PARTY AUTONOMY IN THE LEGAL REGULATION OF ADULT RELATIONSHIPS: WHAT PLACE FOR PARTY CHOICE IN PRIVATE INTERNATIONAL LAW?

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Abstract This article is an examination of the merits of permitting the exercise of party autonomy in choice of court and choice of law in respect of the personal and patrimonial aspects of adult relationships. It provides a commentary on the party autonomy provisions of EU harmonization instruments, actual and proposed, in family law. The treatment considers the particular issues of drafting which arise from the specialties of family law, and ponders whether or not the refinements required render the exercise of permitting party autonomy self-defeating.

Key words: choice of court, choice of law, Maintenance Regulation, Matrimonial Property proposal, party autonomy, restrictions on choice, Rome III, Succession Regulation.

I. INTRODUCTION

The device of party autonomy is firmly embedded in private international law rules pertaining to contractual obligations and commercial matters generally. Freedom of choice of court, and of choice of law in contract is entrenched in the British legal psyche as a fundamental principle. Party autonomy is characteristic of the common law rules, and is prominent also in the European regime, viz the Brussels I Regulation on civil and commercial jurisdiction,[1] the Rome I Regulation on the law applicable to contractual obligations,[2] and the Rome II Regulation on the law applicable to non-contractual obligations.[3] This last example is less deeply planted; few had thought of the possibility of parties seeking in advance to select the law to govern the consequences of any allegedly delictual incident which later should befall them, as claimant or

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[1] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, art 23. See also 2005 Hague Convention on Choice of Court Agreements.

[2] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), art 3.

[3] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), art 14.

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defendant.[4] Nonetheless the freedom endowed by Rome II, Article 14 has passed relatively unremarked into the conflict of laws toolbox.

In matters of personal status and family law, UK private international law rules typically have been, at best, silent and, at worst, antagonistic in the matter of party choice. This is ironic given that the origins of autonomy as a tool for the resolution of conflict disputes lie in the sixteenth-century analysis of marriage contracts by the French jurist, Dumoulin.[5]

The purpose of this article is to examine the nature, availability and extent of 'choice' in modern conflict of laws rules pertaining to the personal and patrimonial aspects of adult relationships, and to consider the incidence of the use of party autonomy, and restrictions thereon, to determine jurisdiction and choice of law in that context. What place is there, and ought there to be, for the principle of party autonomy in the treatment and resolution of conflict cases concerning adults and their transnational legal affairs?

A. The Significance of 'Agreement'

The prominence of, and importance attributed to, private agreements in the commercial side of private international law—wherein judges routinely search for and give effect to what the parties themselves have agreed, and 'leave it, more or less, at that'[6]—has prompted Briggs to speak of the 'contractualisation'[7] of private international law: '[w]here one can show the parties' common, or mutual, intention, it is natural to suppose that it should guide the judge in the application of the rules of private international law . . .'.[8] Nygh attributed the admission of party autonomy into private international law rules of contract both to pragmatism ('the necessary accompaniment of the globalisation of international trade and commerce') and to idealism ('the human right of individuals to arrange their personal and economic lives as they see fit, subject only to such restraints as are necessary to maintain public order and prevent the exploitation of the weak').[9]

These reasons could extend equally to the domain of family law. Yet there is, at present, scant evidence in UK rules of party freedom to direct private international law affairs in family law. The concept is emerging forcibly, however, in European rules and proposals.

In the sphere of private international law, it is arguable that the private agreement of parties as to jurisdiction and/or choice of law should constitute, at least *inter se*, an immediate source of rights and obligations. With regard to the contractual sphere, Briggs has written, 'One characteristic of a mature legal

[4] Though see PM North, *Essays in Private International Law* (OUP 1993), ch 4; and ch 7, 'Choice in Choice of Law', 187–91.

[5] See, for background detail, HE Yntema, '"Autonomy" in Choice of Law' (1952) 1(4) AmJCompL 342; and P Nygh, *Autonomy in International Contracts* (Clarendon Press 1999) 4–5.

[6] A Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP 2008) Preface, viii.

[7] ibid para 1.05. [8] ibid para 1.02. [9] Nygh (n 5) 258.

system is that persons who have legal capacity should be able to make agreements in such terms as they consider to serve their interests, and should be able to expect the courts, or other dispute resolution tribunals, to be prepared to enforce them according to their terms.'[10] Is the sphere of personal adult relations so different that the same considerations should not apply? To what extent in adult relations should the will of the parties be determinative of their rights and duties *inter se* and also vis-à-vis third parties? Should a privilege (or right?)[11] of self-determination in relation to private international law be afforded to the parties to determine how their legal and personal relations should be ordered, and to agree where litigation should be pursued and which law the forum should apply? Moreover, in what circumstances, if any, ought that privilege to be qualified?[12]

II. THE REGULATION OF ADULT RELATIONSHIPS—PRIVATE RIGHT OR PUBLIC POWER?

Writing in the early 1990s, Sir Peter North observed, perhaps with a note of surprise, that the spread of party autonomy in commercial matters had not resulted in any suggestion, judicially or in law reform proposals, that spouses should enjoy more direct freedom to choose the law applicable to matrimonial issues.[13] That party autonomy had not then received the same force of application in family law as it has in the realm of contract was attributed by Sir Peter to two reasons. First, family law is concerned with matters of capacity, and it has not traditionally been deemed appropriate that parties, by their own agreement as to governing law, should be able to clothe themselves with, or deny themselves, capacity.[14] Though it may be accepted that the parties to a *transaction* should enjoy the power to choose the law to govern that transaction, the position regarding capacity seemingly is different.[15] The second reason is that 'marriage is to be regarded as more of a status than a contract, with the corollary that, "its incidents are determined not by the will of the parties but by the prescriptions of the law".'[16] Sir Peter drily concluded, however, that 'Such a statement is, however, in the international context, more impressive than convincing. It assumes that there is a readily indentified, obviously correct "law" to be applied, free from determination by the will of the parties . . . a rash assumption in English private international law . . .'.[17]

[10] Briggs (n 6) para 1.22.

[11] See L Brilmayer, 'Rights, Fairness and Choice of Law' (1989) 98 YaleLJ 1278: 'Choosing to talk in terms of rights rather than policies or interests represents a fundamental jurisprudential commitment which is reflected in the way that concrete problems are resolved.'

[12] cf Yntema (n 5) 344 and 357.

[13] North (n 4) 176.

[14] See eg criticism of Cheshire's intended matrimonial home theory in relation to capacity to marry in North (n 4) 175. cf misgivings about ascribing the regulation of commercial capacity to contract to the putative proper law, unless objectively ascertained: 'intention cannot here be allowed free play' (GC Cheshire, *International Contracts* (David Murray Lecture) (1948)).

[15] See eg Yntema (n 5) 343.

[16] ibid.

[17] North (n 4) 176.

Should parties, as a matter of policy, be able to regulate their civil status and civil relations?[18] Should parties be permitted to be the architects of their own private international law rights and duties? This draws into focus the relationship between state autonomy (the power of the state to establish rules of law) and private autonomy (the power of the parties to make their own arrangements). Famously, in the European harmonization of laws project, while the desire of the *individual* to craft his own arrangements has been encouraged, with regard to state autonomy, only the UK and Ireland have enjoyed autonomy on the question of opting in to European instruments.[19] Within any given legal system there is a clearly understood relationship between the legislature and the individual, in which the individual is the inferior. This is seen particularly clearly in the law of marriage, in respect of which the individual's freedom to create obligations as s/he pleases typically is circumscribed by the laws of the *locus*, as to form and sometimes as to essentials, and by the personal law(s) of the parties as to essentials.

The tension between public power and private will has been explained by Yntema, thus:

> . . . while the general laws established for the public welfare derive from the *volonté generale*, the parties are at liberty by their agreements to prescribe for themselves 'private laws' regulating the infinite variety of individual interests within the sphere of free enterprise. The conception as applied to conflicts of laws, that the parties should, as it were, legislate by contracting with respect to their particular affairs, however, has met with doctrinal criticism . . . .[20]

In the context of commercial jurisdiction, Briggs analyses the tension as a friction between public law and private law:

> . . . whether a court has jurisdiction is always – ultimately – a matter of public law which lies beyond the direct control or autonomy of the parties. . . . where legislators have established jurisdictional rules for a court, it is not for the parties as individuals to make private agreements which assert priority over that public law.[21]

Private will is not absolute, and evidently must be subordinate to certain considerations of the perceived public good and public order; bilateral private agreement cannot override multilateral public interests. In contrast, Brilmayer, in her analysis of private (international) law rights, has stated that, 'Choice of law rights arise out of the fact that the state's legitimate authority is finite and

[18] This is a core theme of modern family law. *Contra* Briggs (n 6) Preface, viii ('the common law of private international law is much more about the resolution of civil disputes that the regulation of civil relations . . .').

[19] Protocol No 21 on the position of the UK and Ireland in respect of the Area of Freedom, Security and Justice (OJ 2008 C115/295) (ex-Protocol No 4 (OJ 1997 C340/99)). See also Protocol No 22 on the position of Denmark (OJ 2008 C115/299) (ex-Protocol No 5 (OJ 1997 C340/101)).

[20] Yntema (n 5) 342–3.

[21] Briggs (n 6) para 1.17. cf Yntema (n 5) 343, '*l'Etat, c'est tout*'.

the state ought to recognize this.'[22] Where then ought the balance of control lie between private interests and public (state) interests?[23]

If the national state (or a supranational regime) is the 'sovereign' source of private international law rules,[24] parties can exercise their private autonomy only insofar as enabled by that state/regime.[25] To what extent should parties be authorized by the national/supranational rules to direct their own private affairs? A mid-position must be reached to regulate, within the framework and design of national or private international law rules, how far individuals can exercise freedom, through private agreement, to elect the forum in which to litigate, and/or to choose the law by which to determine their rights and duties. This is self-determination, within the limits prescribed by law.

III. THE EXERCISE OF CHOICE

Choice can be exercised directly in one of three ways: by expressed intention; by intention inferred from the circumstances of the case (ie tacit election); or by presumed intention (ie neither expressed nor inferred, but choice imputed from an analysis of the circumstances).[26]

Private international law rules in England and Wales pertaining to adult relations and related property matters make virtually no provision for direct choice of court or law, and likewise in Scots law there is barely any such provision.[27] A very rare example of when an individual's intention is directly relevant is in relation to the interpretation of wills.[28]

It is important to bear in mind, however, that parties are able to exercise considerable influence by way of *indirect* choice, through private agreement between two or more individuals, or by unilateral actings. An example of the former is the tactical choice of law which occurs when parties in UK courts decide not to lead evidence of foreign law, with the result that the law of the forum applies by default. Since pleading foreign law is voluntary in UK courts, failure so to do is, in effect, a covert choice of law (even a *fraudem legis*), through the passivity, ignorance, or complicity of litigants, colluded in by the

[22] Brilmayer (n 11) 1294. Governmental interest analysis proponents in the USA would weigh the interests of the forum and of other states, respectively, and would subject the parties' will to (legitimate) state interests, thereby rejecting party autonomy in favour of state autonomy.

[23] cf Rix LJ's reference in *Radmacher v Granatino* [2009] EWCA Civ. 649, at [71] and [83], to the dangers of a principle whereby public policy trumps private autonomy: '... while the public interest in a fair and just exercise of the court's discretion remains, there is fairness and justice too in a proper appreciation of party autonomy; and ... there are dangers in overly paternalist or patronising attitudes or in an insufficiently international outlook.' See below, Section IV.C.2.

[24] Briggs describes choice of law rules as a 'higher form of law, which litigants take as they find in the court where they litigate' (n 6, para 1.19).

[25] cf Yntema (n 5) 343–4, citing Niboyet's description of "*le paroxysme de la volonté des parties*" (J P Niboyet, Note, *Cass. Civ*. 21 *Juin* 1950, S. 1951.1.2.).

[26] cf Nygh (n 5) 106; and Yntema (n 5) 344.

[27] See, however, Family Law (Scotland) Act 2006, section 39(6)(b), discussed below, Section IV.C.1.

[28] Section IV.D, below

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judge.[29] The 'choice' in this instance, of course, is limited insofar as it is a choice between the relevant foreign law and the law of the forum.

With regard to indirect, unilateral choice, there is a version of freedom of choice of law where parties choose not the applicable law *per se*, but rather they manage their circumstances to fix the locale of the connecting factor which is incorporated in the choice of law rule by which the applicable law is identified.[30] The same is true in relation to jurisdiction. In most instances, particularly as regards personal law connecting factors which apply in many private international law rules (especially in family law), parties cannot by mere declaration 'choose' the connecting factor, for the factor is a more subtle and complex concept than one which is capable of straightforward nomination. But an individual nonetheless can control unilaterally the elements which comprise the connecting factor, thereby securing choice 'at one remove'.[31]

The personal law connections in respect of which indirect choice may be exercised are habitual residence (principally relevant in UK rules of jurisdiction in respect of matrimonial proceedings), and domicile (applicable in UK choice of law rules in respect of, *inter alia*, capacity to marry, succession to moveable property, and taxation; and in jurisdiction rules concerning, *inter alia*, matrimonial actions). Express declarations (that is to say, direct choice) of domicile, whether *inter vivos* or *mortis causa*, are not binding, for it is the prerogative of the court, not the *propositus*, to determine domicile.[32] Particularly with regard to the acquisition of a domicile of choice, however, the *propositus* is able to exert very strong influence over a court's likely conclusion, not just through his deeds (the fact of his residence), but also through manifestations of his state of mind.

It is probably fanciful to imagine that an individual would contrive to fix his domicile in a particular legal system, for the purpose, say, of clothing himself with capacity to marry, but it is not beyond possibility that he would seek to engineer his domicile for the purposes of taxation, or to evade a substantive rule of succession; or that he could swing his habitual residence[33] in order to seek or avoid a particular matrimonial remedy and ancillary financial relief.

Similarly, whenever a choice of law rule embodies reference to a fixed connecting factor based on the formulation '*lex loci* . . .', a party(ies) is/are able

[29] See generally R Fentiman, *Foreign Law in English Courts* (OUP 1998); and C Esplugues, J-L Iglesias, and G Palao (eds), *Application of Foreign Law* (Sellier 2011).

[30] Yntema (n 5) 344; North (n 4) 172; and Briggs (n 6) para 2.19

[31] North (n 4) 176.

[32] *Ross v Ross* 1930 SC (HL) 1, *per* Lord Buckmaster at 6. Also *De Bonneval* (1838) 1 Curt. 856; *Whicker v Hume* (1858) 7 HLC 124; *Crookenden v Fuller* (1859) 1 Sw.&Tr. 441; *Woodbury v Sutherland's Trs* 1939 SLT 93; *Latta v Latta* 1954 SLT (News) 74; *Scappaticci v Att.-Gen*. [1955] P.47; *Re Sillar* [1956] IR 344; *Tennekoon v Duraisamy* [1958] AC 354; *Revenue Commissioners v Matthews* (1958) 92 ITLR 44; and *Reddington v Riach's Executor* 2002 SLT 537. See, exceptionally, *In Re M.* [1937] NI 151.

[33] Especially in view of the disarray of authorities on the meaning and interpretation of habitual residence, context by context and forum by forum. This example of party autonomy by actings could be akin to taking part in a lottery.

to exercise autonomy in localizing the factor, ie selecting the relevant place, and in so doing to secure the application of his/their preferred law. Thus, in relation to the formal validity of marriage (that, subject to the Foreign Marriage Act 1892, formal validity shall be determined by the law of the place where the marriage is celebrated),[34] freedom to choose the place of celebration is tantamount to choice of law.[35] Though limited,[36] this is another manifestation of indirect party autonomy. The same principle is true in relation to the formal validity of wills.[37] Likewise in relation to distribution in succession, an incontrovertible acting to manipulative effect is the purchase of land within a legal system the substantive domestic succession rules of which accord with the purchaser's testamentary intentions.

Finally, whenever a choice of law rule leads to application of the *lex fori*, parties, insofar as they are able to select the forum, are able in turn to exercise indirect freedom of choice of law: this would be informed choice, possibly amounting to forum shopping – which may or may not be a vice.

Sir Peter North, with reference to Mann's writing on choice of law in contract, argued that the proposition that, 'To allow the parties freely to choose the localising elements, yet to restrict them in their choice of law, is inconsistent',[38] is one which extends beyond contract law and 'could be taken to support freedom of choice virtually everywhere'.[39]

It is curious that although indirect, limited, choice may be said to be a facet of UK private international law rules (albeit one which, though admitted, is rarely acted upon), the *direct* exercise of party autonomy in family law, even in relation to consenting adults, typically has been eschewed in UK conflict of laws rules. That this is so has become something of a pressure point as regards the UK's participation in EU harmonization measures.

IV. THE EUROPEAN PREFERENCE FOR PARTY AUTONOMY

Private international law rules as they affect adult relationships have been under the European microscope for many years. The proposed transition from national to regional private international law rules has not been as easy, nor progress as rapid, as many would have hoped, an outcome at least partly attributable to the EU enthusiasm for party freedom of choice of court and of law. One feature of the European private international law agenda and

[34] In England, *Berthiaume v Dastous* [1930] AC 79, *per* Lord Dunedin at 83; and, in Scotland, confirming the common law position, Family Law (Scotland) Act 2006, s 38(1).

[35] North (n 4) 174, citing *Reed v Reed* (1969) 6 DLR (3d) 617.

[36] North (n 4) 174: 'It is not possible . . . actually to choose a law different from that of the place of celebration to govern matters of formal validity.'

[37] Wills Act 1963, section 1: a will is to be regarded as validly executed in form if it complies with the law of the place of execution. This is true, even if the testator was on a temporary visit to that place: *Re Wynn* [1983] 3 All ER 310.

[38] F A Mann, 'The Proper Law of the Contract' (1950) 3(1) ILQ 68.

[39] North (n 4) 183.

philosophy is the extension, or proposed extension, of opportunities for the exercise of party autonomy in areas beyond the law of obligations. Party autonomy, in a controlled form, has been widely promoted in the European family law programme, though the concept itself, while deserving scrutiny, has been only superficially assessed. In this section, the party autonomy provisions of four EU instruments or proposed instruments will be reviewed.

A. Rome III—The Regulation and Its Residue

Council Regulation (EU) No 1259/201 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation ('Rome III') came into effect on 21 June 2012 in 'participating Member States',[40] of which the UK is not one.[41] The instrument is the only fruit of difficult debate and negotiation stemming from the European Commission's 2005 Green Paper on applicable law and jurisdiction in divorce matters.[42] By 2008, a divergence of view across Member States as to substantive divorce law, from the liberal to the conservative, had become apparent, making it impossible for certain states to accept the Commission's Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters.[43] It was clear, however, that a significant number of Member States strongly favoured the settlement of harmonized rules on applicable law. The Commission, therefore, acceded to the request of nine Member States to establish enhanced cooperation *inter se* in the restricted area of applicable law. The result is that the current framework of European rules for matrimonial proceedings extends to harmonized rules of jurisdiction and judgment recognition and enforcement which bind all Member States (except Denmark);[44] and harmonized rules of applicable law for divorce and separation, which bind only the limited number of participating Member States—two-speed Europe in action, or inaction, as the case may be.

[40] Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia were the States who addressed a request to the Commission indicating that they intended to establish enhanced cooperation among themselves in the area of applicable law in matrimonial matters. Greece withdrew its request on 3 March 2010 (Rome III, recital (6)).

[41] The UK exercised its right not to opt-in to the proposed measure: Hansard 18 Apr 2007: Col WS7.

[42] Green Paper on Applicable Law and Jurisdiction in Divorce Matters (March 2005, COM (2005) 82 final).

[43] COM (2006) 399 final. See also Commission Staff Working Document, Annex to the Proposal (19 July 2006) (JUSTCIV 174, 11818/06).

[44] Council Regulation (EC) No 2201/2003 of 27th November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, Recital (31).

1. Choice of law

Acceptance of party autonomy in choice of law in divorce and legal separation proved too big a step for the UK. Presently, courts in the UK, once seised of jurisdiction, apply their own domestic law to grounds of divorce.[45] The reasons for this long-standing rule are threefold. First, there is the belief that substantive divorce rules reflect the policy of the forum at any given time: 'the question of the conditions under which the nuptial tie may be loosened or destroyed touches fundamental English conceptions of morality, religion and public policy.'[46] Yntema viewed application of the *lex fori* as a form of legal self-defence against offensive foreign policies.[47] Secondly, at common law, the divorce jurisdiction of UK courts was largely based upon domicile, and so, in many cases, the *lex fori* and the *lex domicilii* coincided, meaning that application of the *lex fori* to matters of status could be justified *qua* application of the *lex domicilii*. When the bases of matrimonial jurisdiction increased in number, however, the choice of law rule was left untouched,[48] and until very recently, unchallenged.[49] The third reason commonly cited in support of the *lex fori* rule in divorce is practical convenience and the financial savings that follow as a result of there being no need to offer proof of foreign law. As has been firmly expressed, however, 'There is danger in these arguments. It is always easier (and cheaper) to apply the *lex fori*; but that argument is not permitted to prevail elsewhere in private international law.'[50] In any event, it was the belief that departure from the *lex fori* choice of law rule would be a grave mistake that led the UK, ultimately, to decide against opting into Rome III.

Recital (15) of Rome III expressly promotes the principle of party autonomy in divorce and legal separation, viz: 'Increasing the mobility of citizens calls for more flexibility and greater legal certainty. In order to achieve that objective, this Regulation should enhance the parties' autonomy in the areas of divorce and legal separation by giving them a limited possibility to choose the law applicable to their divorce or legal separation.' Accordingly, in the cascade of choice-of-law rules, priority is given to party autonomy. The primary rule, contained in Article 5 (choice of applicable law by the parties), provides that the spouses may agree to designate the law applicable to divorce and legal separation from a limited list of potentially applicable laws, viz: the law of the state where they are habitually resident at the time the agreement is concluded;[51] or the law of the state where they were last habitually resident, in

[45] cf approach in Cyprus, Denmark, Finland, Ireland and Sweden (House of Lords EU Committee, *Rome III – Choice of Law in Divorce: Report with Evidence*, HL Paper 272 (2006), para 8).

[46] M Wolff, *Private International Law* (2nd edn, Clarendon Press 1950) 373–4. cf North (n 4) 164.

[47] Yntema (n 5) 358.

[48] See eg *Zanelli v Zanelli* (1948) 64 TLR 556.

[49] See, however, academic discussion in PM North (1980) 1 *Hague Recueil* 9, at 87–8.

[50] North (n 4) 164.

[51] See issues in respect of time, below, Section V.

so far as one of them still resides there at the time the agreement is concluded; or the law of the state of nationality of either spouse at the time the agreement is concluded; or the law of the forum.

Parties, therefore, are empowered to choose as the governing law only the law of the forum, or the law of a country with which they have a 'special connection'[52] at the time their choice is exercised. *Ex facie* harmonization of applicable law rules in the manner proposed brings certainty, but it must be conceded that the interpretation and application of an amorphous connecting factor such as habitual residence can trigger uncertainty.

Choice is permitted only of 'State' law. Acceptance of the principle of party autonomy, even amongst participating Member States, has not extended so far as to permit parties to evade the operation of civil (secular) law, by opting into, eg the religious (ie non-state) law of his/her choosing.[53] In no context does UK law permit bespoke application of a party's religious law (unless that law happens to coincide with, ie constitutes, the law of his/her domicile—that is, where the law of the domicile is founded in religious rules), and reference to an individual's personal law is always a reference only to the civil law (which, however, in many instances, will demonstrate sensitivity to religious issues). The main problem for the UK was that the Regulation adopts a principle of universality, whereby the law of a participating Member State, or of a non-participating Member State, or of a Third State may require to be applied through operation of the rules which enjoin the honouring of party choice.[54] The foreign law may be more stringent than the forum's own law (eg requiring evidence of fault), or more liberal (eg permitting divorce upon request), and public policy considerations, feasibly, could be triggered in both scenarios. The UK had particular concern regarding this principle, especially regarding the choice of a Third State law. For example, if W, of English domicile and Iranian background, married to H, of Iranian domicile, were prevailed upon by H to agree to the application of Iranian divorce law to regulate their divorce to be heard in an English court, it is quite possible that the substantive applicable law would offend the public policy of the forum.[55] However, the initiative would lie with W to persuade the forum of this, placing a new burden on the respondent party, and a necessary but possibly distasteful onus on the forum to adjudge the rule of foreign law in terms of substantive policy.

The fear engendered by the prospect of having to apply a Third State law was not mitigated by the inclusion of other restrictions on choice. First, the law chosen by the spouses under Rome III must be consonant with the fundamental rights recognized by the Treaties and the Charter of Fundamental Rights of the European Union.[56] Secondly, since it is stated that the informed choice of both

[52] Recital (16).

[53] *Contra* Rome I Regulation, Recital (13), 'This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention'.

[54] Recital (12) and Art 4.

[55] Protected by art 12.

[56] Recital (16).

spouses is a basic principle of the Regulation, 'Each spouse should know exactly what are the legal and social implications of the choice of applicable law.'[57] Potentially artificial though this may be,[58] the Regulation states that, '[t]he possibility of choosing the applicable law by common agreement should be without prejudice to the rights[59] of, and equal opportunities for, the two spouses. Hence judges in the participating Member States should be aware of the importance of an informed choice on the part of the two spouses concerning the legal implications of the choice-of-law agreement concluded.'[60]

From the outset of negotiations, the UK was not convinced that the quality and quantity of evidence produced by the Commission was sufficient to justify the harmonization of rules of choice of law in divorce.[61] Although there was in the UK dissatisfaction with the content of what was proposed,[62] in terms of drafting, should the antipathy demonstrated in the UK towards Rome III essentially be regarded as plain reluctance to extend to parties freedom of choice of law, and a disinclination to forfeit the *lex fori* rule? Is defence of the *lex fori* rule, in an absolute, unqualified, form, now less tenable, and the position of 'valiant for the *status quo*' an argument of pragmatism over principle?[63]

Arguably, as a consequence of UK legal conservatism, party autonomy in relation to divorce and legal separation has been unreasonably restricted. Long before the advent of Brussels II *bis*, and the proliferation of grounds of jurisdiction in divorce, Sir Peter North concluded:

> If the courts take jurisdiction over 'exotic foreigners' then the pass has been sold and it is arguably not more bizarre to apply their personal law to the dissolution than to apply it to the creation of their marriage .... Is the application of exotic foreign grounds of divorce to foreign domiciliaries any less acceptable than the application of the forum's grounds to persons domiciled in a country where divorce cannot be obtained, just because one spouse has been resident in the forum for, say, a year, though not necessarily with any intention of remaining there after the divorce has been obtained?[64]

[57] Recital (18).

[58] For how would spousal knowledge be tested, or affirmed?

[59] by what law?

[60] Recital (18).

[61] See House of Lords, Written Statements, 18 Apr 2007: Column WS7, *per* Baroness Ashton of Upholland; and in Scotland, Report of the Justice I Committee of the Scottish Parliament (CJ1004/2005, 7 October 2005). See also, more recently, House of Commons Scrutiny Committee, First Report (2010), Section 80 (Enhanced cooperation in applicable law in certain matrimonial matters).

[62] See generally House of Lords European Union Committee, 52nd Report of Session 2005–06, 'Rome III – Choice of Law in Divorce: Report with Evidence'.

[63] cf North (n 4) 169.

[64] North (n 4) 164. In the same vein, cf dicta in *Ross Smith v Ross Smith* [1960] AC 280, *per* Lord Reid at 306.

There are always policy risks when a court is required to apply foreign law, especially the law of a Third State. The policy interests of the forum, self-evidently, are important, but should that importance extend to the point of excluding from the outset the possibility of application of any other law, even one which the parties have agreed should apply? The relative ease with which an individual can access an EU divorce court means that at least one party's social and cultural connections frequently will lie with a country other than the forum.

Private arrangement and agreement are becoming the leitmotif, at least in domestic law, of adult relationships. Increasingly, parties are encouraged to attempt to solve their matrimonial disputes by alternative dispute resolution.[65] Voluntariness and consensus are central to the mediation and collaborative law-making procedures, and increasingly play a part in the judicial process. Building a scheme of private international law rules which facilitate party autonomy seems a suitable basis for argument.

2. Jurisdiction

It is to be hoped that during review of the operation of Brussels II *bis* the suggestions aired in the 2005 Green Paper as to jurisdiction can be revisited, viz to allow bilateral party choice of court in cases of divorce and legal separation,[66] thereby authorizing a more consensual approach to matrimonial jurisdiction.

The starting point for the jurisdiction of UK courts in matrimonial proceedings is the Domicile and Matrimonial Proceedings Act 1973, as amended.[67] The English rules are contained in Part II of the Act, and the Scottish rules in Part III. Both sets of rules are to the effect that a court in the UK shall have jurisdiction to entertain an action for divorce, separation, or nullity of marriage[68] if and only if: (1) that court has jurisdiction under Brussels II *bis*;[69] or (2)

[65] See, in England, Family Procedure Rules 2010, Part 3 and Practice Direction 3A; and in Scotland, Rules of the Court of Session (Ch 49 – Family Actions), rules 49.1 and 49.23; and Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 (SI 1993/1956), as amended, rules 33.22 and 33A.22.

[66] But not annulment: while the policy reasons in favour of permitting *choice of court* for divorcing parties can be argued to apply equally to parties seeking annulment, the *choice of law* implications in the latter are fundamentally different, being inextricably linked to the forum's construct of choice-of-law rules of marriage.

[67] In England and Wales, by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005 (SI 2005/265); and in Scotland, by the European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgments) (Scotland) Regulations 2005 (SSI 2005/42).

[68] There continue to be special rules of jurisdiction for actions of declarator of marriage (section 7(3), 1973 Act), and in relation to declarators of nullity of marriage, where one party was dead at the date of the action, and that party was domiciled at death in Scotland, or had been habitually resident there for one year before death (sections 5(4) and 7(3A), 1973 Act).

[69] Council Regulation (EC) No 2201/2003 of 27th November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility. For detail see, M Ni Shuilleabhain, Cross-Border Divorce Law: Brussels II

the action is an excluded action insofar as no court of a Contracting State has jurisdiction under the Council Regulation and either of the parties to the marriage is domiciled in England and Wales, or Scotland, *mutatis mutandis*, on the date when the proceedings are begun. The rules do not currently admit more than minimal exercise of direct party autonomy.

As explained in the Borras Report, insofar as the grounds of jurisdiction adopted in Article 3,[70] 'are based on the principle of genuine connection between the person and a Member State',[71] it was not intended to confer on the parties to a matrimonial cause much direct freedom to choose the court in which the proceedings may be raised. Within the seven bases of jurisdiction in Article 3, express scope for direct party choice is limited to Article 3.1(a), indent 4, which allows for jurisdiction, in the event of a joint application, in the court of the Member State in whose territory either of the spouses is habitually resident.[72] Even here, the parties' freedom to choose the court is qualified insofar as choice is restricted to the territory of a Member State in which either spouse, presumably at the date of the joint application, is habitually resident; choice can be effected only at the date of the application, and not, eg in a pre-nuptial agreement, further restricting the already limited option of direct choice.

Article 3 contains an element of indirect, tacit choice insofar as parties are able to exert a degree of autonomy over their habitual residence and/or domicile, as described above.[73] In general, however, the *forum actoris*

Bis (2010); J Fawcett and JM Carruthers, *Cheshire, North and Fawcett: Private International Law* (14th edn, Butterworths 2008) ch 21; L Collins (ed), *Dicey, Morris and Collins, The Conflict of Laws* (14th edn, Sweet & Maxwell 2006), ch 18; and in Scotland, EB Crawford and JM Carruthers, *International Private Law: A Scots Perspective* (3rd edn, W Green 2010) ch 12.

[70] In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State:

(a) in whose territory:

- the spouses are habitually resident, or
- the spouses were last habitually resident, insofar as one of them still resides there, or
- the respondent is habitually resident, or
- in the event of a joint application, either of the spouses is habitually resident, or
- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made, and is either a national of the Member State in question or, in the case of the UK and Ireland, has his or her 'domicile' there;

(b) of the nationality of both spouses or, in the case of the UK and Ireland, of the 'domicile' of both spouses.

[71] A Borras, Explanatory Report on the draft Brussels II Convention, ('Borras Report') (OJ 1998 C221/27), para 30.

[72] See, for discussion, Ni Shuilleabhain (n 69) paras 4.09 – 4.14.

[73] See eg the approach to the meaning of habitual residence taken by the French *Cour de Cassation* in *Moore v Moore (or Maclean)* [2006] ILPr 29 *viz*: 'The place where the party involved has fixed, *with the wish to vest it* with a stable character, the permanent or habitual centre of his or

provisions of Article 3 are limited, 'exceptionally'[74] to indents 5 and 6, which require, respectively, that the applicant satisfies stipulated residence and nationality/domicile criteria. With regard to Article 3.1(b), some states had wanted the condition of nationality or domicile to attach to one spouse only, but that was rejected on the ground that it would amount to pure *forum actoris*.[75] Moreover, the phrases in Article 3.1(b) are to be read disjunctively so as to produce one provision for the UK and Ireland, and another for all other Member States; it does not provide an additional gateway, or element of choice, for domiciliaries of the UK and Ireland.[76]

The Borras Report's explanation for the very minor role afforded to party choice of court—'it is logical that it should be so since the issue is matrimonial proceedings'[77]—glosses over the issues, and the reasoning is far from self-explanatory, as subsequent EU developments confirm.

a) Prorogation of jurisdiction

In 2005, the Commission Green Paper stated that, 'To allow the parties to agree that a court or the courts of a certain Member State should have jurisdiction in divorce proceedings between them could enhance legal certainty and flexibility and be particularly useful in cases of divorce by consent.'[78] This theme continued in the 2006 Commission Proposal for a Council Regulation,[79] which sought to grant limited scope for spouses to choose the competent court. The proposed prorogation provision, heralded as improving legal certainty and predictability for spouses,[80] was in the following terms:

> Article 3a
> *Choice of court by the parties in proceedings relating to divorce and legal separation*
>
> 1. The spouses may agree that a court[81] or the courts of a Member State[82] are to have jurisdiction in a proceeding between them relating to

her interests' (emphasis added). cf *LK v K (No 2)* [2006] EWHC 3280 (Fam), *per* Singer J, at para 35.

[74] Borras Report, para 32.

[75] Borras Report, para 33.

[76] *Re N (Jurisdiction) NDO v JFO* [2009] ILPr 8.

[77] Borras Report, para 31.

[78] Green Paper on Applicable Law and Jurisdiction in Divorce Matters (March 2005, COM (2005) 82 final) para 3.6.

[79] COM (2006) 399 final.

[80] Explanatory Memorandum to the Commission Proposal, 8 (with fns 81–83 added).

[81] Family Law Act 1986, section 44, provides that no divorce or annulment obtained in any part of the British Islands shall be regarded as effective in any part of the UK unless granted by a court of civil jurisdiction. This is the position, irrespective of parties' domicile(s) and religion. By contrast, divorces obtained outside the UK in a variety of extra-judicial ways (eg divorce by mutual consent—*H v H (Validity of Japanese Divorce)* [2006] EWHC 2989 (Fam), [2007] 1 FLR 1318; or by religious authority) may be accorded recognition in the UK, in terms of section 46 of the 1986 Act. It was not intended in the Proposal formally to extend to parties the power to choose a non-judicial forum.

[82] Not a *non*-Member State: the decision of a non-EU court whether or not to accept jurisdiction, is not one over which the EU has any control.

divorce or legal separation provided they have a substantial connection with that Member State by virtue of the fact that

(a) any of the grounds of jurisdiction listed in Article 3 [of Brussels II *bis*] applies, or
(b) it is the place of the spouses' last common habitual residence for a minimum period of three years,[83] or
(c) one[84] of the spouses is a national of that Member State or, in the case of the United Kingdom and Ireland, has his or her 'domicile' in the territory of one of the latter Member States.

A principle of limited party choice of court in divorce and legal separation is overdue. The private will of parties always is secondary to (public) rules of private international law, but the rule itself ought now to be extended so as to authorize party choice.

It is appropriate that parties should not be given untrammelled power to choose the divorce forum; the underlying principle of the Borras Report remains extant, namely, that the grounds of jurisdiction ought to be 'based on the principle of genuine connection between the person and a Member State'.[85] Notably, however, it was not proposed in the 2006 Commission Proposal to allow parties to elect to confer matrimonial jurisdiction on a Member State in which they own heritable property (whether currently or formerly used as a matrimonial home),[86] even though conceivably it may be convenient for the jurisdiction of such a state to be available to parties. The relationship between the personal and proprietary consequences of marital breakdown is clear in human terms, but the Proposal sought to deal only with the personal consequences, leaving the matter of financial provision on divorce to the forum's own rules.

Similarly, the Commission Proposal did not encompass a provision equivalent to Article 24 of the Brussels I Regulation, to provide for jurisdiction based upon submission by the defendant. Brussels II *bis*, in its present form, does not allow a defendant to confer jurisdiction upon a Member State court merely by entering appearance before it,[87] and so curtails a recognized form of expression of party autonomy. If agreement as to choice of court were to be

[83] No requirement was proposed that one of the parties still resides there, nor indeed that one of them still resides anywhere else in the EU. The relationship between this provision, and art 3.1(a), indent 2 of Brussels II *bis* is curious. Art 3a(b) would appear to be stricter than art 3.1(a), indent 2 in terms of the time prescription, but less strict insofar as it does not require a continuing personal connection with either spouse. The need for the three-year connection (an apparently arbitrary figure) is not clear, and is excessive.

[84] Less strict than art 3.1(b), which requires *common* nationality or *common* domicile on the part of spouses.

[85] Borras Report, para 30.

[86] Not necessarily covered by art 3.1(a), indent 1 or 2.

[87] Art 6 confirms the exclusive nature of jurisdiction under arts 3, 4 and 5.

exercisable at any time up to the point of instigation of proceedings, there would be no need for a separate submission provision.

The rule as proposed was said, in particular, to improve access to court for spouses of different nationalities/domiciles, who do not qualify under the current residence bases in Article 3.1(a) of Brussels II *bis*, by enabling them to designate by common agreement a court of a Member State of which only *one* of them is a national.[88] This possibility would apply to spouses living in a Member State, as well as to spouses living in Third States, and so the introduction of prorogation would help to eliminate the dilemma of 'Community citizens' resident in a Third State who are said to be denied access to (European) justice.[89]

Brussels II *bis* already contains one rule which is based expressly upon prorogation:[90] Article 12 gives scope to seise the court of a Member State other than that in which the child[91] is habitually resident, which court has general jurisdiction *per* Article 8 in matters of parental responsibility.[92] There is precedent therefore within the instrument for direct party choice.

B. Maintenance

Private ordering in relation to family finances, in particular the property of married persons, has been a contentious subject, nationally in the UK, and internationally. In terms of private international law, the different approaches taken by legal systems to the effect of marriage and other adult relationships upon the property rights of spouses/partners have the potential to produce complex conflict of laws problems.[93] The scene has been a lively one in European terms, with a considerable amount of action proposed in relation to family property generally, though considerably less actually taken. The sole instrument introduced pertains to maintenance obligations.

[88] Commission Staff Working Document, Annex to the Proposal (19 July 2006) (JUSTCIV 174, 11818/06), para 5.5 (Policy Option 5—'Giving the spouses a limited possibility to choose the competent court').

[89] The current jurisdiction rules do not allow spouses to apply for divorce in a Member State of which only one of them is a national, in the absence of another connecting factor.

[90] cf 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, art 10, which confers limited power on parties to prorogue the jurisdiction of the 'divorce court'. See P Lagarde, *Explanatory Report*, para 61.

[91] Art 12 is not confined to children who are resident in the EU: *Re I (A Child) (Contact Application: Jurisdiction* [2009] UKSC 10.

[92] Art 12.1. See eg *X v Y* [2009] ILPr 22 (*Cour de Cassation*) (re. Brussels II); *Re S-R (Contact: Jurisdiction)* [2008] 2 FLR 1741; *Bush v Bush* [2008] EWCA Civ. 865; and *C v FC* [2004] 1 FLR 317.

[93] Section IV.C, below.

1. Jurisdiction

Choice of court is a feature of Council Regulation (EC) No 4/2009[94] of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations[95] ('the Maintenance Regulation'), applicable in all EU Member States from 18 June 2011.

With the familiar rhetoric of increasing legal certainty and predictability,[96] Article 4 permits prorogation of court by agreement of the parties, the permitted choice falling upon a limited number of forums, namely, the court of the habitual residence or nationality (to be interpreted in a UK court as referring to domicile)[97] of either party. Article 4.1 contains a useful *tempus inspiciendum* provision, establishing that the relevant time for ascertaining the personal law connecting factor is the time either when the choice of court agreement is concluded, or the time of seisin. Additionally, in the case of spouses/ex-spouses, parties may choose the court having jurisdiction in matrimonial matters, or the court of the Member State of the spouses' last common habitual residence for a period of at least one year.

There is a presumption of exclusivity of choice, to the effect that jurisdiction conferred by agreement shall be exclusive unless the parties have agreed otherwise.[98] However, later submission by the defendant without protest as to the jurisdiction also confers jurisdiction upon a Member State court.[99]

2. Choice of law

Article 15 of the Maintenance Regulation provides that, in Member States bound by the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations,[100] the law applicable to maintenance obligations shall be determined in accordance with that Protocol. The Protocol was signed and ratified by the EU on 8 April 2010, but, the UK having decided not to take part in the relevant Council Decision,[101] the Protocol will have no effect in the UK.

[94] OJ 2009 L7/1.

[95] The concept of maintenance obligation is interpreted autonomously for the purposes of the Regulation, but it is intended to cover all maintenance obligations which arise from a family relationship, parentage, marriage or affinity, in order to guarantee equal treatment of all maintenance creditors: Recital (11) and art 1.

[96] Recital (19).

[97] Recital (18). cf, in choice of law, art 9 of the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations (see Section IV.B.2, below).

[98] Art 4.1. cf Brussels I Regulation, art 23.1.

[99] Art 5. cf Brussels I Regulation, art 24.

[100] See generally A Bonomi, *Explanatory Report* (2009).

[101] Council Decision of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (2009/941/EC), Recital (11), and art 3. Contrast Council Decision of 31 March 2011 on the signing, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (2011/220/EU), in the adoption and application of which the UK *is* a participant (recital (6)).

Accordingly, in UK courts, the law to be applied to maintenance obligations continues to be that of the domestic *lex fori*.[102] This is a notable example, therefore, of the UK having accepted in a European family law instrument the principle of party freedom of choice of *court*, while simultaneously rejecting the corresponding rule of private international law which permits party freedom of choice of *law*. Rejection of freedom of choice of law in this area was thought to be justified in the UK as a matter of policy: 'There is very little application of foreign law in family matters within the UK, and in maintenance cases in particular the expense of proving the content of that law would be disproportionate to the low value of the vast majority of maintenance claims.'[103] In a sense, however, perhaps this denial of the opportunity to choose the applicable law is tantamount to absolute protectionism on the part of the State, both of perceived State interests (continued application of the *lex fori*), and of the interests of perceived weaker parties (avoidance of costs relative to proof of foreign law). Is this an argument based once again on pragmatism rather than principle?

Articles 7 and 8 of the Protocol permit designation of applicable law (including the law of a non-EU state)[104] by parties. Article 8, which is of broader compass than Article 7,[105] permits the parties (subject to compliance with provisions on formal validity and non-age), at any time, to choose as applicable law any one of the following: the law of any State of which either party is a national or habitual resident at the time of the designation; the law designated by the parties as applicable, or the law in fact applied, to their property regime; or the law designated by the parties as applicable, or the law in fact applied, to their divorce or legal separation.

The Protocol incorporates certain weaker party protection devices. First, Article 8.4 states that, notwithstanding party choice of law, the question whether the maintenance creditor can renounce his/her right to maintenance shall be determined by the law of his/her habitual residence at the time of the choice. This imposes a mandatory rule requirement, in effect. Secondly, Article 8.5 imposes an informed consent rule, by stipulating that, 'unless at the time of the designation the parties were fully informed and aware of the consequences of their designation,[106] the law designated by the parties shall not apply where the application of that law would lead to manifestly unfair or unreasonable consequences for any of the parties'. Article 8.5 begs many questions and raises incidental ones, but the policy of protection is evident.

[102] See, for Scotland, Family Law (Scotland) Act 2006, section 40.

[103] House of Commons European Scrutiny Committee, 17th Report (2008–09), section 4.

[104] Art 2.

[105] Art 7 permits the maintenance creditor and debtor to choose the law of the forum for the purpose only of a particular proceeding in a given State, eg in the case of divorce, permitting the spouses to choose the *lex fori* in the matter of maintenance as well as substance.

[106] Presumably the forum would apply its own law to assess whether either/both party(ies) was/were 'fully informed' and aware of the consequences of their choice.

Its purpose seems to be to permit one party, unadvised at the time of choice of law, to undo that choice if the consequences of application of that law would lead, in the view of the forum, to manifest unfairness for any party. Article 8.5 marches close to the territory of public policy in Article 13, which states that application of the law chosen by the parties may be refused only to the extent that its effects would be manifestly contrary to the public policy of the forum. Under Article 13 (but not Article 8.5), the forum can strike out a provision of the *prima facie* applicable law, even where both parties are shown to have been fully informed and aware of the consequences of their choice.

Adoption of the Maintenance Protocol by participating states demonstrates that, as a matter of technical law-making, freedom of choice, closely controlled, can be extended to parties in areas beyond the law of obligations, but the construction of the rules is necessarily more elaborate.

C. Matrimonial Property

1. Scotland

Scots choice of law rules in relation to matrimonial property were placed on a legislative footing by section 39 of the Family Law (Scotland) Act 2006.[107] By section 39(6)(b), the private international law rules set out in section 39 are subject to the spouses' contrary agreement. Within the scheme of statutory rules, therefore, private ordering by contracting-out is endorsed,[108] if not exactly given headline status; the unobtrusive placing of the provision is significant. Section 39 does not contain within it, *expressis verbis*, a public policy exception, but the general power of the forum to refuse to apply a foreign law on the grounds that it is incompatible with the public policy of the forum must be presumed to apply.

2. England: Radmacher v Granatino

The legitimacy and effect of the exercise of party autonomy in relation to matrimonial property was subject to UK Supreme Court scrutiny in the seminal case of *Radmacher v Granatino*,[109] concerning the principles to be applied when a court, in considering post-marital breakdown financial arrangements, must decide what weight should be given to an ante-nuptial agreement made between the husband and wife.

[107] There are no corresponding statutory choice of law rules for the property consequences of civil partnership. Section 39 does not apply in relation to the law on aliment, financial provision on divorce, transfer of property on divorce or succession: section 39(6).

[108] cf in domestic law, Family Law (Scotland) Act 1985, s 16 (agreements on financial provision).

[109] [2011] 1 AC 534.

On the subject of autonomy, the President of the Court, Lord Phillips, stated that,

> The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future.[110]

This, surely, is as true of an agreement on choice of law as it is of an agreement as to substantive financial provision. Contemporary mores place a high value on personal autonomy. As Thorpe LJ remarked earlier in the Court of Appeal, 'Due respect for adult autonomy suggests that, subject of course to proper safeguards, a carefully fashioned contract should be available as an alternative to the stress, anxieties and expense of a submission to the width of the judicial discretion.'[111]

The judgment of the Supreme Court ushered in a new era for party autonomy, recognizing as it does the weight and 'new respect'[112] now to be given to the exercise of party freedom of choice in the context of marriage contracts. That being so, is there any reason why the same respect for adult autonomy should not extend to freedom of jurisdiction and choice of law (within reason,[113] and only insofar as rules of private international law themselves authorize)?

3. EU developments

In 2006 the European Commission published a Green Paper on conflict of laws in matrimonial property regimes.[114] According to the Commission, broad consensus emerged during the consultations, in favour of according parties a degree of freedom in choosing the applicable law for their matrimonial property regime, so long as the option is closely regulated to prevent choice of a law having little relation 'to the couple's real situation or past history'.[115] After considerable delay, two proposals were published in 2011, namely, a Proposal for a Council Regulation on jurisdiction, applicable law and the

[110] [78].

[111] [2009] EWCA Civ 649, at [27].

[112] *V v V* [2011] EWHC 3230 (Fam), *per* Charles J at [36]. See also *Z v Z* [2011] EWHC 2878 (Fam).

[113] There's the rub. Baroness Hale, at [135] of her dissenting judgment, referred to relationships characterized by imbalance of bargaining power, and in this area, above all, certain protective measures have to be put in place. See below, Section V.D: Weaker Party Protection.

[114] COM (2006) 400 final. See also Annex (SEC (2006) 952), partially comprising the fruits of an EU-commissioned study entitled, 'Matrimonial Property Regimes and the Property of Unmarried Couples in Private International Law' (JAI/A3/2001/03).

[115] Explanatory Memorandum, para 5.3.

recognition and enforcement of decisions in matters of matrimonial property regimes ('the Matrimonial Property Proposal'),[116] and a parallel Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships ('the Registered Partnerships Proposal').[117] The common goal of the Proposals was to establish a clear European legal framework for determining jurisdiction and the law applicable to matrimonial property/registered partnership regimes and facilitating the movement of decisions and instruments among Member States.

Following the visible trend in recent European proposals, party autonomy is a dominant feature of the Matrimonial Property Proposal,[118] both as to jurisdiction and in choice of law. By Article 4, parties can exercise (restricted) freedom of choice of court insofar as they can empower the courts of a Member State 'divorce forum' to rule on matters concerning the parties' matrimonial property.

In relation to choice of law, Article 16 enables spouses/future spouses to choose as the law[119] applicable to their matrimonial property regime, any one of the law of the common habitual residence of the parties, or the law of the nationality or habitual residence of either party at the time the choice is made.[120] Freedom of choice of law is not extended to registered partners. The reason for denying even limited freedom of choice to registered partners is not explained, and the logic of so doing is not apparent: 'While not all Member States recognise the concept of such partnerships it is not clear why, in appropriate circumstances, partners could not choose the law of a Member State where the law did provide for the concept of registered partnerships.'[121]

a) UK reaction

In 2011, stakeholders in the UK were invited to express views on how the UK should approach these European proposals, and specifically on whether or not it would be in the UK's national interests to opt-in to the negotiations on the Commission's proposed Regulations.[122]

[116] COM (2011) 126 final; 2011/0059 (CNS).
[117] COM (2011) 127 final; 2011/0060 (CNS).
[118] And the Registered Partnerships Proposal.
[119] Art 21 guarantees the principle of universality.
[120] See also Recitals (19) and (20). By art 5.2, parties can confer jurisdiction on the Member State whose law has been chosen under art 16. A form of (limited) indirect choice rests in this relationship between party choice of court, and choice of law. Inferred or presumed choice of law through the exercise of choice of court was the subject of debate during the negotiations on the Rome I Regulation (see, ultimately, Recital (12)).
[121] Joint consultation by the Ministry of Justice, Scottish Government, and the Northern Ireland Department of Finance and Personnel, 'Matrimonial Property Regimes and the property consequences of registered partnerships – How should the UK approach the Commission's proposals in these areas?' (Consultation Paper CP 8/2011, 2011), para 39.
[122] ibid.

It is not difficult to criticize the detail of the proposals (and it is the detail that matters), or to disregard them as being tailored to the civilian mindset and legal traditions, and on their face ill-suited to UK culture, social and legal. Not surprisingly, the UK Government announced in June 2011 its decision not to opt-in to the Matrimonial Property/Registered Property Proposals, and indicated that, on account of the significant differences in EU legal systems, it is unlikely that the UK will participate in the proposals post-adoption. Be that as it may, the negotiations will be monitored to ensure that the interests of the UK and its citizens are protected. But leaving aside easy criticism of much of the substantive content of the proposed instruments, and elevating the scrutiny to a more principled or abstract level—what ought to be the reaction, at this stage of development of conflict rules, to a suggestion of increased party autonomy in this subject area?

One objection voiced in relation to the potential increase in this area of application of foreign law in UK courts is the difficulty, and expense, associated with proving foreign law.[123] This is largely, however, a false objection, for under existing UK choice of law rules concerning matrimonial property, the application and therefore proof of foreign law may be required.[124] In light of recent case law in England and statutory intervention in Scotland, the UK reaction to the matrimonial property dossier and to a suggestion of increased party autonomy ought to be more positive.

D. Wills and Succession

Traditionally, Scots and English choice of law rules pertaining to succession, have permitted certain room for the exercise of *indirect* party choice (to the extent that, in the context of the scission principle,[125] parties are free to choose where they buy immoveable property, and insofar as individuals can order their lives so as to manipulate their domicile), but party autonomy by way of *direct* choice of law has featured only in the context of interpretation of wills. A will must be construed in accordance with the law by reference to which it was written, that is, the legal system contemplated by the testator,[126] which may or may not be the same as the governing law of the essentials of the will. The testator's intention, deemed or actual, is the paramount consideration.[127]

[123] Ministry of Justice, Scottish Government, and the Northern Ireland Department of Finance and Personnel, 'European Commission's proposed Regulations on matrimonial property regimes and the property consequences of registered partnerships – Response to Public Consultation' (CP (R) 8/2011, 2011) paras 14 and 15.

[124] eg the House of Lords in *De Nicols v Curlier* [1900] AC 21 (and No 2 [1900] 2 Ch 400, *per* Kekewich J at 413) was prepared to investigate and apply French law.

[125] The scission principle refers to the split nature of the Scottish and English choice of law rule in succession, which differentiates between the law governing succession to moveables (the ultimate domicile of the deceased) and that governing succession to immoveables (the *lex situs*).

[126] *Dellar v Zivy* [2007] ILPr 60.

[127] *Re Scott* [1915] 1 Ch. 592.

In *Philipson-Stow v IRC*,[128] Lord Denning said, 'whilst I would agree that the construction of the will depends on the intention of the testator, I would say that in no other respect does his intention determine the law applicable to it'.[129]

In the main, party autonomy has not been a dominant choice of law tool in this area of the subject. In some respects, this is surprising, particularly as regards testate succession, for making a will is as voluntary an act as entering a contract,[130] and is transactional, rather than status-related, in nature, the primary objective of any testamentary writing being to express the testator's intentions for the transmission of his estate. Unlike the position in divorce, maintenance obligations and matrimonial property, however, the exercise of party autonomy by a testator is for him alone, and so is a form of unilateral choice.

In October 2009, the European Commission announced the publication of a proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession ('the Succession Proposal').[131] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession ('the Succession Regulation') was published in July 2012,[132] and shall apply in participating Member States to the succession of persons who die on or after 2015.[133] Predictably, and in step with European drafting propensities of late, party autonomy is a prominent theme.

1. Choice of law

As far as choice of law is concerned, Article 21 of the Succession Regulation provides the new general, unitary rule, which is that, unless otherwise provided for in the Regulation, the law applicable to the succession to the deceased's estate as a whole shall be that of the state[134] in which the deceased had his habitual residence at the time of death. Article 22, however, enables a testator to choose[135] the law of his nationality[136] as the law to govern the succession to

[128] [1961] AC 727. Also *Levick* [1963] 1 WLR 311.

[129] [1961] AC 727, HL at 760–761.

[130] cf North (n 4) 196.

[131] COM(2009) 154 final (2009/0157 COD). See also Commission Staff Working Document accompanying the Proposal: Summary of the Impact Assessment (SEC(2009) 411 final).

[132] OJ 2012 L201/107.

[133] Arts 83.1(c) and 84.

[134] Art 20 confirms the principle of universality of application.

[135] cf 1988 Hague Convention on the law applicable to succession to the estates of deceased persons (which has never entered into force), art 5 of which adopted a principle of limited party choice of applicable law.

[136] See Recital (38). The alternative of 'domicile', normally afforded to the UK and Ireland, is not offered, presumably because of the exercise by each country of the right not to opt-in to the instrument: Recital (82) (*contra* Recital (32) of the Succession Proposal).

his estate. An article providing for limited freedom of choice of law can be viewed as a sensible counterbalance to such a weakly constructed general rule; against the background of Article 21, it is understandable that a party would wish to exercise choice in order to align himself with a more permanent point than undefined habitual residence. Freedom to choose the applicable law is qualified inasmuch as it is restricted to the law to govern the succession 'as a whole'.[137] *Dépeçage* is outlawed, and a testator will not be able to use the instrument to subvert its own unitary rule.

In terms of mechanisms protective of state interests and/or third party interests, the Regulation contains the customary public policy safeguard for the forum in Article 35. Article 27.2 of the Succession Proposal, which sought to restrict the exercise of the forum's discretion by stating that the application of a rule of the *lex successionis* may not be considered to be contrary to the public policy of the forum on the sole ground that its clauses regarding the reserved portion of an estate differ from those which are in force in the forum, has been omitted from the final Regulation. Under current choice of law rules in the UK it would be unprecedented for a British forum to exclude the operation of the rules of the *lex successionis* as to family provision merely because they differ from those of the *lex fori*.

2. Jurisdiction

The majority of so-called 'international' successions, as with any succession, are non-contentious, and the proposal to create a set of European jurisdiction rules specifically for this area is somewhat at odds with UK common law experience and expectations. Reflecting, however, admission in the Succession Regulation of the principle of limited party autonomy in the matter of applicable law, Article 5 (choice-of-court agreement) provides that where the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State, the parties concerned[138] may agree that a court of that Member State shall have exclusive jurisdiction to rule on any succession matter.[139]

3. UK reaction

Following publication of the Succession Proposal, the UK Government launched a public consultation exercise[140] to investigate whether it would be in

[137] *Contra* 1988 Hague Convention on the law applicable to succession to the estates of deceased persons, art 6.

[138] Undefined in the Regulation. See generally Recital (28).

[139] This choice-of-court provision is rather different from the discretionary jurisdiction transfer mechanism contained in art 5 of the Succession Proposal, the intended purpose of which was to permit the court of the deceased's habitual residence to defer to that of his nationality if the former court considered that the latter was better placed to rule on the succession.

[140] UK Ministry of Justice, 'European Commission proposal on succession and wills: a public consultation' (Consultation Paper CP41/09).

the national interest to opt in. Although freedom of choice of law in the area of succession is largely a novelty to UK lawyers, the main objections expressed,[141] interestingly, did not pertain to party autonomy *per se*, but rather to the need to refine the meaning of the connecting factor of the 'deceased's habitual residence at time of death' and, more critically in England and Wales, to the problem of clawback, that is, the situation which arises when a person benefiting from a forced inheritance is able to make a claim for that inheritance from the lifetime gifts made by the deceased.[142] Reaction in the UK was that any potential benefit of the proposal was outweighed by the risks.[143] In December 2009,[144] the Government announced its decision not to opt in to the proposed instrument, meaning (for the time being, at least) that the UK, like Ireland, is not bound by the Succession Regulation.[145]

Leaving aside cavils about the precise formulation of habitual residence, what should be the reaction to a suggestion of party autonomy in the private international law rules of succession? Should not individuals be encouraged to facilitate succession planning, to have their estate transmit upon death, within reason and from an approved shortlist, according to a law of their predetermination? Limited, direct party autonomy seems, in principle, to be consonant with the concept of testamentary freedom[146] and, if exercised, would afford a testator, at the time a will is made, greater confidence as to how his estate ultimately will devolve.[147]

The Commission appears to be putting forward the Matrimonial Property/ Registered Property Proposals and the Succession Regulation as companion instruments, as part of the project to harmonize conflict of laws provision for EU citizens in a great many interlocking matters.[148] The instruments, actual and proposed, are far from perfectly aligned, indeed are capable of controversial overlap and confusion. Fulfilment of the aim of creating regulations on maintenance obligations, on succession, and on the property of married persons and of registered partners, which are consistent and coherent *inter se*, is a task of extreme difficulty, and the acute problem of demarcation between and among instruments has not been adequately addressed. But the theme of party autonomy is a recurring one, and in these interconnected areas of law, the aim ought to be uniformity of approach.

[141] See House of Lords EU Committee, 6th Report of Session 2009–10, *The EU's Regulation on Succession: Report with Evidence*, HL Paper 75 ('HL Succession Report').

[142] See HL Succession Report, para 86. Under English domestic law, there is no forced inheritance and therefore no clawback.

[143] UK Ministry of Justice, 'European Commission proposal on succession and wills: Response to public consultation' (CP(R) 41/09 (2010)), Executive Summary.

[144] Hansard 16 Dec. 2009: Col.141 WS.

[145] Recital (82).

[146] Albeit that the extent of such freedom varies from system to system.

[147] cf O Kahn Freund's description of the 'prophylactic' function of choice of law rules: [1974] III *Hague Recueil* 147, at 341 and 344.

[148] Succession Regulation, Recitals (11) and (12).

V. LIMITATIONS ON THE EFFECTIVENESS OF CHOICE

In terms of the mechanics of choice, whenever it is proposed to introduce party freedom of choice, constraints need to be imposed to regulate its permitted expression. These concern matters such as the formal validity of choice (which tends not to be controversial),[149] the time at which choice may be exercised (including the revocability or otherwise of choice, a topic which can impinge on substance, and so more often is productive of difficulty), and, importantly, the protections and safeguards which will override choice in appropriate circumstances. Likewise, thought must be given to the exclusivity or otherwise of choice, and to the consequences for the parties of breach of agreement.

A. The Timing of Choice

The time at which choice may be exercised, and the issue of mutability, can be a contentious topic. In order to prevent flagrant forum shopping in family law, a party's connection with the court selected should be controlled, not only geographically (ie choice limited to jurisdictions with which the individual, spatially, has a substantial connection), but also temporally (ie a substantial connection at *tempus inspiciendum*, however that may be defined). It is elementary to say that not only must a rule be clear as to the time at which parties may exercise choice (eg pre-nuptially, and/or immediately post-nuptially, and/or at any time thereafter),[150] but also, if the choice is to apply a variable connecting factor such as domicile or habitual residence, which, by its very nature, is prone to change, that the precise moment at which the connecting factor is to be determined, is clear (ie either fixed immutably at the point when agreement is concluded; or varying from time to time thereafter).[151]

With regard to choice of court in divorce, while endorsement by the parties at the point of instigation of divorce proceedings of a choice made many years before may seem clumsy and unnecessary, it has to be conceded that if, say, a pre-nuptial choice was made from a limited list of permitted courts, based on, eg the residence of the parties, those circumstances may well have changed by the time of instigation of proceedings, in such a way as to render the choice dubious. If, for example, at the point of conclusion of a pre-nuptial agreement in terms of which the parties agreed to prorogue the matrimonial jurisdiction of England, they were then habitually resident in England, would that agreement

[149] eg Rome III, recital (19) and art 7 re choice of law.

[150] In the Succession Regulation, a person may choose as the law to govern his succession the law of the State whose nationality he possesses at the time of making the choice or at the time of death. This is an improvement on the test of nationality (/domicile) set out in the Succession Proposal, which lacked any temporal qualification or awareness.

[151] It was a basic flaw of art 3a (Choice of court by the parties in proceedings relating to divorce and legal separation) of the Commission Proposal re Rome III that no account was taken of mutability of personal connecting factor.

remain valid and binding ten years later, where the parties, say, two years after marriage, had left England and moved permanently to Scotland?

Rome III contains certain protections as to the time at which an agreement on choice of law may be concluded.[152] Parties are permitted to choose, *inter alia*, the spouses' common habitual residence as at the date of the agreement. If, by the date of institution of divorce proceedings possibly several years later, both parties have acquired a new habitual residence, the forum *per* Brussels II *bis*, Article 3, will be in the position of applying foreign law. Articles 5.2 and 5.3, however, permit an agreement designating the applicable law to be modified up to the time the court is seised, and even during the course of proceedings if the law of the forum so provides. The flexibility of this temporal provision helps ensure appropriateness of applicable law.

B. Negative Choice

The question arises whether parties should be able to exercise, not only a positive choice, that is, to prorogue the jurisdiction of a particular forum or to designate a certain law as applicable, but, conversely, to make a 'negative' choice, that is, derogating from the jurisdiction of an otherwise available forum, or agreeing that a particular law should not apply. If the eliminated court or law is, nonetheless, an available option under the forum's default rule of private international law, a negative choice such as this, *prima facie*, would trespass on state autonomy and, in principle, should be viewed as *ultra vires* and unenforceable. Perhaps the more live issue is one which would arise in relation to choice of court, namely, whether the choice is exclusive or non-exclusive, a matter in respect of which much experience has been gathered in commercial law.[153] Recourse has been had in Article 23 of Brussels I to an exclusivity presumption,[154] and a similar approach would seem necessary to give sufficient strength and meaning to the choice in family law.

C. Public Policy and Mandatory Rules

Choice of court rules, and choice of law rules *per se* are neutral in character. Only when the applicable law has been identified through operation of the relevant connecting factor will parties proceed to prove the content of the foreign law. Difficulties emerge when the content of that foreign law is found to infringe the interests of the forum, in the guise of its public policy or its mandatory rules; at that point, the expression of private autonomy clashes with 'public law'. An autonomous, fully informed, freely consenting party should

[152] eg Rome III, recital (20) and arts 5.2 and 5.3.
[153] cf Yntema (n 5) 357.
[154] Not applicable under Schedules 4 and 8, Civil Jurisdiction and Judgments Act 1982. cf Presumption of exclusivity in the Maintenance Regulation, art 4.1.

not be legally capable of overriding the very policy of the forum, for to do so not only would compromise his own private interests,[155] but also would render nugatory the interests of the state as expressed in its rules of private, including private international, law. Accordingly, where party choice would prejudice the reasonable requirements/expectations of any third parties (eg children or creditors), the court should be able to disregard that choice, if it is the policy of the *lex fori* to protect such persons from the adverse consequences of another's choice.[156] But there may be a higher policy, laid on a European basis, to which even the policy of the forum is subordinate.[157]

Accepting that the autonomy of the parties is not absolute, but rather is subject to the rules of law of the forum,[158] and its public policy (used sparingly),[159] nonetheless the principle that 'public law' ultimately trumps private will should not be used to justify the exclusion, in all cases, of the exercise of party freedom of choice.[160] Use of the device of *limited*, ie controlled, freedom of choice—choice, that is, from a finite range of forums, or of a limited range of applicable laws—can help to manage the tension between private and public autonomy, operating as a moderation or restraint on what the forum may perceive to be an unreasonable or inappropriate exercise of party choice.

D. Weaker Party Protection

Typically, where party choice is permitted in rules of private international law, an individual's right to exercise choice is limited not only by the boundaries of what the rules themselves authorize, but also by the perceived weaknesses of his own bargaining power/negotiating status. There may be disparate bargaining power between parties at the point of marriage, or inequality may emerge during the marriage. One of the most contentious issues concerning party autonomy in family law, is whether, and how, to protect vulnerable

[155] cf *Bank of Africa Ltd v Cohen* [1909] 2 Ch. 129.

[156] See, eg, art 18 of the Matrimonial Property Proposal, which allows parties to effect a choice of law, or make a new choice, during the course of their marriage. Art 18 endeavours to ensure that the rights of third parties whose interests might be prejudiced by a change of the couple's matrimonial property regime are protected: the effects of a change of matrimonial property regime are confined to the parties and do not affect the rights of third parties. See *Explanatory Memorandum*, para 5.3.

[157] An apt example is the expression of European disapproval, on public policy grounds, of provisions of the applicable law awarding exemplary or punitive damages 'of an excessive nature': Rome II Regulation, Recital (32).

[158] eg parties cannot, by agreement, dictate that procedure should be governed by a law other than the forum.

[159] cf *Harding v Wealands* [2004] EWHC 1957 (QB), *per* Elias J at [76]—the fact that a foreign law does not reflect the policy adopted in England is a 'far cry' from saying that it offends English conceptions of public policy.

[160] cf Briggs (n 6) para 1.22; North (n 4) 196; and Nygh (n 5) 71.

parties from the pitfalls and deficiencies of their own ill-informed or unwise choice.

There seems to be international acknowledgement of the need for rules of private international law to protect commercially 'weak parties'. Family law features a different category of 'weak party' than that which is cast in commercial law, and a question arises even as to when weakness should be determined—what is the *tempus inspiciendum*?[161] Weakness in family law must be judged on a case-by-case basis, rather than generically as is the case in commercial law, where, for example, under the Brussels I Regulation, if an individual qualifies as a consumer, he is deemed to be weak no matter what the reality of his situation may be. Recognition of this fact entails that the forum must be afforded latitude to classify an individual as weak or not. As regards temporal issues, the likelihood is that a court will be concerned principally with a party's perceived weakness at the point of litigation, but in the context of party choice in private international law, the court rather should be concerned with perceived weakness at the (anterior) point of contracting.

In any event, could individual vulnerabilities within family law be managed in a comparable manner to the treatment in the Brussels I and Rome I Regulations of the commercially weak?[162] In personal adult relationships in particular, a dominant party, in personal or financial terms, should not be permitted to exploit or oppress a weaker party.[163] The genuine purpose of the exercise of party autonomy in this context should be to generate certainty as to forum and/or applicable law; its function should not be to cause legal or economic prejudice to one party through a manipulative or exploitative choice forced by another.[164]

Weaker party protection, in some respects, can be conferred through the forum's rules on capacity and consent. Clearly, agreement procured by duress, misrepresentation or fraud cannot be valid. But how paternalistic ought the law to be? Assuming consent freely given, ought the requisite level of consent, in this context, to be informed consent, given, that is, in full appreciation of its implications, evidenced by each party having taken independent legal advice prior to the exercise of choice, and in the light of full disclosure by each party of his financial affairs? The level of protection formulated by the Supreme Court in *Radmacher v Granatino* would seem to be a good starting point.[165]

[161] cf and contrast *Radmacher v Granatino* and *De Nicols v Curlier* [1900] AC 21, in both of which the party/ies' financial fortunes changed over the course of the marriage.

[162] See also the protective limitations on choice in Rome II Regulation, art 14.

[163] See eg overriding mandatory provisions rule in the Matrimonial Property Proposal: art 22.

[164] It is worthwhile noting that the weaker party protection offered in the Maintenance Regulation is light-touch; there is no general requirement that parties should obtain independent legal or financial advice before making their choice, but the choice of court provision in art 4 does not apply to any dispute relating to a maintenance obligation towards a child under the age of 18, specifically in order 'to protect the weaker party'. Recital (19); *contra* the position which formerly prevailed under art 23, Brussels I Regulation.

[165] Section IV.C.2, above.

As Briggs has said, '... if the law makes proper provision to guard against oppression or coercion, and has a structure to prevent the application of laws whose content is simply intolerable, it becomes harder to understand why adults should not be able to choose the law which applies to the resolution of their status: the law moves from status to contract, one might say.'[166]

E. Pacta sunt servanda?

The European preference for party freedom of choice of court and of law rests almost entirely in notions of certainty and predictability. Where multiple forums potentially are available, and multiple laws potentially applicable, it is desirable that, where possible, uncertainty should be avoided by means of party election. There is no better guarantee of certainty than invocation of the principle *pacta sunt servanda*—agreements are made to be kept. But can the reality of party autonomy live up to its promise?[167]

Where party freedom of choice is to be permitted, questions inevitably will arise as to the validity and more particularly the enforceability of agreements on choice of court and/or of law. Moreover, there will be cases where one party to an agreement subsequently will seek unilaterally to renounce it, or to renege upon its terms.

1. Breach of choice of court agreements—lis pendens

Where party choice of court is permitted against the backdrop of a *lis pendens* regime, to what extent should an agreement be enforced if another court is seised first, in apparent breach of the agreement? In the commercial sphere, the decision in *Erich Gasser GmbH v MISAT*,[168] and the fallout therefrom, is notorious: the presence of a choice of court agreement shall not derogate from the primacy of the priority of process rule. If the *Gasser* principle were to be applied, *mutatis mutandis*, in, eg the matrimonial context, a court seised by one party, in terms of Article 3 of Brussels II *bis*, but in breach of spouses' earlier agreement, would oust the jurisdiction of the court earlier nominated by the parties in their choice of court agreement.[169] Of course, if the solution which now is proposed to deal with the *Gasser* issue[170] were to be mimicked in family law, this problem would fall away.

[166] Briggs (n 6) para 2.19.
[167] cf *Erich Gasser GmbH v MISAT* [2005] QB 1.
[168] [2005] QB 1.
[169] Additional questions could arise, as have emerged in the commercial sphere, as to whether or not, if an exclusive agreement is breached by one party, or is overridden or set aside by the court, a claim in damages should be open to the frustrated party.
[170] See Proposal to recast Brussels I Regulation (14 December 2010, COM 2010 748/3), and General Approach agreed by Council of European Union (Justice and Home Affairs) (1 June 2012) (JUSTCIV 209/CODEC 1495), arts 29 and 32.2.

Separately, in terms of jurisdictional controls, a transfer mechanism akin to that in Article 15 of Brussels II *bis* could be applied, whereby a forum seised in breach of a choice of court agreement entered into by parties could be empowered to exercise discretion to decline jurisdiction in favour of the court earlier designated. Conversely, a court seised by virtue of a choice of court agreement could be permitted, by way of exception[171] to exercise discretion to decline jurisdiction, to take account of the parties' changed circumstances (assuming, that is, choice of court exercised, eg pre-nuptially) or the discovery of unfair bargaining,[172] and to transfer the case to a court of another Member State, if the latter is better placed to hear the case. Such discretion, if it were conferred, could not be exercised lightly, for a court should not easily be persuaded to override an agreement made by consenting adults, properly informed as to the implications of their choice. As Briggs has said with reference to the commercial sphere, '. . . the expectation surely ought to be that where parties make an agreement for the resolution of disputes, that agreement should be respected where possible, and reinforced where necessary'.[173] Nonetheless, this type of discretionary device could be employed as a legitimate check on unequal bargaining power and/or to curb forum shopping, and *prima facie* would be apt for the family law arena.

VI. CONCLUSION

This article has explored the extent of party choice which is permitted in conflict of laws rules, existing or proposed, pertaining to adult relationships and the patrimonial consequences thereof. In 1993, Peter North wrote that the growth in the permitted exercise of direct choice of applicable law in areas beyond contract is a 'significant and welcome development. . . . Choice of law rules should be designed to fulfil this prophylactic role.'[174] In the years since 1993, however, there has been only minimal change in the extent to which party freedom of choice is sanctioned in UK private international law rules.

Party freedom of choice is an important subject in the context of the UK's desire to engage, or not, in the European programme for judicial cooperation in civil matters, the opt-in mechanism itself being a manifestation of UK state autonomy. Party autonomy, as a tool in the private international law rule-making kit, is favoured by European legislators, and the trend in EU instruments is in favour of party autonomy.

In this author's view, in relation to the legal regulation of adult relationships, extension of party freedom of choice of court would be an appropriate progression. Authorization of a more consensual approach to matrimonial

[171] At the court of origin's own motion, or upon request by either party.
[172] Ni Shuilleabhain (n 69) paras 2.64 and 4.14.
[173] Briggs (n 6) para 1.12. See further at paras 2.04 and 2.11.
[174] North (n 4) p 200.

jurisdiction, through operation of a prorogation provision, should be admitted. However, limitations and controls will be necessary. In the first place, limitations as to the formal validity of choice, and as to the evidencing of free and informed consent must apply; and secondly, direct choice of court should be made from a finite list of approved connecting factors, to ensure sufficient connection between the parties and/or the subject matter and the forum. The time at which this connection with the putative forum is to be judged would require to be clearly stipulated, to buttress the sufficiency of connection. Given the policy implications of the personal and patrimonial aspects of adult relationships, perhaps forum discretion by way of jurisdiction transfer mechanisms should be included in the scheme of rules.

Although the received wisdom of applying only the *lex fori* in divorce is less convincing than once it was, as regards party freedom of choice of law in divorce, the UK has made its decision not to participate in Rome III. Non-participation in Rome III should not prevent the UK from accepting prorogation of party choice of court in matrimonial actions, if that were to be pursued in a Brussels II *bis* recasting exercise.

Party freedom of choice of law in the family law context is more complex than in the commercial arena. Limitation on freedom necessarily is a feature on the family law side of the house. In commercial law, parties may choose a neutral, unconnected applicable law, but in family law the choice of such a law would provoke suspicion as likely to be abusive, or in the interests of the dominant party. Consequently, if choice were to be permitted, it would require to be made from a finite list of legal systems deemed in law to have sufficient connection to the parties. These connections of deemed sufficient appropriateness would require to be identified, not only by reference to space, but also to time, and with regard to the latter, not only the time at which choice may be exercised, but also the time at which the relevant connecting factor is to be judged.

Moreover, even if choice of law were to be made from a limited, approved list, would additional safeguards be required over and above the normal control of forum public policy? In family law distinguishing between a so-called mandatory rule of the forum and the forum's public policy would be a fine and possibly not useful distinction. Restriction of choice to choice from a list would provide sufficient protection, combined with forum public policy.

If choice of law is to be allowed as a concept, and if choice is to serve any purpose, it cannot be so hedged about with constraints and safeguards, that the benefit of extending freedom is merely illusory.

Particularly in relation to choice of court in divorce, but also as regards the distribution of money and property by way of maintenance, matrimonial property or upon succession, the value to international, or peripatetic, couples, of being empowered to make their own private international law arrangements, within the limitations of relevant private international law rules, is principally the benefit of certainty. However, to permit increased party autonomy is also to

generate satellite litigation on topics such as the existence, validity and enforceability of agreement, contractual capacity and informed consent.

Regulating the operation of choice, and defining its justified limits, is not an easy task in the arena of adult relationships. If there is the will to extend party autonomy in this area of private international law, there is a way, but delineation between that which desirably may be added to the party autonomy template of commercial law, and that which sensibly can be avoided for fear of rendering the construct of rules so elaborate as to be self-defeating, will call for expert knowledge, sound judgment and meticulous draftmanship.