Brexit and international family law

This note sets out some preliminary reflections on the impact on international family law of the UK voting, by a close majority, to leave the EU.

Marital disagreements are sad and unfortunate. Sometimes a spouse may decide to separate, despite what may be the financial and personal cost. Nevertheless issuing a divorce petition quickly is not always needed, a period of reflection and consideration is often beneficial and divorce settlements can be done sensibly and constructively with wisdom and respect on both sides.

This is where the UK finds itself today. There is much within the original English Family Law Code of Practice, encouraging a conciliatory approach on separation and divorce, which is highly applicable as discussions start with the EU about the UK exit.

This note is exclusively on family law but is part of the bigger political and legal picture. It is intended to start a discussion within England and Wales about what existing EU laws we want to replace, and with what new laws, and what EU laws we want to retain in any way e.g. as domestic laws or other international treaties. We hope it will start a constructive debate about these issues.

What happens now?

Formal notice will need to be given to the EU under Art 50 of the Treaty of Lisbon but there is no time urgency for doing so. Initial indications are that it will not be given until the autumn. There is then a two year timetable for termination of the formal legal relationship with the EU. This can be extended but only on unanimity of all other EU members. Elements of laws and EU obligations can be ended earlier by agreement. A time of reflection and consideration, as divorce lawyers would refer to it, would be sensible before the formal notice is given. These are big events, both in family law and in so many other areas of our life, that haste and speed may not necessarily be beneficial. Time for reflection may be wise.

How will Brexit inform the law?

Laws work best with either public support or imposed by a legislature with public support. But when it is known a law is changing or will change, effectiveness and adherence to a limited life span law can diminish. It no longer has a normative effect. It no longer carries public support. What will happen in practice as it is known that sooner or later some of the EU family laws will come to an end?
Again family law can assist. The Children Act 1989 came into force in 1991. In the two years between passing through Parliament and becoming effective law, many lawyers and judges conducted matters as if the new law was in effect, or certainly the principles of the new law were increasingly followed. The Family Law Act 1996 introduced no-fault divorce and although it anticipated several years before implementation, many lawyers and judges therefore proceeded to require much less evidence of fault for a divorce than previously. If Parliament had decreed that no-fault divorce was appropriate, why until the new law was in force be difficult in requiring particular evidence of fault? This practice continued even though the legislation was never brought into effect.

So where it is known that certain EU laws may be coming to an end, what effectiveness and support in practice will prevail? What will be the normative effect of likely replacements for existing EU law? This will be particularly so where some existing EU laws are not popular and new laws are more in accord with English family law culture.

In any event, as a specialist family law profession of practitioners, we must now within England and Wales actively and urgently consider those areas where presently we have EU law. If they will automatically end in a couple of years and there would otherwise be a vacuum, what laws do we need? In a number of areas there is an obvious substitute e.g. in many Hague Convention laws which are in fairly similar terms and cover similar areas to EU law and indeed were often drafted at the same time as EU laws. Their existence will significantly remove the vacuum which would otherwise arise on EU laws no longer having effect.

But what about the other areas where we must have new domestic law to replace EU law?

Moreover, how can these urgent discussions in England and Wales be of benefit to other countries around the world, both within Europe and elsewhere, which are looking at international law reform? This is a law reform opportunity which was unexpected, is urgently required and allows the common law English family law tradition to reflect on the future. This is not in any idealistic fashion because we now, today, need to start considering new laws.

**Areas of affected law**

What are some of the relevant areas?

**Divorce jurisdiction:** This is now found only in EU law. With only a few minor issues, it is largely accepted and works pretty well. National law will be needed to replace EU law. Our future divorce jurisdiction law should remain the same as it is across the EU.

**Forum disputes:** Very many in England and Wales will be pleased at the end of the EU law of “first to issue” proceedings creating a race to court. But the EU objective of certainty and clarity is commendable and not found in our unfettered entirely discretionary forum based law. There needs to be a debate about what should be our future forum law if it is neither
first to issue nor entirely discretionary. Perhaps it could be a hierarchy of jurisdiction. This
has been recommended to the EU and which it has not been willing to accept.

**EU Maintenance Regulation:** Much of this is found in the 2007 Hague Maintenance
Convention, although without the complications of applicable law. This Hague law is likely to
enter into force in a number of countries over the next two years. England and Wales would
also like to get rid of the unpopular restriction of needs-based claims if the only jurisdiction
connection is sole domicile. Arguably the English courts will be more relaxed if it is known
this law is now only short-term.

**International children issues:** Again, much of this is found already in Hague Convention
laws. The six-week timetable in Brussels II is frequently complied with by England and
Wales in non-EU cases and this is likely to continue.

**Marital agreements:** England and Wales has been very unhappy about the imposition by
the EU of binding marital agreements without any independent legal advice and which have
sometimes been found to be gender disadvantageous. Whether the Supreme Court law of
*Radmacher* or the Law Commission proposals of February 2014 implemented into statute,
England and Wales is likely quickly to reassert the importance of independent legal advice
as a means of overcoming duress and gender discrimination.

**Family law treaties with non-EU countries:** It will be excellent for the UK to be able again
to enter into family law arrangements including joining in with new Hague Convention
signatories, especially in child abduction work. It would be good not to have to wait the
entire two-year notice period before we can do so.

There are other areas. It is a very exciting opportunity for the profession in England and
Wales to examine what EU family laws will no longer exist and what should be better
replacements.

England and Wales will still be a major worldwide centre for international families and for the
resolution of international family law disputes. There are very many experienced, specialist
and very committed family law solicitors, barristers and judges. Debate about improved laws
for international families regularly occurs. Many want that debate to embrace countries
outside the EU.

There are very good elements within EU family law which we will want to retain. Equally
there are elements which go against the entire culture of family law in England and Wales.
Just like our political leaders over the coming months, we need within the family law
profession to have wisdom and discernment to know the way forward, as to what we seek to
retain and what we seek to replace and with what new laws and new directions. There is
much which is good within our family law tradition but equally we are conscious that the
discretionary, common law approach can give rise to unnecessary lack of certainty, clarity
and predictability. With Brexit, how do we find the better way forward?
This should be regarded, in the particular circumstances now prevailing, as a wonderful opportunity and prospect for better international laws for us, with other countries.

None of this will happen very fast but it requires serious, wise, careful and deliberate debate and discussion to start now.

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