



University
of Glasgow

Carruthers, J. (2008) *De facto cohabitation: the international private law dimension*. Edinburgh Law Review, 12 (1). pp. 51-76. ISSN 1364-9809

<http://eprints.gla.ac.uk/41999/>

Deposited on: 02 April 2012

De Facto Cohabitation: the International Private Law Dimension

*Janeen M Carruthers**

- A. INTRODUCTION
- B. THE NATURE OF THE RELATIONSHIP
- C. INTERNAL SCOTS LAW
 - (1) Household goods
 - (2) Money and property
 - (3) Financial relief on termination
- D. SCOTTISH CONFLICT OF LAWS PERSPECTIVE
- E. JURISDICTION
 - (1) Possible bases of jurisdiction
 - (2) Council Regulation (EC) No 44/2001
 - (3) Residual Scottish rules of jurisdiction
 - (4) Law Commission proposals for England and Wales
 - (5) Jurisdiction of the English courts in family law
 - (6) The need for new rules of jurisdiction
 - (7) Conflicting jurisdictions
- F. CHOICE OF LAW
 - (1) The position under the 2006 Act
 - (2) Problems of mutability
 - (3) Formulating a choice of law rule
 - (4) Cohabitation contracts and opt-out agreements
- G. RECOGNITION OF OVERSEAS DECREES
- H. EU GREEN PAPER
 - (1) Harmonised rules of jurisdiction
 - (2) Harmonised choice of law rules
- I. CONCLUSION

* Reader in Conflict of Laws, School of Law, University of Glasgow. The author records her thanks to Professor Elizabeth B Crawford for comments on earlier drafts of this article.

A. INTRODUCTION

In recent times there has been a great deal of social, political and academic interest in the United Kingdom in the statutory institution of civil partnership,¹ and in the rules of law, internal and conflict of laws, which regulate the status of civil partner and its incidents.² Attracting far less comment, however, have been those rules which govern what is a more commonly encountered form of domestic relationship, *de facto* cohabitation. Recent legislation in Scotland has given *de facto* cohabitants new rights and responsibilities,³ but in conflict of laws terms it is not clear when or to whom these rights and responsibilities apply.

B. THE NATURE OF THE RELATIONSHIP

When considering the formulation of conflict rules (particularly choice of law rules) to govern domestic relationships, it is first necessary to distinguish the various types of relationship which are to be found with regard to unmarried couples. The following legal categories can be identified:

- (a) regulated (*de iure*) partnerships, i.e. civil partnership (or similar), registered or formalised according to the internal law of a given state, and imposing upon registered partners all the consequences prescribed by the statutory regime of that state. Civil partnerships registered under the Civil Partnership Act 2004 fall into this category.
- (b) regulated (*de iure*) partnerships, as above, but in respect of which some or all of the statutory consequences (e.g. matters of property and succession) may be excluded by agreement of the parties, i.e. where parties are able to opt out of certain consequences which otherwise would flow automatically from the act of registration or formalisation of the relationship.⁴

1 E.g. Department of Trade and Industry, *Civil Partnership: A framework for the legal recognition of same-sex couples* (2003); K McK Norrie, "Recognition of foreign relationships under the Civil Partnership Act 2004" 2006 *Journal of Private International Law* 137.

2 Civil Partnership Act 2004. Since 21 December 2005 same-sex partners in the UK have been able to register their relationship as a civil partnership, a *de iure*, "regulated" relationship having specified consequences. See also the Civil Partnership (Jurisdiction and Recognition of Judgments) (Scotland) Regulations 2005, SSI 2005/629 and, for England and Wales, the Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005, SI 2005/3334.

3 During the passage through Parliament of the Civil Partnership Act 2004, the House of Lords noted the lack of legal remedies under English law for couples who live together but do not marry or, in the case of same-sex couples, register a civil partnership. The matter has been recently addressed by the Law Commission: see Consultation Paper on *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com CP No 179, 2006) para 1.1; Report on *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007) (both available on www.lawcom.gov.uk).

4 The Civil Partnership Act 2004 does not afford registering couples an opportunity to exercise party autonomy.

- (c) *de facto* unions, i.e. cohabiting relationships⁵ established otherwise than by formal registration and/or legal ceremony, and imposing upon cohabitants all the consequences prescribed by the applicable legislative regime – including, in situations where legal consequences do not flow automatically from the fact of cohabitation, the opportunity to apply for legal rights.⁶ This category includes cohabitation as defined in section 25 of the Family Law (Scotland) Act 2006.
- (d) *de facto* cohabitation where some or all of the statutory consequences (including the right to apply for such) may be excluded by agreement of the parties. This category does not exist in Scotland, where it does not seem possible for cohabitants to agree, prior to or during the period of cohabitation, to contract out of the statutory entitlements laid down in the 2006 Act, albeit that the benefits to be conferred must be applied for by one or both parties. Some legal systems, however, may permit parties to opt out of the default regime and, if desired, to substitute their own arrangements.
- (e) *de facto* cohabitation unregulated by law, i.e. personal domestic relationships which incur no special legal consequences as such. This category includes not only individuals living under a legal system which (as in Scots law prior to the coming into force of the 2006 Act) makes no provision for *de facto* cohabitants, but also persons who do not satisfy the eligibility criteria imposed by the regulatory scheme in question (for example, under the 2006 Act, adult siblings having a shared living arrangement).

Classification of the legal nature of a relationship (*qua* marriage, civil/registered partnership, *de facto* cohabitation etc) is a task for the forum.⁷

Whilst the legislative focus recently has been on conflict problems (potentially arising from civil/registered partnerships,⁸ there is, at least in the UK, a higher incidence of *de facto* unions,⁹ and so legal problems in practice are more likely

5 To be understood as being of a sexual nature, i.e. where the parties are living together “as if they were husband and wife”, meaning that shared living arrangements between parent and adult child, or between siblings, or among friends, for economic or other reasons, are not to be included in this category. In its Consultation Paper on *Cohabitation* (n 3) para 1.12 the Law Commission uses the term “cohabitants” to mean couples who “live together in intimate relationships”. In the Report on *Cohabitation* (n 3) para 3.13 the Law Commission refers to persons who “are living as a couple in a joint household” and “are neither married to each other nor civil partners”.

6 I.e. the right to apply for the adjustment of property rights and financial provision between cohabiting couples upon separation or death.

7 *Lee v Lau* [1967] P 14; *Wilkinson v Kitzinger* [2006] EWHC 835 (Fam), [2006] 2 FLR 397; [2006] EWHC 2022 (Fam), [2007] 1 FLR 295.

8 See E B Crawford and J M Carruthers, *International Private Law in Scotland* (2006) paras 11-35-11-37.

9 For background statistics in England and Wales, see Law Commission, Consultation Paper on *Cohabitation* (n 3) part 2.

to pertain to *de facto* cohabitation than to *de iure* civil partnerships. Moreover, situations concerning parties who have not formalised their relationship are likely, for that very reason, to be more complicated, or at least to present more difficult problems of proof.

C. INTERNAL SCOTS LAW

Since 21 December 2005 same-sex couples (but not heterosexual couples) have been able to register their relationship as a civil partnership under the Civil Partnership Act 2004. The effect is for parties to become subject to the rules specially created for the institution of civil partnership. Since civil partnership is a *de iure* relationship having specified, tailored consequences,¹⁰ these will override the application of such rules as regulate *de facto* cohabiting relationships.

Prior to the Family Law (Scotland) Act 2006, no single body of rules governed the definition, constitution, and proprietary/financial consequences of *de facto* cohabitation in Scots domestic law. Particular claims against a cohabitant were recognised on occasion, but provision under Scots law was haphazard.¹¹ The 2006 Act¹² introduced a set of rules applying to *de facto* cohabitants, defined in section 25(1) as follows: either member of a couple consisting of (a) a man and a woman who are (or were) living together as if they were husband and wife; or (b) two persons of the same sex who are (or were) living together as if they were civil partners. Thus the provisions in the Act apply both to heterosexual couples and to same-sex couples.¹³

One general problem with regard to the definition of cohabitation is that of identifying the date of commencement, and possibly the date of termination; both, presumably, are questions of fact. The 2006 Act takes the approach of providing in section 25(1) an abstract definition of those who are eligible to be regarded as a “cohabitant”, and of providing in section 25(2) factors which may

10 *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam) at para 50 per Sir Mark Potter P: “the intention of the Government in introducing the legislation was not to create a ‘second class’ institution, but a parallel and equalising institution designed to redress a perceived inequality of treatment of long term monogamous same-sex relationships, while at the same time, demonstrating support for the long established institution of marriage.”

11 E.g. Damages (Scotland) Act 1976 ss 1, 10(2), as amended; Matrimonial Homes (Family Protection) (Scotland) Act 1981 s 18; Mental Health (Scotland) Act 1984 s 53(5); Social Security Act 1986 s 20(11); Housing (Scotland) Act 1988 s 31(4); Finance (No 2) Act 1988 s 42; Adults with Incapacity (Scotland) Act 2000 s 87(1); Mortgage Rights (Scotland) Act 2001. See J M Carruthers, “Unjustified enrichment and the family: revisiting the remedies” (2000) 5 SLPQ 58.

12 Family Law (Scotland) Act 2006 ss 25-30.

13 But not to married couples (necessarily heterosexual), whose proprietary and financial rights derive instead from, *inter alia*, the Family Law (Scotland) Act 1985 and the Succession (Scotland) Act 1964; nor to civil partners (necessarily same-sex) who, in turn, derive their rights from the Civil Partnership Act 2004.

be taken as sufficient to establish cohabitation. Section 25(2) states that the court shall have regard to:

- (a) the length of the period during which A and B have been living together (or lived together);
- (b) the nature of their relationship during that period; and
- (c) the nature and extent of any financial arrangements subsisting, or which subsisted, during that period.

It is not possible, therefore, to advise with certainty whether Scots law would regard a particular couple as being cohabitants for the purposes of the 2006 Act. On the other hand, it may be difficult for a couple to evade the status of cohabitant under the Act, even if that should be their choice, express or tacit, during the subsistence of the relationship¹⁴ – an outcome which is an affront to party autonomy.

The 2006 Act creates a range of new legal rights and corresponding responsibilities applicable to cohabitants. The Act is a response to concern about the absence of a coherent scheme of remedies to offset potential financial hardship suffered by cohabitants upon cessation of the cohabiting relationship. To a large extent the Act extends to cohabitants, *mutatis mutandis*, the rights and responsibilities conferred on married persons by the Family Law (Scotland) Act 1985 (extended to civil partners by the Civil Partnership Act 2004).¹⁵ The rights, in detail, are as described below.¹⁶

(1) Household goods

Section 26 puts in place a rebuttable presumption that each cohabitant has a right to an equal share in household goods¹⁷ acquired (other than by gift, or succession from a third party) during the cohabitation.

(2) Money and property

By section 27, and subject to contrary agreement between the parties, money derived from any allowance made by either cohabitant for their joint household

¹⁴ The trouble lies post-separation, if one party reneges on the couple's earlier "understanding" or "agreement" by applying for rights under the 2006 Act.

¹⁵ Civil Partnership Act 2004 s 261, Sch 20.

¹⁶ See generally: K McK Norrie, *The Family Law (Scotland) Act 2006: Text and Commentary* (2006); J Thomson, *Family Law Reform* (2006); T Guthrie and H Hiram, "Property and cohabitation: understanding the Family Law (Scotland) Act 2006" (2007) 11 Edin LR 208.

¹⁷ By s 26(4) this means "any goods (including decorative or ornamental goods) kept or used at any time during the cohabitation in any residence in which the cohabitants are (or were) cohabiting for their joint domestic purposes" but excluding money, securities, motor vehicles and domestic animals.

expenses or for similar purposes, or property acquired out of such money (excluding, however, the existing or former sole or main residence of the parties) is treated as belonging to each cohabitant in equal shares.

(3) Financial relief on termination

Where the relationship ends otherwise than by the death of either party, it is possible for a cohabitant to apply to the court for financial provision to be made by his or her former partner. Section 28 authorises the court to order one cohabitant to pay a capital sum or to contribute to the upbringing costs of any child of the cohabitation. In deciding whether to grant such applications, the court will take a range of factors into account, including the extent to which any economic advantage¹⁸ derived by the defender from contributions¹⁹ made by the applicant is offset by any economic disadvantage suffered by the defender in the interests of the applicant or any child²⁰ of the couple (and, conversely, the extent to which any economic disadvantage is offset by corresponding advantage).

Where cohabitation ends by the death, and the deceased partner is intestate, the surviving cohabitant can apply to the court within six months for financial provision out of the deceased's estate. Upon proof of satisfaction of the conditions set out in section 29 – that cohabitation subsisted at the point of death and that the deceased died domiciled in Scotland – the court may make an order out of the deceased's net estate for payment of a capital sum to the surviving cohabitant, and a transfer to the survivor of such property, heritable or moveable, as may be specified from the net estate, taking into account factors such as the size and nature of the net intestate estate (including other claims against it), and any collateral benefit received or to be received by the survivor pursuant to the deceased's death.

D. SCOTTISH CONFLICT OF LAWS PERSPECTIVE

These notable changes in Scots private law have the potential to generate not only internal or domestic law problems,²¹ but also conflict of laws problems. Conflict problems, however, are not properly addressed in the 2006 Act, which is a serious and regrettable omission.

It is implicit in the 2006 Act that application may be made for the rights which it provides whenever Scots law is the *lex causae*. However, except in relation to

18 Including gains in capital, income and earning capacity (s 28(9)).

19 Including indirect and non-financial contributions (s 28(9)).

20 Natural or accepted as a child of the family (s 28(10)).

21 E.g. defining cohabitation, and assessing economic advantage and disadvantage.

the rights set out in section 29,²² the Act does not specify, from a conflict of laws perspective, when or in what circumstances the rights should apply. The territorial extent of the new regime is not clear.²³ This is in contrast with the Civil Partnership Act 2004, part 5 of which contains conflict of laws provision dealing with civil partnerships formed or dissolved abroad.²⁴

The 2006 Act contains no jurisdiction rules with regard to *de facto* cohabitation, and only very limited choice of law provision. Effectively, therefore, the Act introduces significant new rules without enacting when those rules are to apply. It is easy to imagine the kinds of uncertainty which might arise – for example as regards the cohabitation in Scotland of one or more foreign domiciliaries, or concerning Scots-domiciled parties all or part of whose period of cohabitation was spent outside Scotland, or again concerning the cohabitation in Scotland of Scottish-domiciled parties who own property abroad. If proceedings having an actual or potential conflict of laws dimension are brought in a Scots forum, guidance will require to be drawn from general conflict principles governing capacity to enter into legal relationships, and the validity of such relationships, recognition of status and its incidents, matrimonial property issues and more general property matters, together with public policy considerations.

E. JURISDICTION

The silence in the 2006 Act about jurisdiction is the most difficult to fill. The essential antecedent question, not addressed in the Act, is in what circumstances Scottish courts have jurisdiction to rule on the financial/proprietary rights of cohabitants. Assuming that initial jurisdiction, a further question arises as to the extent of the Scottish courts' jurisdiction over foreign assets upon termination of cohabitation by separation or death. This latter point is a highly significant matter for couples who form relationships while living in Scotland and who subsequently

²² Financial relief upon termination of the relationship by the death intestate of either cohabitant. It is clear that in respect of the rights of the survivor, Scots law can be the *lex causae* only if it is the deceased's *lex ultimi domicilii* (s 29(b)(i)).

²³ Cf in this respect the Age of Legal Capacity (Scotland) Act 1991 s 1.

²⁴ Notably, however, there is no direct reference in the 2004 Act to choice of law. As regards the financial consequences of a civil partnership (being one, presumably, registered in Scotland), or of the death intestate of a civil partner (by inference, domiciled at death in Scotland), s 261(2) and Sch 28 of the 2004 Act extend to civil partners, *mutatis mutandis*, (i) the rules contained in the Succession (Scotland) Act 1964 concerning intestate and testate succession; (ii) rights in moveable property and money conferred by the Family Law (Scotland) 1985, as well as the financial relief provisions of that Act upon dissolution of a relationship; and (iii) certain other miscellaneous legislative provisions concerning, *inter alia*, bankruptcy, damages, and housing. The new rights will arise whenever Scots law is the governing law, though, as with *de facto* cohabitants under the 2006 Act, there may well be doubt as to when this will be the case. See Crawford & Carruthers, *International Private Law* (n 8) para 13-16.

move abroad, or *vice versa*, including, in particular, European citizens who, making the most of opportunities within the EU for increased mobility, set up home or purchase immovable property in a country other than their state of origin.

The question whether Scottish proceedings in respect of the financial/proprietary consequences of a *de facto* union would be competent, or whether a Scottish court would be entitled to apply to cohabitants the provisions of the 2006 Act, would seem to rest upon the Scottish court having jurisdiction, the basis of which is not clear, and upon the individuals in question satisfying the section 25 definition of cohabitants.

(1) Possible bases of jurisdiction

Apart from the rules contained in the Civil Partnership Act 2004,²⁵ there are no special rules in Scots or English conflict law pertaining to jurisdiction with regard to the separation of unmarried couples,²⁶ or with regard to the financial or proprietary consequences of separation.²⁷

(2) Council Regulation (EC) No 44/2001

Some consideration ought to be given to Council Regulation (EC) No 44/2001.²⁸ It is a matter of interpretation whether the Regulation excludes from its scope, by virtue of art 1.2(a),²⁹ rights in property arising out of a personal or

25 And in the Civil Partnership (Jurisdiction and Recognition of Judgments) (Scotland) Regulations 2005, SSI 2005/629, and, for England and Wales, the Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005, SI 2005/3334.

26 Council Regulation (EC) No 2201/2003, OJ 2003 L338/1, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (“Brussels II bis”) deals only with matrimonial matters.

27 Council Regulation (EC) No 44/2001, OJ 2001 L12/1, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters does not apply to “rights in property arising out of a matrimonial relationship” (art 1.2(a)). There is no express mention of rights in property arising out of other family or related relationships. Cf draft Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2007) art 1.2(a). See also Agreement between EC and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2005 L299/62.

28 OJ 2001 L12/1, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

29 “The Regulation shall not apply to: (a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; . . .”. The difficulties of reconciling art 1.2(a) and art 5.2 (special jurisdiction in matters relating to maintenance) are well-known and will not be rehearsed here: see Case C-220/95 *Van den Boogaard v Laumen* [1997] ECR I-1147, [1997] QB 759; Case C-271/00 *Gemeente Steenberg v Baten* [2002] ECR I-10489; *Wermuth v Wermuth* [2003] EWCA Civ 50, [2003] 1 WLR 942; Case C-433/01 *Freistaat Bayern v Blijdenstein* [2004] ECR I-981; *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 618; *Moore v Moore* [2007] EWCA Civ 361, [2007] *International Litigation Procedure* 36.

family relationship other than marriage. A wide (though probably teleological) interpretation of art 1.2(a), which I support, suggests that it does. In other words, the phrase “rights in property arising out of a matrimonial relationship” should be construed widely so as to include rights in property arising out of a relationship akin to marriage.

If, however, a narrower interpretation of art 1.2(a) is preferred, and it is taken to be the case that property rights arising out of a relationship akin to marriage properly fall within the scope of the instrument, the standard rules for allocation of jurisdiction in civil and commercial matters would apply. In that context, however, a further question might arise in interpreting art 22.1 of the Regulation (exclusive jurisdiction in proceedings concerning rights *in rem* in immovable property), namely, whether proceedings concerning the respective property rights of separating *de facto* cohabitants in heritable property situated, say, in Scotland may be said to “*have as their object rights in rem in immovable property*” (emphasis added), and thereby to confer upon the Scots courts *exclusive* jurisdiction.³⁰

Arguably, in relation to orders for financial or proprietary relief upon termination of a personal relationship, the question of title to property and its transfer is secondary to the making of an appropriate distribution of “global” or “collective” property between the parties. Family property transactions of this nature are essentially a matter of personal law, and such cases involving the transfer of property in the event of termination of the relationship concern the ancillary property aspects of what is not generally, or principally, a proprietary relationship.³¹ There would be a clear benefit to the parties if the forum were to have in view the complete financial picture of the separated cohabitants, and therefore it may be deemed appropriate, in some cases, not only for a non-*situs* forum (being, say, the place where the parties cohabited) to exercise jurisdiction over the parties’ foreign property, but also for that forum to apply whatever law it should consider to be most appropriate to the transfer of the foreign property (not necessarily the *lex situs*).³²

30 Cf Case C-294-92 *Webb v Webb* [1994] ECR I-1717, [1994] QB 696; *Ashurst v Pollard* [2001] Ch 595 at para 33 per Jonathan Parker LJ. See J M Carruthers, *The Transfer of Property in the Conflict of Laws* (2005) paras 2.25 ff, 2.51-2.67; Crawford & Carruthers, *International Private Law* (n 8) para 7-27.

31 Cf E F Scoles, “Choice of law in family property transactions” (1988-II) 209 *Recueil des Cours* 13 at 22; T C Hartley “Matrimonial (marital) property rights in conflict of laws: a reconsideration”, in J J Fawcett (ed), *Reform and Development of Private International Law: Essays in honour of Sir Peter North* (2002) 215 at 225.

32 Cf *De Nicols (No 2)* [1900] 2 Ch 410; *Chiwell v Carlyon* (1897) 14 SC 61 (South Africa).

(3) Residual Scottish rules of jurisdiction

Part III of the Domicile and Matrimonial Proceedings Act 1973 – headed “Jurisdiction in consistorial causes (Scotland)” – applies, by definition, only to actions related to marriage.³³ At present, there is no bespoke set of jurisdictional rules for actions relating to *de facto* cohabitation, or more particularly, the financial or property rights of *de facto* cohabitants. Normally, jurisdiction conferred on a Scots court to bring a legal relationship to an end carries jurisdiction to deal with the attendant property consequences. In cases of separation of *de facto* cohabitants, however, there is no legal union to be judicially dissolved, and hence no ancillary action for financial relief. But where a property dispute between unmarried persons necessarily involves prior proof of the existence of *de facto* cohabitation bearing certain legal consequences (whether automatic, or by application upon satisfaction of given criteria) according to a particular legal system – whatever that may be – the court seised of the property proceedings would be required to consider the “incidental” question of the existence of the *de facto* cohabitation (e.g. whether the eligibility criteria were satisfied).

In the absence of tailor-made rules of jurisdiction, and taking the view (which I prefer) that the property rights of *de facto* cohabitants are excluded from the scope of Council Regulation 44/2001, one must turn, by default, to the residual Scottish rules of jurisdiction contained in the Civil Jurisdiction and Judgments Act 1982.³⁴ Section 20, in conjunction with Schedule 8,³⁵ permits the Scots court *qua situs* to assert, declare or determine proprietary or possessory rights, or rights of security, in or over moveable property,³⁶ and also *qua situs* of immoveable property.³⁷ There are, additionally, certain other grounds of residual jurisdiction,³⁸ namely, those to the effect that a defender may be sued in the court for any place where any moveable property belonging to the defender

33 Applying in cases where the primary remedy sought is one of divorce, separation, nullity of marriage etc, as well as to ancillary or collateral orders.

34 Significantly, the Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM (2006) 399 final, proposes in art 1(5) to amend art 7 of Regulation (EC) No 2201/2003 by introducing a uniform and exhaustive rule of residual jurisdiction in matrimonial matters which would replace the existing national rules. The objective is to ensure access to court for spouses who live in a non-member state, but who retain strong links with the member state of which they are nationals (or in the case of the UK and Ireland, domiciliaries), or in which they have resided for a certain period. This is further evidence of the onward march of the EU harmonisation programme. There is no proposal, yet, to harmonise the residual rules of jurisdiction in civil and commercial matters (see Council Regulation (EC) No 44/2001 art 4).

35 As amended by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, itself amended by Civil Jurisdiction and Judgments Regulations 2007, SI 2007/1655.

36 Sch 8(i).

37 Sch 8(h), (k). These grounds are not ruled out as exorbitant by Council Regulation (EC) No 44/2001.

38 Which are deemed exorbitant by Council Regulation (EC) No 44/2001.

has been arrested, or where any immovable property in which the defender has a beneficial interest is situated, notwithstanding that the ownership of such property is not relevant to the projected litigation.³⁹

(4) Law Commission proposals for England and Wales

In May 2006, the Law Commission issued a consultation paper on the financial consequences of cohabitation, addressing the matter of remedies available upon relationship breakdown to couples who cohabit without marrying or, in the case of same-sex couples, without registering a civil partnership.⁴⁰ The scope of the consultation was limited, dealing only with the issue of financial relief upon termination of the relationship by means of separation or by death of either party. Part 11 of the consultation paper assessed the “procedural consequences” of the reform proposals, including issues relating to jurisdiction and applicable law. It is gratifying that in proposing law reform for England and Wales, the Law Commission, unlike the Scottish Parliament, has been alert to the importance of legislating for cases that have a substantial foreign element,⁴¹ by asking exploratory questions about whether English courts should have jurisdiction over such cases, and if so, what law they should apply to decide the case. The Law Commission has since issued its final report on the subject.⁴²

(5) Jurisdiction of the English courts in family law

The jurisdictional basis of the English courts in matters concerning adult relationships differs according to the particular area of family law concerned.⁴³

The Law Commission took the preliminary view that the rules of jurisdiction for proceedings relating to *de facto* cohabitation should be modelled upon Council Regulation (EC) No 2201/2003.⁴⁴ In its final report, the Commission recommended that the scheme of jurisdiction should be “drawn from those contained in Brussels II *Bis*”.⁴⁵ For the reason elaborated below,⁴⁶ however, it appears that extension of Brussels II *bis* jurisdictional bases to *de facto*

39 Sch 8(h).

40 Consultation Paper on *Cohabitation* (n 3).

41 Which, for this purpose, would include a Scottish element.

42 Report on *Cohabitation* (n 3). For recommendations in relation to jurisdiction and applicable law, see part 7, in particular paras 7.15, 7.16 and 7.22.

43 See e.g. Domicile and Matrimonial Proceedings Act 1973 (which in turn refers, in the first place, to Council Regulation (EC) No 2201/2003) (ancillary relief on divorce); Matrimonial and Family Proceedings Act 1984 (ancillary relief on divorces obtained overseas); Council Regulation (EC) No 44/2001 (applications for maintenance); Inheritance (Provision for Family and Dependents) Act 1975 (provision for a deceased person's dependants).

44 Consultation Paper on *Cohabitation* (n 3) para 11.59.

45 Report on *Cohabitation* (n 3) para 7.15.

46 See E.(7) below.

cohabitants would be misplaced inasmuch as Brussels II *bis* is concerned only with matters of personal status.⁴⁷ It is one thing to decide that a jurisdictional connecting factor based upon habitual residence is an appropriate localising agent – which would be a reasonable, if hardly surprising, conclusion – but it is quite another thing to say that any new scheme should be *modelled* on Brussels II *bis*, when the two schemes (one existing, and one proposed) are quite different in purpose and scope.

(6) The need for new rules of jurisdiction

Until the Family Law (Scotland) Act 2006, Scots law had no difficulty in treating an unmarried but cohabiting couple as strangers, and so dealing with any financial or property disputes between them by applying the rules of jurisdiction and applicable law appropriate as between strangers. Cases seldom arose,⁴⁸ reported conflict cases never. However, now that the 2006 Act has put in place a special regime for cohabiting couples, it seems inappropriate to continue to treat such persons, for the purposes of jurisdiction and applicable law, as though they were strangers in law, when elsewhere the law itself provides otherwise.

If jurisdiction rules were to be introduced for proceedings relating to *de facto* cohabitation, it would be possible to formulate a general rule, conferring upon a court (or administrative tribunal) jurisdiction in, for example, “matters relating to cohabitation ...”.⁴⁹ Alternatively, there could be crafted special, subject-specific rules of jurisdiction, taking note of what the forum may be asked specifically to do, for example:

- to declare that the relationship is one of cohabitation such as would incur statutory consequences (i.e. such as would satisfy section 25 of the 2006 Act);
- to declare that the relationship is not one of cohabitation such as would incur statutory consequences;
- to make declaration as to the cohabitants’ respective rights of ownership in household goods etc, or to resolve any dispute concerning such property;
- to make an order for financial provision where cohabitation has ended otherwise than by death; or
- to make an order out of the deceased cohabitant’s net estate for payment of a capital sum to the surviving cohabitant, and for transfer of property to the survivor.

⁴⁷ A point which the Law Commission recognises: see Consultation Paper on *Cohabitation* (n 3) para 11.52, and Report on *Cohabitation* (n 3) para 7.8. Though some changes to Brussels II *bis* are currently under discussion (see Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 (n 34)), there has been no suggestion that this aspect of the instrument should be changed.

⁴⁸ *Shilliday v Smith* 1998 SC 725: see Carruthers (n 11).

⁴⁹ Cf Council Regulation (EC) No 2201/2003, art 3.

Rules of jurisdiction similar to those contained in Brussels II *bis*, art 3 have been thought to be appropriate vis-à-vis proceedings for the dissolution or annulment of civil partnership, or for the separation of civil partners,⁵⁰ there being a close parallel with the nature of the proceedings in art 3.⁵¹ Whilst it would be possible (albeit more difficult than for *de iure* relationships) to replicate, *mutatis mutandis*, the grounds of jurisdiction contained in Brussels II *bis*, art 3 as regards proceedings concerning *de facto* cohabitation, it seems doubtful that this would be appropriate.⁵² Recital 8 of Brussels II *bis* states that:

As regards judgments on divorce, legal separation or marriage annulment, this Regulation should apply only to the dissolution of matrimonial ties and should not deal with issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures.

Article 3⁵³ is concerned wholly with matters of personal status, whereas most, if not all, of the issues likely to arise in *de facto* cohabitation proceedings will concern the financial and proprietary incidents of the relationship, rather than status *per se*. To use art 3 for this purpose would be to exceed its remit vis-à-vis married couples,⁵⁴ for whom jurisdiction is restricted to matters of status.

Arguably, the subject-matter jurisdictional rules contained for Scotland in sections 28 and 29 of the Matrimonial and Family Proceedings Act 1984⁵⁵ would provide a better framework⁵⁶ upon which to model rules of jurisdiction pertaining to *de facto* cohabitation, since the 1984 Act rules, unlike those in Brussels II *bis*,⁵⁷ are concerned expressly with matters of financial or proprietary relief rather than personal status.⁵⁸ By listing relevant jurisdictional connecting factors,⁵⁹ and, if

50 See the Civil Partnership (Jurisdiction and Recognition of Judgments) (Scotland) Regulations 2005, SSI 2005/629, reg 4 and, for England and Wales, the Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005, SI 2005/3334, regs 4, 5.

51 Neither SSI 2005/629 nor SI 2005/3334 makes reference to jurisdiction in respect of remedies ancillary to the principal remedy sought.

52 The Law Commission has recognised this in its report, restricting its recommended bases of jurisdiction to those based upon Brussels II *bis*, art 3, indents 1, 2, and 4, viz: where “(1) the parties are both habitually resident in England and Wales; or (2) the parties were last habitually resident in England and Wales and one of them still resides there; or (3) in the event of a joint application, either party is habitually resident in England and Wales”. See Report on *Cohabitation* (n 3) para 7.15.

53 Also SSI 2005/629 reg 4, and SI 2005/3334 regs 4, 5.

54 Or, as regards civil partners, SSI 2005/629 reg 4, and SI 2005/3334 regs 4, 5.

55 And for England and Wales in part III of the Act.

56 Thought not completely appropriate, for cases governed by the 1984 Act, by definition, have a strong foreign element by reason of the fact that a foreign court has already exercised consistorial jurisdiction over the parties. Cf Law Commission, Consultation Paper on *Cohabitation* (n 3) para 11.53.

57 Or SSI 2005/629, or SI 2005/3334.

58 Eg *A v S (Financial Relief after Overseas Divorce)* [2002] EWHC 1157, [2003] 1 FLR 431.

59 For example:

(a) the applicant was domiciled or habitually resident in Scotland on the date when the application was made; and

desirable, supplementary conditions, analogous to section 28 of the 1984 Act,⁶⁰ it would be possible to ensure that only individuals having a reasonably close link with Scotland would be permitted to seek financial or proprietary relief in the Scottish courts.

(7) Conflicting jurisdictions

Regardless of what ground(s) of jurisdiction might be thought appropriate (parties' common habitual residence; their former common habitual residence insofar as one of them still resides there; the defender's habitual residence; the pursuer's domicile; the *situs* of property belonging to either party and the subject of the dispute between them etc), a problem may arise concerning conflicting competing jurisdictions.

At present, taking the view that neither Council Regulation (EC) No 44/2001 nor Council Regulation (EC) No 2201/2003 contains rules governing the allocation of jurisdiction in proceedings concerning *de facto* cohabitation, a Scots court seised of jurisdiction under the residual national rules would probably be entitled to utilise principles of *forum non conveniens*⁶¹ to resolve problems of conflicting jurisdictions. If, however, a new bespoke rule of jurisdiction were to be adopted, as outlined above, the question would arise whether a mandatory or discretionary solution to the problem of conflicting jurisdictions was suitable, the former reflecting the *lis pendens* (priority of process) approach, such as contained in Brussels II *bis*, art 19⁶² and Council Regulation 44/2001 art 27, and the latter being in line with the rule contained in the Domicile and Matrimonial Proceedings Act 1973 for cases where the competing consistorial forums are Scotland and a non-EU state.⁶³ Given the strong and bullish attitude of Europe

(b) the other party to the cohabiting relationship –

(i) was domiciled or habitually resident in Scotland on the date when the application was made; or

(ii) was domiciled or habitually resident in Scotland when the parties last lived together as cohabitants [as defined]; or

(iii) on the date when the application was made, was an owner or tenant of, or had a beneficial interest in, property in Scotland in which at some time the parties cohabited.

60 To the effect that a Scottish court could entertain application for financial relief only if certain conditions were satisfied, e.g. that (a) the cohabitation falls to be recognised in Scotland [e.g. under Family Law (Scotland) Act 2006 s 25]; (b) the application was made within [one] year after the date when cohabitation ceased; (c) the cohabitation had a substantial connection with Scotland; and (d) both parties are living at the time of the application. Cf the provisos listed in Report on *Cohabitation* (n 3) para 7.15.

61 Civil Jurisdiction and Judgments Act 1982 s 49.

62 Noting, however, the discretionary element in art 15 (“transfer jurisdiction”).

63 Section 11, Sch 3 para 9. See, e.g., *Shemshadford v Shemshadford* [1981] 1 All ER 726; *Breuning v Breuning* [2002] EWHC 236, [2002] 1 FLR 888; *Otobo v Otobo* [2002] EWCA Civ 949, [2003] 1 FLR 192; *Ella v Ella* [2007] EWCA Civ 99. If the couple in question should have an interest in heritable

(and in light of possible EU developments),⁶⁴ a *lis pendens* approach perhaps would be more likely. It is interesting to note that the Law Commission initially favoured, for use in England and Wales, a *lis pendens* solution to problems of conflicting jurisdictions,⁶⁵ but that, following consultation, it has recommended that the English court should have a discretion to stay proceedings if there are proceedings pending in another jurisdiction in relation to financial relief for cohabitants following separation.⁶⁶

F. CHOICE OF LAW

Strictly, the subject of choice of law presupposes the jurisdictional rules which, as we have just seen, do not yet exist. However, since the aim of this article is to speculate, and thereby not only to assist the debate but also to lay bare the conflict of laws deficiencies of the Family Law (Scotland) Act 2006, further choice of law discussion is now offered.

There is a likelihood of a Scots forum⁶⁷ being called upon to consider the matter of applicable law in at least three situations:

- (a) in determining whether the provisions of the 2006 Act apply to a particular relationship, i.e. whether the relationship is a qualifying relationship in terms not only of the definitional criterion in section 25 of the Act but also of identifying Scots law as the *lex causae*, that is, the law applicable to the relationship and its incidents;⁶⁸
- (b) in determining whether a Scottish domiciliary was or is eligible to enter into a *de facto* (unregulated)⁶⁹ cohabitation abroad – or, for that matter, a *de iure* relationship – and thereby to incur the legal consequences (personal, proprietary or financial) of an overseas legal system; and
- (c) in determining the legal effect of a foreign *de facto* cohabitation, involving Scottish or non-Scottish domiciliaries, upon moveable or immoveable

property in Scotland, it is thought unlikely that a Scots forum would sist proceedings in favour of a non-situs forum: cf *Mitchell v Mitchell* 1992 SC 372. See, however, Carruthers, *Transfer of Property* (n 30) paras 2.51-2.67; *Razelos v Razelos* [1970] 1 WLR 390; *Galbraith v Galbraith* 1971 SC 65; *Bain v Bain* 1971 SC 146; *Hamlin v Hamlin* [1986] Fam 11; *Sandford v Sandford* [1985] 15 Fam Law 230; *Holmes v Holmes* [1989] Fam 47.

64 See H below.

65 Consultation Paper on *Cohabitation* (n 3) para 11.61.

66 Report on *Cohabitation* (n 3) para 7.16.

67 Properly seised – see E.(3) above.

68 E.g. do Scots law and Scots public policy govern eligibility (as to age, consanguinity etc) to live in a relationship such as would attract the consequences endowed by the Act? Is there any role for a (putative) cohabitant's personal law?

69 I.e. in terms of its creation rather than its legal consequences.

property situated in Scotland, i.e. in recognising, or not, the purported extra-territorial effect of an overseas statutory or private (i.e. contractual) regime or foreign decree.

The manner in which a Scottish (or English) court, currently, would deal with identification of the *lex causae* in proceedings related to *de facto* cohabitation is a matter of speculation. Among the contenders for the applicable law to govern *de facto* cohabitants' financial and proprietary rights are: the law of the country where the cohabitation commenced, or where the longest period of cohabitation took place, or where the relationship terminated, or where financial and proprietary relief is sought. It is apparent that there are a number of variables which could impact upon determination of the governing law, viz:

- (a) the nature of the cohabitation: whether it is regulated (*de iure*, formalised by legal ceremony), or unregulated (*de facto*);
- (b) the place of cohabitation: whether it occurred wholly or partly in Scotland; the significance of the law of the place where the parties first or last cohabited;
- (c) the personal law(s) of the cohabitants: a different choice of law rule may be preferable, according to whether:
 - (i) one (or both) cohabitant(s) is (or are) domiciled in Scotland;⁷⁰
 - (ii) one (or both) cohabitant(s) is (or are) domiciled in, or nationals of, the state in which the *de facto* cohabitation subsists or formerly subsisted;⁷¹
 - (iii) one cohabitant is domiciled in, or a national of, the state in which the *de facto* cohabitation subsists, and the other is domiciled in, or a national of, the state under whose law the *de facto* cohabitation, or its legal consequences, are recognised as binding;⁷²
- (d) the exercise of party autonomy by the parties: have they purported to enter into an agreement to regulate their relationship and its financial or proprietary consequences? Is the agreement formally and essentially valid (raising another choice of law question – valid by what law)? Has the agreement been revoked?
- (e) the identity of the parties to the legal proceedings: whether the dispute arises between the cohabitants *inter se*, or between one or both cohabitants and a third party (e.g. a cohabitant's issue, parent, spouse, registered partner, or creditor);

70 Should a rule of dual reference be applied to matters of essential validity such as eligibility to form a *de facto* union? Cf choice of law rules concerning capacity to marry, and other matters of essential validity of marriage: Family Law (Scotland) Act 2006 s 38.

71 There is growing use of the commonality principle in Scots, English and harmonised European choice of law rules.

72 Cf the "recognition by" rule utilised in *Armitage v Attorney-General* [1906] P 135.

- (f) the purported extra-territorial reach of any statutory or private regime, imposed or recognised by the law of the state in which the *de facto* cohabitation subsists, which seeks to regulate the proprietary rights and obligations of cohabitants; in particular, whether the regime purports to affect property, moveable and immoveable, in Scotland.⁷³

(1) The position under the 2006 Act

Under Scots law it remains uncertain which law governs, for example, an individual's eligibility to attain the status of *de facto* cohabitant (for the purposes of section 25 of the 2006 Act). Factors which must be taken into account by the court in deciding whether a claimant qualifies as a cohabitant for the purposes of the Act include the length and nature of the cohabitation, but it remains to be seen whether a Scottish forum will be prepared to take into account any period of cohabitation spent abroad.⁷⁴ More significantly, it is not clear in what circumstances a Scottish court would be entitled to apply the provisions in the Act covering the personal, financial and proprietary consequences of cohabitation.⁷⁵

Once seised of jurisdiction, should the Scottish court always apply the *lex fori* to matters of the type under discussion?⁷⁶ This is the approach recommended for England and Wales by the Law Commission, which has proposed that, by analogy with the rule on applicable law in divorce, and concerning ancillary matters such as financial relief upon divorce, the *lex fori* should govern financial relief between *de facto* cohabitants on separation and death.⁷⁷ There is no doubt that a *lex fori* rule would be simple and straightforward. Similarly, a presumption

73 Cf *De Nicols (No 2)* [1900] 2 Ch 410 and, with regard to separation of property, *Shand-Harvey v Bennet-Clark* 1910 1 SLT 133, where parties were married in Mauritius, choosing by private marriage contract a system of separation of property, and later moved to Scotland, acquiring Scots domicile. The question of the competing rights of creditors of the husband and the wife in respect of property which had been the subject of gift from husband to wife was determined by the conditions of the marriage contract – and so not by the domestic law of Scotland (which at that time held gifts between spouses to be revocable).

74 Cf *Walker v Roberts* 1998 SLT 1133, a case of marriage by cohabitation with habit and repute, in which the Scots court refused to take into account a period of time spent in Swaziland. However, the *ratio* was that the constitution of marriage by this irregular means is a question of form, to be governed by the *lex loci celebrationis*, and the only *lex loci* judged significant was Scotland. The 2006 Act s 3(1) has since abolished this type of irregular marriage.

75 Other than that, in order to satisfy s 29 of the 2006 Act, the deceased must have died domiciled in Scotland.

76 Cf Choice of law rules in relation to grounds of divorce, and financial provision upon divorce: Crawford & Carruthers, *International Private Law* (n 8) paras 12-15, 13-24.

77 Consultation Paper on *Cohabitation* (n 3) para 11.62, and Report on *Cohabitation* (n 3) para 7.22. The Law Commission's position is that, assuming jurisdiction were based on parties' habitual residence, it would be probable that the *lex fori*, in any event, would be the law of the place where the parties had been cohabiting.

in favour of applying the *lex fori* could be useful, on the grounds of certainty and predictability, particularly where parties have agreed to have the matter litigated in a particular forum, or have submitted to that court's jurisdiction. But ought a presumption in favour of the *lex fori* to be rebuttable and, if so, what arguments might a cohabitant deploy to persuade the forum that a different law should apply? At the very least, application of the *lex fori* would be subject to the acquiescence of a foreign *lex situs*, as concerns immovable property abroad and possibly also moveable property.

Importantly, the case for aligning the choice of law rule in relation to the financial and proprietary rights of *de facto* cohabitants with that pertaining to divorce and financial relief on divorce is severely weakened by the latest EU Commission proposal concerning the applicable law in matrimonial matters.⁷⁸ The EU Commission proposes to introduce a harmonised choice of law rule in matters of divorce and legal separation,⁷⁹ based in the first place upon the (restricted) choice of the spouses,⁸⁰ and, in the absence of choice, upon a "scale of connecting factors"⁸¹ which would refer, in turn, to the law of the spouses' common habitual residence, failing which their last common habitual residence insofar as one of them still resides there, failing which their common nationality or, in the case of the UK and Ireland, common domicile, failing which the place where the application is lodged (i.e. the *lex fori*).⁸²

If a *lex fori* rule were thought to be too inflexible or parochial, then, arguing by analogy from use of the matrimonial domicile in marriage cases, it may be said that Scots law should apply *qua lex causae* in relation to rights arising during the cohabitation whenever the cohabitation occurred in Scotland. This, however, immediately raises temporal issues. Is the 2006 Act intended to provide a Scottish remedy for *de facto* cohabitants, who cohabited for all, or most, or even only part of their relationship in Scotland? And conversely, what should be the extent of the Act's application to those couples who cohabited for all, or most, or part of their relationship outside Scotland, and who happen to own property in Scotland?

(2) Problems of mutability

In any given case, what should happen where the connecting factor designated in a conflict rule changes over the course of time – for example, where parties

78 Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 (n 34) ch IIa.

79 It is not intended that the proposed rule would extend to marriage annulment, since that remedy is closely linked to the conditions for the validity of marriage, and for which, it is said, the exercise of party autonomy would be inappropriate (recital 6).

80 Article 20a.

81 Preamble, recital 7.

82 Article 20b.

commence their cohabitation in State A, where each is domiciled, relocate for employment or other reasons to State B, and subsequently return, after a long or short period, to State A (or indeed move to State C)? Mutability is a problem of considerable difficulty. Should parties' property rights *inter se* crystallise when they commence their cohabitation, or float, varying with regard to each acquisition according to the time and place of acquisition, so that the law governing the parties' property rights changes from time to time? This type of problem, well-known in connection with matrimonial property disputes,⁸³ has not hitherto been encountered in the context of *de facto* unions. Scots law has no experience of the *conflict mobile* in the context of unmarried persons' property rights. It can be anticipated that a similar approach would be taken to that which pertains to matrimonial property.⁸⁴ In that case the future rights of *de facto* cohabitants would be deemed to change with a change of cohabitation *locus* (i.e. mutability), subject only and always to the control of the *lex situs* of immoveable property. It is a matter of speculation whether (apparently) vested rights in earlier acquired property would be prejudiced by a change of domicile by both parties or a change of cohabitation *locus*, but it is at least arguable, from the context of marriage, that vested rights should not be disturbed.

(3) Formulating a choice of law rule

If proper account is to be taken of the variables mentioned above, then, as matters currently stand, the Scottish court should apply a flexible connecting factor, namely the proper law of the cohabitation (the law of closest connection), in order to determine whether the cohabitation incurs any financial and proprietary consequences. This would allow the court to find the "centre of gravity"⁸⁵ of the parties' relationship.

A general rule could be buttressed by a number of special rules, or presumptions, such as: if parties have entered into a cohabitation contract, that contract, if valid by its own applicable law (express or tacit), should govern, subject only to the public policy of the forum (and of the *lex situs* in relation to immoveable property); in the absence of regulation by the parties of their own affairs, their rights in immoveable property should be determined by the *lex situs*; and if the parties spent, say, the last five years cohabiting in State X, the law of that State should (in the absence of private regulation) be presumed to govern their rights in moveable property.

83 Crawford & Carruthers, *International Private Law* (n 8) paras 13-08, 13-10, 13-11.

84 Cf Family Law (Scotland) Act 2006 s 39(5).

85 M Wolff, *Private International Law*, 2nd edn (1950) 520; Hartley (n 31) at 226.

A simpler model is found in section 39 of the 2006 Act, which introduces statutory choice of law rules in relation to matrimonial property. This model might suggest that the *lex situs* should determine cohabitants' rights in immoveable property, and that the law of the common domicile or habitual residence⁸⁶ should determine their rights in moveable property.

(4) Cohabitation contracts and opt-out agreements

For legally sophisticated couples who enter into a cohabitation contract, it is possible that they will wish to choose the law which is to govern proprietary and financial rights. If so then, subject to the usual public policy considerations, there is no reason why the choice should not be upheld, provided it is formally and essentially valid by the law governing the agreement.⁸⁷

If parties elect to opt out of the default consequences of a particular regime, the permissibility of opt-out should be a matter for determination by that same law.⁸⁸

Where there is no choice of law clause, the law applicable to financial and proprietary rights is probably the default rule, for example the proper law of the cohabitation, identified in the normal way.

G. RECOGNITION OF OVERSEAS DECREES

In the absence of special rules for recognition of overseas decrees concerning the legal consequences of *de facto* cohabitation, the Scottish courts would require to construe Council Regulation (EC) No 44/2001⁸⁹ to determine whether its system of judgment recognition and enforcement applies to rights in property arising out of a relationship akin to marriage.⁹⁰ Assuming, as I believe, that such relationships are excluded from the Regulation's scope, and further assuming that the system

86 Albeit this factor requires further refinement: common domicile/habitual residence from time to time, or at a defined point (e.g. at commencement or upon termination of the cohabitation; or at the point of acquisition)?

87 This approach is less parochial than that recommended by the Law Commission, namely that the law of England and Wales should be the governing law in all cases arising in an English or Welsh court concerning opt-out agreements. See Report on *Cohabitation* (n 3) para 7.22.

88 It is assumed that it was not intended to permit opt-out of the provisions on *de facto* cohabitation in the Family Law (Scotland) Act 2006, but some individuals may wish to do so, e.g. parties cohabiting in France who purchase for their joint use a holiday cottage on Skye, but who do not wish that heritable property to fall subject to rights provided by Scots law in terms of the 2006 Act. If such a matter should fall to be litigated in a non-Scottish forum (probably France) which decides that the action principally concerns rights *in personam* rather than rights *in rem* in foreign property, the parties' opt-out may well be upheld by that forum. It would be for the Scottish *lex situs* to acquiesce in any order *in personam* issued by the non-*situs* forum.

89 And possibly to refer to the European Court of Justice for a preliminary ruling on the point.

90 Cf E.(2) above.

of judgment recognition and enforcement contained in Council Regulation (EC) No 2201/2003 does not apply,⁹¹ then a party seeking recognition in Scotland of a decree obtained abroad concerning the existence or incidents of a *de facto* union would require to invoke the residual Scottish rules. These are to be found at common law in the principles for enforcement by decree conform, and in statute in the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933.⁹²

A foreign court (that is, the granting court) would not be deemed to have jurisdiction if the subject matter of the dispute were immovable or moveable⁹³ property situated outside that court's jurisdiction. In the matter of recognition of overseas decrees, if the forum (say of the place where the parties cohabited) applied, *qua* governing law, its own law, and if that regime (say, of community – or separation, or hybrid – of property between cohabitants) purported to affect all property belonging to the couple, including that situated abroad, the Scottish *forum rei sitae* would nevertheless retain absolute physical and legal control over any property situated in Scotland.⁹⁴ The Scottish court would therefore have an undeniable right to recognise *inter partes*, or not,⁹⁵ the purported proprietary effects of the *de facto* cohabitation imposed by the foreign regime. In the event of a competing claim to property in Scotland by a third party, such as a creditor, the question would become one of competing real rights, to be determined by the pre-existing, well-established common law conflict rules concerning title to property.⁹⁶

If a dispute were not *inter partes* but between the cohabitants and some third party (such as a cohabitant's issue, parent, spouse, or creditor claiming rights conferred by domestic Scots law), the Scottish court would probably be more reluctant to recognise such proprietary consequences of cohabitation as were conferred by a foreign law where those consequences – at least insofar as they purport to affect property situated in Scotland – would prejudice the third party's claim according to Scots law. Such a dispute might, for example, be between a child's right to aliment from a parent, or a creditor's right to execute diligence in respect of assets in Scotland, and the claim of the parent's or debtor's cohabitant

91 And that nor do the recognition rules contained in the Civil Partnership Act 2004 part 5 (as regards heterosexual relationships, because of the same-sex requirement contained in s 216; and as regards same-sex relationships, because of the need for formalisation as per Sch 20).

92 See Crawford & Carruthers, *International Private Law* (n 8) paras 9-15-9-33. This is the obverse of *Maples v Maples* [1988] Fam 14.

93 *McKie v McKie* [1933] IR 464.

94 Meaning that, strictly, the Scottish *forum rei sitae*, upon application by either cohabitant, could decide to apply the 2006 Act in respect of such property.

95 Cf *De Nicols (No 2)* [1900] 2 Ch 410; and n 88 above.

96 Crawford & Carruthers, *International Private Law* (n 8) paras 17-07, 17-08, 17-15.

under a foreign law to, say, funds in a bank account in Scotland. The Scottish *lex situs* would be likely to prevail over the foreign regime, statutory or conventional, and would always retain a public policy discretion.

Where both parties to a *de facto* cohabitation are nationals, domiciliaries or residents of one or more EU member states, or where the property over which they argue is located in Europe, it would seem to be a peculiar, indeed counter-intuitive, result to have to resort to common law or UK statutory principles of decree enforcement. Perhaps it is time to negotiate a European solution.

H. EU GREEN PAPER

In its Consultation Paper, the Law Commission rightly intimated that any proposals it makes concerning international private law are subject to review, pending legislative proposals at a regional EU level.⁹⁷ In July 2006 the EC Commission produced a Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition.⁹⁸ This was in pursuance of the Vienna Action Plan (1998)⁹⁹ and the Hague Programme (2005),¹⁰⁰ and followed a preliminary study of the rules in the member states.¹⁰¹ The purpose of the Green Paper was to launch a consultation exercise on the various legal issues which arise in an international context concerning the matrimonial property rights of spouses,¹⁰² and the property consequences of other forms of domestic union. The adoption of a European instrument concerning these matters is said to be justified by reason of the fact that¹⁰³

97 Consultation Paper on *Cohabitation* (n 3) para 11.47. Cf Report on *Cohabitation* (n 3) para 7.28.

98 COM (2006) 400 final.

99 OJ 1999 C19.

100 "Strengthening freedom, security and justice in the EU": Council and Commission Action Plan implementing the Hague Programme (OJ 2005 C198).

101 Study conducted in 2003 by a Consortium of the TMC Asser Institute, The Hague, and the Catholic University of Leuven, Belgium, commissioning expert national reports from the then 15 Member states. The Scottish report, by E B Crawford and J M Carruthers, is available at http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm.

102 Green Paper para 1 defines matrimonial property regimes as the "sets of legal rules relating to the spouses' financial relationships resulting from their marriage, both with each other and with third parties, in particular their creditors" (para 1).

103 Green Paper para 1. For statistical data regarding the incidence of "international" relationships, see Commission Staff Working Document, *Annex to the proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters: Impact Assessment* (SEC (2006) 949).

[a] particular consequence of the increased mobility of persons within an area without internal frontiers is a significant increase in all forms of unions between nationals of different Member States or the presence of such couples in a Member State of which they do not have the nationality, often accompanied by the acquisition of property located on the territory of several Union countries.

The primary focus of the Green Paper is the scope and application of matrimonial property regimes across the EU,¹⁰⁴ but, for the purposes of this article, its relevance lies in the treatment of conflict rules concerning other forms of domestic union. There already exists limited Community regulation of certain aspects of the lives of unmarried couples,¹⁰⁵ and so further intervention at a regional European level is not unexpected.

The Green Paper treats registered partnerships¹⁰⁶ separately from *de facto* unions (“non-formalised cohabitation”). In relation to the former, it seems likely that rules will be proposed on jurisdiction, applicable law, and recognition of overseas decrees – or at least that existing rules concerning marriage (and its dissolution) will be extended, with necessary modifications, to registered partnerships. It is more difficult to predict how the EC Commission will act with regard to *de facto* unions. Some form of Community intervention would, however, be a positive step.

“Most national laws”, the Green Paper states, “comprise certain rules laid down by statute or in the case law relating to couples who are neither married nor in a registered partnership.”¹⁰⁷ This is true certainly of Scots law and, to a lesser extent, of English law as well. It is further stated that:¹⁰⁸

[i]n theory, in the absence of specific rules, the conflict rules applicable to contracts (Rome Convention of 1980 on the law applicable to contractual obligations) and to civil liability or, generally speaking, the law of the country where damage occurred would be expected to apply.

In envisaging the use of the Rome Convention in this context, this discloses a preference for a literal interpretation of the Convention, which excludes from

104 Para 2.

105 Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility operates in relation to the children of married and unmarried persons (being an expansion of the scope of Council Regulation (EC) No 1347/2000, OJ 2000 160/19, which operated only in relation to parental responsibility for the children of both spouses rendered on the occasion of matrimonial proceedings); and Council Regulation (EC) No 44/2001 applies to all matters relating to maintenance, including, it would seem, the situation where, according to a particular legal system, maintenance obligations exist between cohabitants.

106 There being at least 11 member states which now provide for some form of registered, non-marital partnership (Belgium, Denmark, Finland, France, Germany, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the UK).

107 Para 3.2.

108 Para 3.2.

its scope “rights in property arising out of a matrimonial relationship” and “rights and duties arising out of a family relationship, parentage, marriage or affinity, including maintenance obligations in respect of children who are not legitimate.”¹⁰⁹ My own more purposive interpretation of the Convention is that contractual disputes between cohabitants are also excluded from the scope of the instrument, and so fall to be regulated by residual national choice of law rules. This is supported by the terms of the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I),¹¹⁰ art 1.2 of which has been revised to encompass modern living patterns by stating that the Regulation shall not apply to

- (b) contractual obligations relating to a family relationship or a relationship which, in accordance with the law applicable to it, has similar effects, including maintenance obligations;
- (c) obligations arising out a matrimonial relationship or a property ownership scheme which, under the law applicable to it, has similar effects to a marriage. . .¹¹¹

Since the national legislature in Scotland has been singularly unsuccessful (or unambitious) in making plain on the face of the Family Law (Scotland) Act 2006 when and where, in terms of the conflict of laws, the cohabitation rules contained in the Act should apply, and given that common law principles concerning such issues are a matter of conjecture (at least if account is taken of the special nature of the disputing parties’ personal relationship), it would be helpful for the EU Parliament and Council to introduce harmonised conflict of laws rules to deal with such matters across the Union. As a minimum, the introduction of harmonised rules of jurisdiction and judgment enforcement would be beneficial, but in view of the speculative nature – seemingly EU-wide – of the relevant choice of law rules for such matters, there would be sense in adding a choice of law rule concerning the financial and proprietary aspects of termination of a *de facto* cohabiting relationship.

¹⁰⁹ Art 1.2(b).

¹¹⁰ COM (2005) 650 final.

¹¹¹ See also Law Commission, Consultation Paper on *Cohabitation* (n 3) para 11.65. Cf Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II), OJ 2007 L199/40, art 1.2, especially art 1.2(b), by which there is excluded from the scope of the Regulation “non-contractual obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships as having comparable effects to marriage, and wills and successions”. Whilst parties who have entered into *de facto* cohabitation contracts would be likely to base any claim arising out of their cohabitation in contract, the great number of individuals who, as a matter of practice, do not enter into such contracts would be more likely to bring proceedings on the ground of unjustified enrichment.

(1) Harmonised rules of jurisdiction

As regards jurisdiction, one possible approach would be the introduction of grounds of jurisdiction akin to those contained in art 3 of Brussels II *bis*, permitting member state consistorial forums to deal not only with matters of personal status, but also with issues concerning the financial and property consequences of marriage. By (justifiable)¹¹² extension, similar bases of jurisdiction then could be introduced to establish the forums considered appropriate to deal with the financial and property consequences of other forms of domestic union, including *de facto* cohabitation.

(2) Harmonised choice of law rules

The fact that, in a particular area, national choice of law rules are under-developed or under-tested does not appear to be an argument which has carried much weight at the EU centre in the debate about whether or not to introduce harmonised rules in that area.¹¹³ Arguably an absence of clarity or certainty should encourage, not impede, EU action. Moreover, since the scope of application of the 1980 Rome Convention is not free of doubt, it would be sensible to craft, of new, a set of European choice of law rules for this area of law.¹¹⁴

A question would then arise as to whether a scissionist principle would be appropriate (i.e. one rule for immovable property and another for moveable) or whether a unity principle would be more satisfactory (i.e. a single connecting factor to regulate the property and financial rights of *de facto* cohabitants).¹¹⁵ Absent a common approach across the domestic laws of the various member states to the property and financial rights of such persons (or the recognition of such), a scissionist rule would seem to be preferable.¹¹⁶

As regards immovable property, a straightforward *lex situs* rule would be the obvious, and probably best, choice, removing or at least reducing what could be difficult public policy problems. A non-*situs* law is potentially problematic. For

112 For this would involve extending equal rights of access to justice, as regards the financial and property consequences of personal relationships, to married and cohabiting persons alike.

113 Cf the UK reaction to the proposed introduction in Rome II of choice of law rules for non-contractual obligations arising out of unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*. E.g. E B Crawford and J M Carruthers, "Conflict of loyalties in the conflict of laws: the cause, the means and the cost of harmonisation" 2005 JR 251 at 271.

114 Cf Law Commission, Consultation Paper on *Cohabitation* (n 3) para 11.64. See, however, Report on *Cohabitation* (n 3) para 7.27.

115 A problem familiar to the EU Commission and to Member States: cf Green Paper on succession and wills, COM (2005) 65 final.

116 Noting, however, that one problem of a scissionist approach, which involves picking and choosing disparate rights from disparate systems, is that a cohabitant could receive cumulative benefits which are more generous than intended by any one system. Cf *Train v Train's Ex* (1899) 2 F 146.

example, in the event of a couple owning immoveable property, say, in State X (being a state which, under its own domestic law, does not extend any proprietary or financial relief to *de facto* cohabitants), there may be a strong public policy objection to having rights in such property governed by the law of State Y (which does provide financial relief to such parties), being the forum in which the proprietary or financial relief is sought by one cohabitant, as well as being, say, the common nationality or domicile of the couple or the place where they (last) cohabited.

With regard to moveable property, and to possible problems of ranking (for example in respect of third party creditors), it is more likely that a personal law connecting factor would prevail (preferably a “common” connecting factor),¹¹⁷ coupled, if necessary, with the usual public policy savings clause. Possible contenders would be the law of the parties’ common habitual residence, or their last habitual residence (insofar as one of them continues to reside there), or their (common) domicile or nationality.

The role of party autonomy would require careful consideration, but its inclusion in the EU Commission Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 would suggest that there may be scope for permitting party choice of law, albeit on a restricted basis.

I. CONCLUSION

This article has sought to examine the conflict rules in Scotland applicable to *de facto* cohabiting relationships, and in particular their financial and proprietary consequences, and to analyse recent developments in this area of law in England and Wales, and in the EU. In attempting to address the conflict of laws aspects of *de facto* cohabitation, the Law Commission in England and Wales, whilst demonstrating a more informed approach than is revealed in the Family Law (Scotland) Act 2006, is proposing solutions which do not seem the most appropriate or logical in terms of conflict of laws thinking. A new EU project is considering matrimonial property rights and cohabitants’ rights at a regional level. The UK should participate fully in these discussions. Given the fact of modern living patterns across the EU, this is a sensible time to negotiate workable legal rules for all categories of domestic relationship, with the aim of producing principled rules of jurisdiction, choice of law and decree recognition and enforcement.

¹¹⁷ Paying attention also to the need for identification of a *tempus inspiciendum* – the time at which the personal law connecting factor is relevant.