The UK and the EU co-working for the benefit of the family law community: A New Hope?

David Hodson OBE MCIArb explores areas where, post Brexit and with the differences behind them of continued membership, the UK and the EU should work together collaboratively for the benefit of international families and to further International family Law.

This is a work in progress and has been shared with government and with lawyers internationally to prompt discussion and debate.

Introduction

Whilst the UK has now left the EU, with a transition period until the end of December 2020, there remain a huge number of international families within the UK and the EU. There are already a great number of international families outside of Europe but with UK or EU connections. It is incumbent on both the UK and EU to find solutions for the benefits of these families and their children. Presuming it is not a continuation of existing EU law and binding CJEU, what is it? The UK will not turn its back on the EU as its closest neighbours where the interests of so many international families are concerned. But it will inevitably now be a different relationship and hopefully one of very good co-working for the benefit of the family law community, for national and international laws, for practising family lawyers and crucially for all international families.

With a nod to George Lucas, how can there be New Hope for a better UK EU co-working family law relationship for the future than the fraught relationship over the past decade with several tensions. How can the UK looking globally help the EU look outwardly beyond the civil world? How can the UK be a bridgehead between the civil and common law? England has already significantly changed its own family law to be nearer some European expectations of family justice and how much should the UK influence the common law world? How can the liberal minded UK and the

liberal aspirations of the EU work closely with the increasingly strong Islamic jurisdictions for the many affected international families with UK and EU connections? How can the UK and the EU together work with the emerging and incredibly populous areas of the world whose family laws have little relationship with conventional European liberal and equality expectations? How can the digital innovations of the Hague Conference and elsewhere be extended with UK and EU active support? These and many other questions need exploring. They are urgent. The demographics of the international family community are no longer regional, or one continent based. The UK and the EU can give so much to the worldwide family law community over this coming decade. This was not possible with ongoing tensions between the UK and the EU within one justice system.

This paper explicitly proceeds on a basis of equality of genders, of nationals and non-nationals, equalities of heterosexuality and same-sex and orientation generally and equalities irrespective of wealth. It proceeds only on the expectation of a priority to the best interests of children. It presumes a good knowledge of international family law hence the shorthand references to international laws.

Domestic violence

The paper deliberately starts here. Any justice system must have protection for vulnerable parties coupled with identification of vulnerabilities and risks at every stage. The same must apply to international justice systems.

The EU Domestic Protection Regulation is the least used in the UK of the EU family laws and also the most recent. It follows the incredible work by the EU on the Daphne project. It provides for the cross-border recognition and enforcement of domestic protection orders made in any EU member state. At the outset of the EU negotiations, the UK government said that it would continue to recognise and enforce protection orders made in EU member states and invited the EU to do so with UK orders. The UK has put this commitment into its national law. Sadly, the EU has seemingly not done the same. This must be reciprocated by the EU. Whatever else happens, this is paramount.

It provides protections in situations of land borders. The UK has an EU land border. For this reason, it must be continued in some distinct way between the UK and the EU. No one in the UK EU combined geographic area should be at greater risk because of geographic borders. However, much more can and must be done.

The Istanbul Convention is broader in its geographical spread than the EU law and yet has had lesser implementation directly in national laws. It's orientation only to women is being rightly ignored in some jurisdictions such as the UK which are implementing in a gender-neutral fashion. The Istanbul Convention expects extra territorial cross-border effect of these orders. This has proved controversial. It is believed there is little or nothing else happening outside the EU and Council of Europe. In a digital era where domestic abuse doesn't physically walk across a geographic border, this is a deplorable state of affairs. With the work from the Daphne project and of the Istanbul Convention, the UK and the EU must combine to work urgently for global acceptance of the need for international domestic abuse protection legislation having international effect. This may include stalking and harassment and will certainly incorporate the digital online environment where much abuse and domestic bullying occurs. Europe has made progress in various ways and must together now make progress globally. This must be a first priority. Almost certainly it cannot be through the device of extraterritorial effect. It must be through international commitment from mutual recognition and enforcement.

Please see the article written by the author on this topic in more detail here

Jurisdiction and forum of divorce

One of the chief benefits of the Brussels II Regulation in March 2001 was the creation of a common jurisdiction law for divorce for the entire EU, subsequently expanded to about 500 million citizens. There was knowledge of the jurisdictional connectedness required by international families travelling around the EU. There was clarity of knowledge of advisers. The UK will have similar jurisdiction from 2021 onwards.

Indeed, the UK should have an internal debate on its continued reliance on the very historic jurisdictional basis of domicile. Many countries, within the EU and many common laws, now have the more certain basis of nationality and the UK should adopt this.

There are good reasons for the UK and the EU to go beyond Europe to encourage other jurisdictions with many international families to accept a common jurisdictional basis.

But this will not happen with the existing EU basis of forum, where more than one country has the opportunity for family court proceedings. Hard as it is, the EU must accept that lis pendens in the family law context and as decided in the late 1990s by policymakers as a way of creating certainty and predictability at the time of dramatically increased movement around Europe has been a

mistake, a social experiment which has gone wrong. In this paper intended for specialists, the significant disadvantages will not be further argued here. Simply it has no prospect of wide acceptance outside the 27 member states. Indeed, it has not been part of any international law of a group of neighbouring countries before March 2001 and specifically not since.

Nevertheless, the traditional forum test in common law jurisdictions of closest connection has risks of litigation through uncertainty.

The answer is the adoption of a hierarchy of jurisdictional criteria thereby creating the forum. Whichever country has the connection through the highest level of connecting factors on the hierarchy then deals with the proceedings. This is found in some EU family laws already. It is arguably an element of thinking in the closest connection criteria in common law. It has already been openly considered by the EU in possible BII divorce reforms. The stumbling block has been which criteria at the different levels of the hierarchy. There has been no major family law debate involving common law and non-EU jurisdictions apart from the UK. Some e.g. Australia and Malaysia have forum tests which are biased towards the home state and have little prospect of any long-term usage in the international community.

The best prospects for the international family justice community is in fact not just common jurisdiction but a common forum test and very probably a hierarchy structure. Curiously, the EU in having seven divorce jurisdictional criteria, some overlapping, lends itself obviously as a hierarchy. The UK from its common law closest criteria perspective and the EU from its certainty and predictability perspective are ideally placed to lead the debate globally for an internationally acceptable forum test.

Relationship agreements

This has been a primary tension between the UK and the EU. The traditional EU civil law position does not require any legal representation, or at most joint representation nor any, or any vigorous, disclosure. The UK position, which is certainly not the strongest in the common law world, requires opportunity for separate legal representation and disclosure to overcome anxieties about prejudice, duress and unfairness including the gender context of family relationships. The UK has been required by the EU to give binding legal authority to agreements reached decades earlier with now dramatically changed circumstances with spouses having sometimes no real understanding of the consequences and producing very unfair outcomes.

Globally, countries such as Australia, at the end of the spectrum with onerous preconditions, are relaxing them yet nevertheless still treating PMAs as binding. Nevertheless, the civil law tradition of marital agreements has no prospect of progress in the common law world. It is perceived as out of touch with expectations of basic contract law and gender rights entitlements. It may be that the EU is simply unwilling to encourage any change so deep-seated is this culture. If so, it is hard to see how the UK can be of any assistance in being a bridgehead.

However, undaunted, perhaps there can be some compromise in this New Hope. If civil law countries and cultures will not move in their traditional expectation of no independent legal advice and no vigorous disclosure, then let such agreements be good within those countries. But not beyond national boundaries. If the marital agreement is to have any international effect, as will occur if a family moves across borders, then the marital agreement should have some minimum criteria acceptable internationally. This is no more than occurs in any such situation with international travel.

These minimum criteria cannot be too vigorous. Otherwise acceptability will be impossible. There should be a timeframe in reaching the agreement before the relationship, as exists in many personal contracts of financial commitments. There should be some disclosure so that each party knows the background into which they are entering an agreement. Not the incredibly expensive and exhaustive disclosure found in some US marital agreements. But sufficient so that the parties know to what they are committing and what they are giving up. And then some form of independent advice. This will meet strong resistance from notaries. But there are already arguments in some civil law countries between the sole lawyer, advocate, and the joint lawyer, notary. The international community should require the separateness of advice.

In this way, countries and cultures accustomed to the basic civil law model need not change within themselves. But for families which cross international borders and therefore encountering different requirements there must be international preconditions for such agreements. This is far more than EU law, civil law dominated, requires. The UK, arguably at the weaker end of the spectrum within the common law, is in fact well-placed to have this discussion with the EU and then the rest of the world. International families need to know that their agreements will be good wherever they go and will accord with certain basic fairness preconditions to protect the more vulnerable party.

Applicable law

Applicable law, choice of law, has been another major tension between the UK and the EU. Common law is traditionally local law. Civil law is traditionally choice of law. The UK was not a party to Rome III, the Applicable law Convention. The tensions have caused the Hague to intervene and resolve through protocols embedded within EU laws. Perhaps the tensions can be significantly eased with hierarchy of jurisdiction. If this is accepted, then whichever jurisdiction is the highest in the hierarchy would both take the proceedings and apply its own law. Given that the hierarchy is almost certainly going to include (and somewhere fairly close to the top) the existence of specific agreements then any choice of law agreement is thereby embraced and satisfied.

Digital technology between countries

A recent international success story has been the iSupport created by the Hague Conference alongside the 2007 Convention. It has worked well, for those countries operating it. But a complaint has been that it is expensive to install and operate for some countries including with relatively modest international maintenance traffic. It is in the interests of the international family justice community for these digital technologies to be available around the world and not just larger nations. It is where foreign aid is needed. The international family justice system can only be as good comprehensively as each part. The UK, EU and others need to help parts of the world.

Both within the EU and the Hague laws, intercountry service mechanisms often go slowly. Hence some lawyers adopt their own private methods of service. Here again it can only be a matter of few years, and now accelerated through the experiences during the COVID crisis, before intercountry exchanges are entirely digital for service of family court papers. This is yet again an area where digitally sophisticated jurisdictions such as Australia, some US states, UK and elsewhere must work with the Hague and the EU to put in place a better workable digital system.

Forced marriage and FGM

These acts are often instigated in the family context and against vulnerable young women. The UK perceives itself as having taken a lead internationally alongside a few other countries. A feature is that although it sometimes occurs within the country of the family, often it occurs abroad including with the young woman being sent abroad by her family and sometimes accompanied by family members and then returning. Preventive action is sometimes only possible against the act about to occur abroad. Therefore, a key component of preventive legislation is extraterritorial effect, i.e., powers of courts to make orders against persons ordinarily resident or connected with the country

even though they may be temporarily abroad. This is perceived as controversial. It should only be exercised rarely. But it appears in other legislation e.g. Istanbul Convention in respect of domestic violence.

The EU also has many families for whom this is an issue. It has not hitherto produced EU laws. Both forced marriage and FGM are acts which must be prevented for the individuals and practices eradicated. There is much which the UK and the EU can do together to stop it. It is hoped that a task force or similar can be created with the specific question of extraterritorial effect, the jurisprudential stumbling block for some countries, being particularly examined in the family law context.

The application of personal, religious laws and recognition of potentially gender discriminatory laws

A significant community in the UK and in many EU member states is of the Islamic tradition. There may be other larger or more historic communities, such as African Caribbean, Romany, South Asia. But the Islamic community, both in UK and EU jurisdictions and in specific Islamic countries, have presented distinctive challenges for the international family law community. There have been calls for their personal law, Islamic law of whichever school, to be applied in family courts. There have been concerns about the unilateral status of Islamic divorces, especially outside the civil justice system. Expectations of paternal parental authority have been a real difficulty in respect of international movement of children within families. Islamic countries have been generally unwilling to commit to international family law conventions. Perhaps most of all, there has been major anxieties in the liberal West about fair and equal treatment of women including in marriage contracts and divorce.

Huge sensitivity is needed in this area in any form of policy. Nevertheless, the size and influence of the Islamic world in respect of international family life means it cannot be ignored.

There are some ironies and potential double standards. Some in the UK would regard the desire of a couple for the application in the family courts of their own personal law as similar to the application of a couple's own country's national law, which ironically is itself a key EU policy. The Talaq is a unilateral no-fault divorce traditionally over three months yet many liberal countries have no-fault divorce and ironically England is reforming its divorce law which will give some respondents to a divorce a period of not much more than eight weeks' notice. Some differences in the EU have arisen as the Talaq is pronounced through a mosque or sometimes a sharia council

rather than civil courts. However even here a number of the more developed Islamic countries have an ancillary state registration system which is sufficient for recognition by the UK and some EU countries. The financial outcome on divorce is the mahr found in the original marriage contract. Many liberal countries consider it is very inadequate and an unfair outcome, following a financial agreement reached in gender discriminatory circumstances. But there is in some ways little difference to a few aspects of the civil law marital agreement with no independent representation or disclosure. So, care and consistency are needed on integrity in this area.

There are nevertheless elements which concern liberal jurisdictions of the UK and the EU. These are primarily around aspects of gender. For those families within the UK and EU, arguably the best future prospect is education and passive assimilation of liberal values and equality. This will inevitably be slow. But it will be the most deep-seated and strongest.

In the meantime, there is value in examining mid-way staging points. Islamic tradition prohibits interest, yet the financial services industry worldwide has accommodated this without now any detriment to that industry. Might it be that the UK and the EU together could examine different ways of approaching and accommodating? This work has already started by the EU with South Mediterranean countries. Perhaps building on this but in any event, what can be accomplished with some of the more outward looking Islamic countries? As far as communities within the UK and the EU are concerned, how can bridges be built so that they are more often within the civil justice system rather than as communities offering their own family traditions and outside civil laws and systems? This has to be attempted.

Alternative dispute resolution, ADR

A dominant theme around the world in family justice systems is out-of-court resolution. It has been strongly pushed by governments. Family law professionals have been the strongest supporters as they have been aware of the huge benefits. The EU has supported this with the EU Mediation Directive. The Hague has produced guidance for Mediation in child abduction work. There are active national ADR professionals. Arbitration and collaborative law have also featured strongly.

Yet family arbitration is not customarily within the New York arbitration convention. Even more disappointingly, family mediation is not within the UN, Singapore, mediation Convention of August 2019. International ADR is still very rudimentary with no cross-border standards, training, branding, models or any amount of co-working.

The UK and the EU, along with other significant jurisdictions and cross-border organisations, should together use its combined influence to bring family ADR within existing international laws, to increase its use in international cases and enforceability of the outcome from ADR. Equally they should work actively to encourage the development of international ADR for the benefit of international families.

The Hague conference on Private International Law

In the past couple of decades, the EU through Brussels has pursued vigorously a committed policy of family law justice, with properly funded civil servants and supportive legislatures. It has been backed by adjudication via CJEU. In contrast The Hague, now in its third century, being formed in the late 19th century, has been working in family matters for over a hundred years and does so by embracing all systems of law around the world. It works slowly but consensually and collaboratively. The UK has been a chief supporter and committed to its laws. Unfortunately, The Hague Conference does not have the funding and resources needed to operate as an international family justice system requires in the 21st-century. Vital pieces of law have either not materialised or take very long.

International family matters can no longer be regional nor compartmentalised. There must be far greater co-working. Many, perhaps all, of the items in this paper could (maybe should) be undertaken with or via The Hague Conference. But they cannot do it themselves, despite undoubtedly wanting. A key part of this New Hope policy must be to identify the best vehicle through which resources such as the UK, the EU, Council of Europe, UN and others can work. This may be the Hague but, in any event, must work with the Hague on these issues.

Conclusion

This note can only be very provisional, very first draft thoughts. But is this unrealistic optimism? It cannot be. The huge and growing numbers of international families demand a far better service from nations, from regional groups and globally. Dialogue within closed circles, whether EU or common-law or other, is no longer good enough. International families do not live their lives within the existing legal groupings.

With the new opportunities and renewed commitment, and without the tensions within an attempted combined justice system, the UK and the EU (alongside other leading and innovative

family law jurisdictions) can bring its combined experience, resources and initiatives for the benefit of the worldwide family law justice systems and family communities. This is a crucial task which must be accomplished this decade and started now.

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