of children is in Sweden, not in Greece. In the divorce proceedings in Sweden she proposes that the children would remain under joint custody of the parents, but that the children will remain with her for as long as the husband is still stationed in Athens. If and when her former husband returns to Sweden, new arrangements can be made in the interest of the children.

Comment:

The case only wishes to raise one question. In case a marriage is breaking down, and there are children in the marriage, a solution must be found for the children. The final solution in this particular case is where the children should reside once the marriage has been dissolved, not whether there is a case of child abduction. In the traditional, national context, the problems that arise in this type of abduction cases are very much in one hand. The judges who are involved in the cases, even if several courts within one jurisdiction are entitled to decide the matter, will probably share similar views as to what action should be taken. As a consequence, the national legal systems will probably be able to avoid the situation that an 'abducted' child must as a matter of principle be sent back to the court of residence of the other parent, only to await a further decision of that court saying that the child should finally reside with the parent who abducted the child in the first place. In the truly international context, the present solution is in principle that the child is sent back to the country from where it has been abducted. The courts of that country will in most cases decide where the

child will live in the future. Between states that are not members of the EU, there is probably no other solution available or acceptable. Within the EU, refinement of the present system, improving judicial co-operation, might be considered in order that the unnecessary displacement of a child in this type of 'abduction' cases is avoided.

Case 2. The divorce mother's international career

A Spanish couple, one daughter, is divorced in Spain. The mother obtains custody of the daughter. The husband has visiting rights and may see his daughter every week. The mother is offered a job in Brussels with an international organization. She wants to move there with her daughter. The child will find a place at the international school, with lessons partly in Spanish. The father, the former husband, goes to the Spanish courts and opposes this plan. The custody rights of the mother would not go so far that she has the right to go and live in another country. Furthermore, the move to Brussels would make it impossible to exercise the weekly visiting rights of the father.

Comment

The case tries to present a dilemma that was raised during several interviews. In case a parent has custody over a child following a divorce, what is the extent of this custody? In some member states the custody will be unlimited and the parent with custody can take the child to any country in the world. In other member states the parent with custody will not be able to leave that member state without approval of a court, possibly also not without the approval of the other parent who does not have custody rights. In so far as the prohibition to leave without approval of the court is part of system to have a court monitor the child, the question is whether the monitoring of the child cannot be handed over to the court of another EU member state, once the parent who has custody announces that he is moving to another EU member state. With regard to the exercise of visiting rights, the dilemma is whether this should be allowed to carry so much weight as to prevent the move to another member state.

Matrimonial property

The enterprising couple

A French husband and an Italian wife conclude a marriage contract before they marry in Paris. In this contract, that contains a clause that French law is applicable, they agree that their entire property will be separated. This decision is prompted by the idea that they are both self-employed and wish to protect each spouse from the business risks taken by the other. In case of bankruptcy of one spouse, the property of the other will be protected. Shortly after wedding, the couple moves to London. In London, they take up separate careers. The husband goes into banking and has a very successful career as an independent consultant in the City. The wife sets up a furniture shop in Chelsea, selling design furniture from Scandinavia. The business of the wife is unsuccessful and she has to close once the bank withdraws its financial support. A loan from a Belgian bank is left unpaid by the wife. The marriage then breaks down and the husband commences divorce proceedings in the English courts. The wife, who wants money from her husband to settle her debts, invokes the nullity of the French marriage contract, as under English law the contract would be contrary to public policy. The husband relies on the validity of French marriage contract. The Belgian bank also commences proceedings in England against the wife and the husband. In case the marriage contract is declared invalid, the Belgian bank hopes that under the new case law in England on marital property, the wife is entitled to a share in the substantial earnings of the husband.

Comment

The case tries to present two dilemmas. The first dilemma concerns the matrimonial property relations between spouses. The second dilemma concerns the matrimonial property relations of spouses against third parties. With regard to the first dilemma, the present divergence of choice of law rules may entail that a contract that is perfectly valid under the law of one member state, may not be valid under the law of another member state. In some member states, the actual view is that spouses who enter into an international marriage, would further legal certainty by designating the applicable law. This solution is not only found in treaty law or in national legislation, but was also advocated by some of the practitioners who have been interviewed. With regard to the second dilemma, the question is whether, even if in the future the agreement between spouses would find more universal acceptance, spouses are entitled to rely on such an agreement towards third parties, or, conversely, whether third parties should be made aware of the existence of such an agreement. This second problem was hardly discussed in the interviews, but it follows from the first.

5. WHAT ISSUES NEED TO BE ADDRESSED

Divorce

The application of the national choice of law rules poses little problems in practice. Nevertheless, the national rules lead to wide divergence in result.

On the basis of interviews it is difficult to take a position pro or contra unification of choice of law rules. Although the concept of unification appealed to many respondents, there were some serious objections as well. There are important differences in opinion that originate in the internal law as to what values are important. These impact lead to very different approaches on the level of national private international law. As long as there is no agreement as to the values that should underlie a future unified choice of law rule, unification appears to have little chance of success. Assuming that a future instrument will not set aside the application of general principles of private international law, in an extreme scenario the unification could lead to an increase of techniques of private international law, such as the use of the public policy exception or the 'facultative application of choice of law rules'. It is also not very clear what positive impact the unification would have on internal market or on the free movement of persons. Unification may have an effect towards the phenomenon of forum shopping, but it is far from certain whether this is a compelling reason for unification. The number of courts that will have international jurisdiction in accordance with Brussels II is limited. Also, it is far from clear why it would be inexcusable to make use of the options for 'forum shopping' that are available under Brussels II.

Maintenance of spouses

In some member states the application of choice of law rules poses some problems in practice, as the content of the national choice of law rule is under debate. A problem that appears to exist with regard to unification of rules on maintenance of spouses is the link that exists in certain national legal systems with the law that is applied to the divorce. Whereas in some member states the trend is towards a rule that is dissociated from the law that is applicable to the divorce, in other member states the problem appears to be totally linked to the law that is applicable to the divorce. In view of that link, an attempt to unify the rules on maintenance for spouses should be undertaken after or in combination with a unification of the choice of law rules for divorce.

Maintenance of children

The application of choice of law rules posed few problems in practice. Within the EU the Brussels Convention (now Regulation 44/2001) solved problems with jurisdiction. Most member states apply the law of habitual residence of the child to the maintenance question. It appears that within the EU most claims for maintenance of children are brought in the member state of habitual residence of the child. Problems that were mentioned mostly concerned the relation with third states.

Matrimonial property

In this area there appears to be a clear need for steps towards unification. Matrimonial property was singled out as the chief reason for forum shopping. The approaches of the civil law and the common law countries are very different. From the perspective of the civil law countries the recognition of a marriage contract poses problems in the common law countries. From the perspective of the common law countries the recognition of the trust poses

problems. In this area, unification could also clarify the position of third parties who do business with the spouses.

Parental responsibility

Two particular problems have been identified. One problem is the decision on custody (or parental responsibility) during the period that the marriage is breaking down and the parents are ending cohabitation. Closer cooperation of the courts from different member states may mean that unnecessary displacement of a child is avoided. The solutions that are now available (or are under discussion see Proposal (2002/C 203 E/27) might be reviewed to see whether they can meet that objective. Alternatively, the solutions that will be adopted in the future might be monitored closely to see whether such unnecessary displacement occurs as frequently as suggested. Another problem is the movement within the EU after divorce has been granted and custody has been awarded to one of the parents. In practice the parent who has custody may be confronted with restrictions when the parent wishes to move to another member state. As far as these restrictions relate to protection of the child, there appears a need for a system where the protection can be handed over with few formalities to an authority in another member state.

Application of foreign law

Application of foreign law was, in the member states where courts are used to apply foreign law, as one of the main practical problems. Application of foreign law is a general problem that is not limited to family law cases. As long as choice of law rules - whether unified or of national origin - prescribe the application of a foreign law, reliable information on the content of the foreign law is a condition precedent for an acceptable decision. A system for information on the law of the member states, possibly also a system for consultation between judges of the member states could remedy the problems that exist at this moment. The impression is that specialization of lawyers and judges would be a further step to help remedy these problems.

6. AREAS FOR WHICH ACTION SHOULD BE CONSIDERED

In the light of the above, action should be considered with respect to the following issues. This report does not pretend to say that such action should necessarily lead to further EU legislation. However, the issues that are mentioned clearly touch upon problems that exist in practice.

- Information on the law of other member states (accessible to lawyers and judges);
- Consultation between judges on the law of other member states;
- Legal certainty with respect to the law that is applicable to the matrimonial property of spouses;
- Judicial cooperation with respect to parental responsibility in the period leading to and in the period during divorce proceedings;
- With respect to parental responsibility after the divorce has been granted, clarification of the restrictions on movement that are allowed within the EU.

7. FINAL GENERAL REMARKS WITH REGARD TO THE UNIFICATION OF THE CHOICE OF LAW RULE FOR DIVORCE

EU Regulation 1347/2000 has unified the rules on jurisdiction and on recognition of divorce decrees for cases that are within the scope of the regulation. The choice of law rules for divorce rules have not yet been unified, not on the global level, not on a regional level.

The interviews again demonstrated that within the European Union, at present, there are very different approaches as to the concept that underlies the national choice of law rule. The underlying concept is in some member states heavily influenced by approaches of the internal law. Thus, in some member states, the approach of the internal law, that there should not be too many obstacles to the granting of a divorce, has influenced the choice of law rule. The national choice of law rule is based on the *favor divortii*, favouring the granting of a divorce as outcome of the case. It appears that such is the case in The Netherlands and in Scandinavian countries. The choice of law rules of The Netherlands encourage spouses to designate Netherlands law, a law that will allow the divorce. In the absence of agreement between spouses, the courts will in many cases also apply Netherlands law. In Scandinavian member states, the law of the court will be applied. On the opposite side, the internal law of some member states appears to favour an outcome of the case that protects the marriage and the family. This objective of the internal law means that in cross-border cases a divorce cannot be obtained lightly. The values of the internal law influence the outcome of international cases. An Irish respondent provided a clear example when he referred to the influence of national values on the decision-making in international cases.

In most continental member states, the choice of law rules are fashioned on the traditional approach that the law that should be applied is the law that is most closely connected to the case. Such an approach may give the impression that the values of the national law will play a subordinate role when deciding international cases. However, in states where the internal law contains certain barriers to the granting of an immediate divorce, spouses will probably not be allowed, in international cases, to designate a law that will immediately lead to a divorce. Thus, respondents in Spain pointed to a case where it was held not possible to apply a law that was connected to the case and that would have allowed the immediate dissolution of the marriage.

In case unification of the choice of law rules is undertaken, the profound differences in approach, ranging from an approach based on *favor divortii* to an approach that purports to be neutral but that in any case will not automatically favour a solution that will lead to a swift dissolution of the marriage, will be a serious obstacle. The research study focussed on the practical problems that exist as a consequence of the non-harmonization of the choice of law rules in the EU. Such a study cannot explain in detail the concepts that underlie the present national choice of law rules and the validity of such concepts on the present day. Successful unification seems improbable, as long as there is no agreement on the concept that should underlie the unified rules. At present it appears that the states that have adopted rules that are based on the *favor divortii* will be unwilling to give up such rules for rules that are based on a more neutral approach. On the other hand, it also appears that states that have adopted rules with a neutral character will be unwilling to accept rules that favour the dissolution of the marriage.

Another debate that again came up during the interviews is the debate between those who favour the application of the *lex fori* and those who favour application of traditional choice of

law rules. In general, member states that favour a quick dissolution of the marriage will apply the law of the court, or will allow spouses to designate a law that leads to the dissolution of the marriage. Application of the *lex fori* does not necessarily entail adherence to the approach of *favor divortii*, as can be seen by comparison of the situation in The Netherlands and in Belgium. In both member states the choice of law rule for divorce leads in the large majority of cases to application of the law of the court. In The Netherlands application of the law of the court will always lead to a quick dissolution of the marriage, but not so in Belgium.

In principle it should be possible to draft a choice of law rule that is more neutral than a rule that refers to the *lex fori* but that nevertheless favours a certain solution. A prime example of such a set of choice of law rules is contained in Articles 4 to 6 of the Hague Maintenance Convention (applicable law) 1973. These rules are based on the idea to favour payment of maintenance to the maintenance creditor, but do not revert automatically to the *lex fori*.

It is not said that the set of rules of Articles 4 to 6 of the Hague Maintenance Convention can ever be copied into a set of choice of law rules on divorce, but the approach of Articles 4 to 6 of the Hague Maintenance Convention may have a certain attraction. The result of the case would be less dependent on the court that has been addressed and it might offer better possibilities to cater for the needs and expectations of spouses who move frequently within the community. An issue that will need to be addressed is whether a connecting factor that is only present in one of the spouses is acceptable (e.g. the marriage will be dissolved when one of the spouses is national of, or is habitually resident in, a (member) state that allows the (rapid) dissolution of the marriage).

In the preceding paragraphs the position has been taken that unification of choice of law rules will require agreement as to the solution that is to be favoured. Presupposing that a solution to favour divorce meets with approval, some tentative thoughts on the possible approach of a future choice-of-law rule have been expressed. Judging on the interviews, it seems not very likely that agreement can be reached on the direction that should be taken by future choice of law rules, although the respondents did support the general idea of unification. Some member states will favour a solution leading to a (rapid) divorce, others will not. As a consequence, the condition that is considered a condition precedent for unification will not be met.

In case unification is successfully undertaken, a problem that should be addressed is the present rule of Article 8 Hague Maintenance Convention (applicable law) 1973. The origin of this rule is the relation that in many countries exists between the right of a former spouse to maintenance and the question whether the former spouse was at fault to the divorce. This relation should be reconsidered in case a uniform choice of law rule for divorce would favour the rapid dissolution of the marriage.

In case unification proves beyond reach, two solutions remain. First of all, the situation whereby the law of the court is applied could be taken as point of departure when reconsidering the rules on jurisdiction. In order to prevent forum shopping, an effort could be made to draft more stringent rules on jurisdiction. The adoption of the stringent rules on jurisdiction could be followed up by a limited unification, requiring application of the *lex fori* in all circumstances. Secondly, the present situation can be maintained, whereby the member states apply their own national choice of law rules and jurisdiction and recognition and enforcement is regulated by EU regulation 1347/2000. The question is whether the subsistence of national choice of law rules will, on the long or the short term, undermine the recognition of a divorce under Regulation 1347/2000.

Contributors

Dr G.E. Schmidt

Mrs. Dr. V. Lazic

Mr. B.J. van het Kaar

Mr M.J. de Rooij

General Adviser

Prof. Mr Th. M. de Boer (University of Amsterdam)

ANNEX 1 QUESTIONNAIRE INTERNATIONAL DIVORCE PRACTICE IN EU MEMBER STATES 2002

This interview does not primarily aim at obtaining information about the private international law of your country. For this purpose, the Commission sent a questionnaire to the Member States in 2000.

The purpose of this interview is twofold:

- *the Commission would like to hear about the actual occurrence of several problems in the Member States and*
- *the Commission is very much interested in hearing the personal opinions of experts who are involved in international divorce cases. Therefore, we would like to underline that you are not interviewed as a representative of your country but as an expert. Please feel free to give your personal opinion.*

A. General questions

1. Could you give an indication of the number of *international* divorce cases in your country/in your court?
2. Could you give an indication of the number of international divorce cases in which you are or have been involved in your professional capacity?
3. Could you give an indication of the percentage of international divorce cases in which the main foreign connection is with Member States, as opposed to cases in which the main foreign connection is with Non-Member States?
If many cases are connected to Non-Member States, which are the States to which most of the cases are connected?

B. Possible advantages of harmonisation

In earlier discussions, several advantages of the harmonisation of choice of law rules for divorce and related issues have been mentioned. We are interested to know about the actual occurrence of the problems that should be solved by such harmonisation. We would also like to ask you to which extent you expect a harmonisation of choice of law rules to really contribute to the solution of these problems.

To avoid any misunderstandings, we should point out that by “choice of law” we mean the process of designating the applicable law, not necessarily the freedom of the parties to designate the applicable law themselves. The term “choice of law” may cover that freedom as well (in which case we’ll use the phrase “party autonomy”) but we’ll use it as referring to the application of so-called “choice of law rules” or “conflict rules”.

Furthermore, we will use the phrase “harmonisation” even though it may suggest we are talking about Directives rather than Regulations. What we have in mind, however, is an EC instrument that is meant to *unify* rather than *approximate* choice of law rules in the area of family law within the European Union. It is likely that such an instrument will be a

Regulation rather than a Directive. Unification might, therefore, be a more appropriate term than harmonisation.

However, the phrase “harmonisation” is generally used in the European context to denote both unification through Regulations and approximation through Directives.

In some of the questions we will distinguish between the application of the *lex fori* and other approaches such as the application of national law or the law of the domicile or the habitual residence of the parties. This is because there is a principal difference between these approaches: if in all Member States the *lex fori* is applied all Member States will make use of a uniform choice of law rule, but on a substantive level there is no harmonisation as all courts in the Member States apply their own law. If one of the other conflict rules is applied, harmonisation will also be achieved on a substantive level.

Forum shopping

4. Do you have any experience in cases where forum shopping might have been an issue, for instance:

- where each party started proceedings in a different Member State, applying different laws? Or one party started proceedings in your country, while the other took action in a court in another Member State or in a country outside the European Union?
- where the action was brought in a court that would seem not the most convenient court for the parties, except for choice of law reasons?

5. Would the prevention of forum shopping be a reason for advocating harmonisation of choice of law rules in the Member States as far as the following topics are concerned:

- divorce/legal separation/marriage annulment
- parental responsibility
- maintenance obligations
- matrimonial property regimes

6. If yes, would it also be a reason to reject the application of the *lex fori* for the topics mentioned?

Legal certainty and predictability of result

7. Do you have any experience in cases where legal certainty and predictability of result was an issue

- as far as it concerns *choice of law rules* applied by foreign courts;
- as far as it concerns the rules of the *applicable foreign law*?

Please, distinguish between

- divorce/legal separation/marriage annulment
- parental responsibility
- maintenance obligations
- matrimonial property regimes

8. Would legal certainty and predictability of result be a reason for advocating harmonisation of choice of law rules in the Member States with regard to the several topics just mentioned?

9. If yes, would legal certainty and predictability of result be served better by the application of *lex fori* or by a uniform choice of law rule (referring to nationality, domicile, etc.)?

Free movement of persons and the smooth functioning of the internal market

10. Do you have any experience in cas es where the free movement of persons and the smooth functioning of the internal market was (probably) influenced by the absence of harmonisation of choice of law rules regarding divorce and/or related issues?

11. Would the free movement of persons and the smooth functioning of the internal market be a reason for advocating harmonisation of choice of law rules in the Member States with regard to the several topics mentioned?

12. If yes, would the free movement of persons and the smooth functioning of the internal market be served better by the application of the *lex fori* or by the application of a choice of law rule that may refer to foreign law (nationality, domicile, etc.)?

C. Possible effects of harmonisation, either positive or negative

Harmonisation of choice of law rules may have several effects that are not clearly positive or negative. We are interested to know about your expectations with regard to these effects.

Increase and complication of proceedings

13. Have you ever been involved in an international divorce case in which proceedings were complicated as a result of the non-harmonisation of conflict rules, or where the parties submitted more motions than they would have in a comparable domestic case? E.g.: forum shopping as discussed above, or non-recognition in one Member State as a direct or indirect result of the application of another choice of law rule in another Member State (as far as this would still be possible under the Brussels II Regulation).

14. Do such cases frequently occur?

15. Are there any other types of cases giving rise to problems in this respect?

16. Do you expect that harmonisation of conflict rules will have a positive effect on such cases? Or do you rather expect a negative effect (e.g. as a result of a more frequent application of foreign law)?

17. Is the complication of proceedings an argument either in favor of or against the harmonisation of conflict rules? Does it make any difference in this respect whether a *lex fori*-approach is taken, or an approach different from your own (e.g. choice of law rules referring to nationality, domicile etc.)?

Effects on agreement between the parties and out-of-court settlements

18. Do you expect that the harmonisation of choice of law rules can have (frequently occurring) positive or negative effects with regard to

- the freedom of the parties to agree on the applicable law (party autonomy), either with respect to divorce or with respect to related issues;
- the freedom of the parties to agree on the substantive aspects of the case (divorce and/or related issues) and to have their agreement authorized by a judicial or non-judicial authority?

19. Would these effects, if any, be a compelling reason to harmonise (or not to harmonise) choice of law in these areas?

The extent to which all related matters can be dealt with in the same proceedings, and applying the same law

At first glance, it would stand to reason that the same court deals with both the divorce and all other issues coming up in divorce proceedings (maintenance, parental responsibility, matrimonial property etc.). Nevertheless, it is conceivable that, for instance, the husband petitions for divorce in the Member State of his habitual residence (e.g. if he resided there for at least a year immediately before the application was made, Article 2(1)(a) Brussels II Regulation) and that the wife subsequently sues her ex-husband for maintenance in behalf of herself and her children in the Member State of her habitual residence (Article 5(2) Brussels I Regulation). At present, both courts will apply their own choice of law rules with regard to either issue. This may mean that the divorce issue may be governed by another law than the one that is applied to the maintenance claim. But even if the same court deals with both divorce and maintenance, it is possible that these issues are governed by different laws, as the choice of law rules for divorce and maintenance may differ, even within the same jurisdiction.

20. Do you have any experience with cases in which the divorce issue was addressed by the courts in one Member State and one or more of the related issues by the courts of another Member State or the courts of a country outside the European Union?

21. If yes, could you think of any reason justifying such divergence? Should the rules on jurisdiction be changed in such a way that the plaintiff/petitioner is discouraged from bringing different (divorce-related) issues before the courts of different countries?

22. If yes, does it make a difference whether the related issue (e.g. maintenance) is submitted
 (a) while the divorce claim is still pending in another jurisdiction?
 (b) subsequent to the divorce?

23. Should all related issues be addressed by the same choice of law rule as the one covering divorce?

24. If yes, should the choice of law rule on the related issues be identical to the choice of law rule on divorce, or should it be the other way around?

D. Possible impediments and disadvantages

Several objections have been raised to the harmonisation of choice of law rules on divorce and related issues. Some of those have to do with the possibility that national courts would be obliged to apply choice of law rules that are markedly different from the ones they used to apply under their national conflicts laws. Closely related to these objections is the refusal to apply foreign law on public policy grounds.

Introduction of non-acceptable foreign law; public policy considerations

25. Do the choice of law rules of your legal system frequently lead to the application of foreign law with regard to

- divorce/legal separation/marriage annulment
- parental responsibility
- maintenance obligations
- matrimonial property regimes

26. If yes, is the public policy argument frequently raised?

27. Do you expect that the courts in your country will evade or even refuse the application of foreign law, either by invoking public policy or by other private international law techniques, if the choice of law rule calls for the application of

- a foreign law allowing divorce by consent;
- a foreign based on favor divortii notions (for instance: if, under that law, divorce should be granted on the sole ground that petitioner claims the marriage has irretrievably broken down);
- a foreign law restricting the possibility that the petition for divorce will be granted;
- a foreign law based on divorce by “fault”;
- legal concepts such as legal separation and marriage annulment?

E. Correlation between the topics discussed and jurisdiction or recognition and enforcement

28. Do you, from your own experience, expect that a change of the choice of law rules will (or should) have any impact on jurisdiction and/or recognition and enforcement?

29. Do you, from your own experience, expect that jurisdiction and/or recognition and enforcement will (or should) have any impact on a possible change of the choice of law rules?

F. Desirability of an instrument

30. Taking into account the several effects of harmonisation of choice of law rules, would you support it?

31. If yes, subject to which proviso?

32. Would you prefer harmonised choice of law rules to be developed within the EU only? Or would you be in favor of world-wide harmonisation, e.g. within the framework of the Hague Conference of Private International Law?

G. Profile of a possible future instrument

Scope:

33. Should a possible future instrument include choice of law rules
- pertaining to divorce only;
 - pertaining to divorce as well as to legal separation and marriage annulment;
 - pertaining to parental responsibility;
 - pertaining to maintenance obligations (between spouses and between parents and children);
 - pertaining to matrimonial property issues?
34. Should the scope of a possible future instrument be restricted to cases that have only connections with other Member States or should it deal with all divorce cases?

Contents of a prospective choice of law rule for divorce:

We would appreciate it if you will answer this question, even if you are opposed to the harmonisation of choice of law in the area of divorce and related matters.

35. Which choice of law rule should be laid down in a new EC instrument with regard to the various issues mentioned before? Please, give the order of the connecting factors you would prefer, e.g. by numbering them.

a. divorce/legal separation/annulment

- current common nationality of the spouses
- last common nationality of the spouses
- current common domicile / habitual residence of the spouses
- last common domicile / habitual residence of the spouses
- place of marriage
- place where divorce proceedings have been commenced (forum)
- other:

b. parental responsibility

- domicile/habitual residence of the child
- nationality of the child
- current common nationality of the spouses
- last common nationality of the spouses
- current common domicile / habitual residence of the spouses
- last common domicile / habitual residence of the spouses
- place of marriage
- place where divorce proceedings have been commenced (forum)
- lex divortii
- other:

c. maintenance (between ex-spouses)

- domicile/habitual residence of maintenance creditor
- nationality of maintenance creditor
- current common nationality of the spouses
- last common nationality of the spouses
- current common domicile / habitual residence of the spouses
- last common domicile / habitual residence of the spouses

- place of marriage
- place where divorce proceedings have been commenced (forum)
- lex divortii
- other:

d. child maintenance

- *domicile/habitual residence of the child*
- *nationality of the child*
- current common nationality of the child and parent
- last common nationality of child and parent
- current common domicile / habitual residence of child and parent
- last common domicile / habitual residence of child and parent
- place of marriage
- place where divorce proceedings have been commenced (forum)
- lex divortii
- other:

e. matrimonial property regime

- current common nationality of the spouses
- last common nationality of the spouses
- common nationality of the spouses at time of marriage
- current common domicile / habitual residence of the spouses
- last common domicile / habitual residence of the spouses
- common domicile / habitual residence of the spouses at time of marriage
- place of marriage
- place where divorce proceedings have been commenced (forum)
- lex divortii
- other:

36. Should this/these choice of law rule(s) be (a) strict one(s) or should the courts have ample opportunity to depart from it/them, taking into account the circumstances of the case?

- divorce/legal separation/annulment
- parental responsibility
- maintenance obligations (children / ex-spouses)
- matrimonial property issues

37. Should the spouses be allowed to choose the applicable law?

- divorce/legal separation/annulment
- parental responsibility
- maintenance obligations between ex-spouses
- maintenance obligations between parents and children
- matrimonial property regimes

38. If yes, should this choice be restricted to certain legal systems?

- (former) common national law
- (former) common domiciliary law
- lex fori
- other:

39. Should the applicable law govern the whole matter or should there be exceptions such as application of mandatory rules of *lex fori*? If yes, can you give examples of mandatory rules in your

own legal system that should be considered mandatory in the choice of law context?
– application of the public policy exception? If yes, can you give examples of rules of foreign law that would be contrary to the public policy of your legal system?

40. Do you have any additional comments?

CASE I

Patria and Xandia are both Member States of the European Union. Husband and Wife are nationals of Patria. They married in 1990 and live in Xandia since that year. After having discovered that Wife's internet friend is also a very good friend in real life, Husband decides to seek the advice of a lawyer. The lawyer tells him that he can start divorce proceedings either in Patria or in Xandia, at his choice. The courts in Xandia will apply the law of the habitual residence of the parties, in this case the law of Xandia. Under this law, the grounds for divorce are limited. In this particular case, Husband would obtain a divorce if he succeeds in proving that Wife committed adultery with her internet friend. Under Xandian choice of law rules, the law of Xandia would apply to maintenance questions as well. As a consequence, Husband will not have to pay any maintenance, as Wife is the party at fault. Wife, on her turn, is advised by her lawyer to bring a divorce claim in Patria. The Patrian courts will apply the law of Patria, being the national law of the spouses, only requiring that the marriage has irretrievably broken down.

Under the law of Patria such an assertion is non-rebuttable. Furthermore, Wife's lawyer informs her that Patria is a party to the 1973 Hague Convention on the Law Applicable to Maintenance Obligations. Therefore, the courts of that State will, by virtue of Article 8 of that Convention, also apply the law of Patria to a possible maintenance claim. As a consequence, Wife will obtain maintenance from Husband irrespective of fault or guilt of either party.

Questions:

1. Do cases like this often occur in your country?
2. It is likely that the parties in this case will try to get the case before the court each of them expects to render a decision that benefits him/her most. What should be done about this?
 - a. prevent forum shopping on the level of jurisdiction, e.g. by creating a hierarchy in the jurisdictional rules of the Brussels II Regulation (e.g. by deciding that the court of the common nationality has only jurisdiction if neither party is domiciled in a Member State);
 - b. prevent forum shopping by harmonising the conflict rules, both on divorce and on related matters;
 - c. prevent forum shopping by another solution, viz.:
 - d. do nothing. Although the different courts will provide different solutions, each of the solutions is justifiable. It is, especially in international cases, quite often somewhat arbitrary which solution is applied;
 - e. do nothing. Although it would be desirable to prevent forum shopping, jurisdictional rules and conflict rules should not be adapted to this rather small minority of cases;
 - f. other solution:

CASE II

A divorce case is pending in a court in Patria, a Member State of the European Union. This court finds, on the basis of its choice of law rules (perhaps: the future harmonised choice of law rules of the European Union), that the law of Forenia, a Non-Member State, is applicable.

In Forenia, a court can dissolve a marriage

- if the husband declares his will to divorce;
- if there is mutual consent between the spouses;
- on the request of the wife, if one of a limited number of grounds has been met, viz.:
 - the husband refuses to fulfill his maintenance obligations to the wife;
 - the husband suffers from infirmity preventing conjugal relations;
 - the husband abstains from sexual relations for over four months;
 - the husband has been sentenced for an offense that brings disgrace to his family;
 - the husband is absent without justification for over a year;
 - the husband causes grave moral harm to the wife.

As a consequence, under Forenian law, the husband will always succeed in achieving a divorce, while the wife's petition may frequently be denied. This, according to the court, is in conflict with the principle of equal treatment of men and women, and therefore a violation of Patria's public policy.

Questions:

1. Should, in your personal opinion, a court in a case like this apply the law of Forenia unrestrictedly or should it make a correction in order to obtain equal treatment?
2. If a correction should be made, should this be
 - the application of the grounds for divorce for the wife in all cases, even if the petition is submitted by the husband;
 - the application of the grounds for divorce for the husband in all cases, even if the petition is submitted by the wife;
 - the application of another law:
 - the law which should be considered the law most closely connected, after Forenian law;
 - lex fori;
 - another solution?

ANNEX 2 LIST OF INTERVIEWEES

Austria

Mrs. Mag. S. Beck,
Judge, Bezirksgericht Döbling, Vienna

Mr. Dr. A. Kriegler
Lawyer, Vienna

Mr. Dr. G. Thoma-Twaroch
Judge, Bezirksgericht Döbling, Vienna

Belgium

Mr. Prof. Dr. P. Senaeve
Councilor, Court of Appeals, Brussel

Mrs. J. Sosson
Lawyer, Bruxelles

Denmark

Mrs. Reimers-Lund
Lawyer, Copenhagen

Mrs. Rousing-Koch
Lawyer, Copenhagen

Finland

Mrs. A. K. Aaltonen
Judge, City Court, Helsinki

Mrs. K. Rintala- Jaalivaara
Lawyer, Helsinki

Mrs. E. Tikka,
Judge, City Court, Helsinki

France

Mrs. V. Chauveau
Counselor, la Cour, Paris

Mrs. R. Crépin-Mauriès
Vice-President, Family Affairs, Tribunal de Grande Instance, Paris

Germany

Mr. H.E. Schwarz
Judge, Oberlandesgericht, Stuttgart

Mr. W. Vornberg
Lawyer, Frankfurt/Main

Greece

Mrs. P. Adamopolou
Lawyer, Athens

Mr. E.N. Vassilikakis
Lawyer, Thessaloniki

Ireland

Mrs. A. Dunne
Senior Counsel, Dublin

Mr. P. O'Sullivan
Judge, High Court, The Four Courts, Dublin

Mr. M. White
Judge, Circuit Court, Family Court, Dublin

Italy

Mrs. V. Biscardi
Lawyer, Roma

Mr. F. Eramo
Judge, Tribunali per i Minorenni dell'Abruzzo

Mrs. F. Mangano
Judge, Tribunale Civile, Roma

Luxembourg

Mrs. L. Dupong
Counselor, Court, Luxembourg

Mr. Engel
Canzemius and Hoffmann, Judge, Cour d' Appel, Luxembourg

Netherlands

Mr. L. Strikwerda
Advocate-General, Supreme Court of the Netherlands, The Hague

Mr. M. Wiglevén
Councilor, Gerechtshof Amsterdam, Amsterdam

Portugal

Mr. J. Castro Caldas
President of the Legislation Committee of the Bar Association
Former Bastonario

Spain

Mr. J.A. Marfil
Lawyer, Madrid

Mr. L. Zarrauqui
Lawyer, Madrid

Sweden

Mr. Prof. A. Agell
Faculty of Law, Uppsala University
Professor of Private Law (Professor emeritus)

Mrs. Prof. Janterä-Jareborg
Faculty of Law, Uppsala University
Professor of Private International Law and International Civil Procedure

Mr. F. Renström
Lawyer, Stockholm

United Kingdom

Mr. P. Moor, Q.C.
? , 1 Mitre Court, London

Mr. M. Nicholls
Barrister, 1 Mitre Court, London

Mr. M. Preston
Solicitor, London