EU refuses to reform divorce forum jurisdiction but “speeds up” child abduction

The European Union last week, 30 June 2016, adopted the European Commission proposal’s for reform of Brussels II, the Brussels Regulation.

This is the primary EU family law legislation. It sets out divorce jurisdiction in all member states and provides forum criteria where more than one EU member state is involved. It adds child abduction laws to the 1980 Hague Convention. It provides for the cross EU border recognition of children orders and divorce orders.

The proposals will now be sent to the Council of the EU and a decision taken by unanimity. The European Parliament will be consulted.

The review of the operation of Brussels II has been underway for several years, and going very slowly. This note deals with these separate elements in Brussels II of divorce and children.

Proposals in respect of much-needed reform of divorce jurisdiction and forum criteria

There are none!

After a long consultation process involving experts, judges, policy advisers and practitioners across Europe and after an admission by the EU that the “first to lodge” forum criteria was having adverse consequences, no proposals for reform have been made. This has apparently been met with unhappiness, a very diplomatic term being used. Outside the niceties of diplomatic language, in reality the response is almost disbelief. There had been much support for reforms. Last autumn the EU seemed to be distinctly positive towards a likely significant reform, although not necessarily as many in the UK would have wanted. But to have no reform whatsoever is amazing.

What are the two separate aspects in the context of divorce and forum?

First, Brussels II introduced in March 2001 identical divorce jurisdiction across the entire EU, in national and international cases, based primarily on habitual residency intermixed with some elements of residency, domicile and nationality. With a few minor elements of uncertainty of interpretation, it has mostly worked very well and generally accepted.
Separately I have written that when the EU laws fall on our leaving the EU, England could well adopt domestic divorce jurisdiction laws on these EU laws. This has not been the issue in the consultation.

It is the second element which was controversial when introduced in March 2001 and has remained very controversial ever since and has been constantly criticised with calls for reform. Because of the many international families around the EU and the EU's wide jurisdiction rules, it was always likely that often more than one EU member state would have jurisdiction. Hence the potential for forum disputes. Hence the need for laws to deal with these forum disputes across Europe. The EU solution was that whoever was first to lodge proceedings secured the jurisdiction. This was irrespective of having a weak connection and another member state having a much stronger connection, known as lis pendens. Enter the race to court to gain priority. Enter the victor; invariably the one seeking to break up the marriage, the one with access to specialist international advice, the one not wanting to contemplate pre-litigation agreements or mediation. It was thoroughly against the UK culture of attempts to settle and encouragement to reconciliation. But the EU has throughout refused to listen, often claiming it is an English problem; England is where many applicants want to have their proceedings and England has a very specialist and proactive family law profession. Only recently has the EU accepted it is a problem.

More than a decade ago some of us in England proposed a solution of a hierarchy of jurisdiction, a solution which has increasingly found favour in many places. Belatedly the EU has looked at it and considered how it might work. The EU has looked alternatively at a transfer provision, an option for a member state to transfer proceedings to the country with the closer connection. The same option is available already in children cases in Brussels II.

Whichever option, there had to be reform of one form or another to get rid of the worst elements of the first to lodge proceedings law and the unfair and arbitrary race to court. Instead, the EU has made no reform proposals at all. The dreadful anti family life, anti settlement consequences of this EU law will now continue for at least another decade, until the next review process.

The EU has been very clear in saying that it is no part of their brief to look at marriage and marriage life. They do have a brief regarding divorce and family breakdown. Unfortunately the laws in respect of the latter are inevitably having an impact on the former. There cannot be narrow reference to the laws of one element of family life without an impact on other aspects. A holistic approach to law is always important.

This is a shocking outcome. Perhaps they were unwilling to admit they were wrong in March 2001 and they have been wrong not to have reformed it at an earlier occasion. But they should have reformed it now. They have not. Families, particularly spouses who want possible reconciliation, use of mediation and negotiation, are the losers. It is highly regrettable.
Children law

There are several important changes. I am grateful to my specialist international children law colleagues at iFLG for their input on this element.

Probably the most prominent is the change in timetable for dealing with child abduction cases. In the 1980 Hague Convention, there is no timetable. Brussels II, Art 11.3 requires a court to issue its child abduction order no later than six weeks after the application is lodged unless exceptional circumstances make it impossible. England and Wales is one of the fastest countries in respect of child abduction work. It is not always possible within six weeks but our family justice system and the instruction of lawyers through the central authority is specifically geared to the six week timetable.

The new proposals from the EU set out a three stage process. There will be a maximum of six weeks for the receiving central authority to process the application, six weeks for the first instance court hearing and six weeks for any appellate court. Even England has struggled to have appeals within the six weeks.

Of course this recognises that there are some notorious countries around Europe which are incredibly slow in dealing with return applications; where the time period is not measured in weeks but in many months. They must be faster and now they have no excuse for appellate periods or within their central authority.

The proposal is beneficial in saying that the appeal process should be a maximum of six weeks. In some countries it is very much longer. It gives a maximum of six weeks for the central authority to deal with the matter when received from another central authority. The fact that within England cases are received and passed on to specialist lawyers significantly faster than that time should not derogate from the fact that some central authorities are longer than six weeks.

So the reform is to be welcomed as it makes explicit maximum periods for the central authority and for the appeal process and maintains the six week period for the core first instance hearing.

Where the matter cannot be dealt within the six weeks to the first instance hearing, there is a duty on the courts to explain to the parents with reasons.

There is also a reform that there would be only one level of appeal in child abduction cases, specifically that a first instance decision is appealable only once. This is of concern as our Supreme Court has on several occasions handed down fundamental and deeply principled judgements in child abduction cases; for the benefit of the parties concerned, our national law but crucially acknowledged as of benefit of the entire international family law community. This opportunity must not be stopped as it is so important
Moreover and another very commendable reform, parental child abduction cases are to be heard by a limited number of courts so that judges develop the necessary expertise. This is the case in the UK. Incidentally, it is also the position in Japan, a new signatory to the 1980 Hague convention, which has just two court centres dealing with child abduction work. Continued experience is that a limited number of judges with greater experience and expertise will lead to greater efficiency, speed and consistency.

There is also reform of the enforcement of children decisions across the EU. At the moment there is sometimes a two-stage element. Decisions as to access and return are automatically enforced but decisions as to custody need an intervening process, known as *exequatur*. This will be abolished. There are specific proposals when enforcement has not occurred within six weeks, and for the state making the original order to be able to declare it is provisionally enforceable. These are commendable changes.

Hearing the voice of the child is a predominant theme in national and international family law discussions. Although there is relatively little dissent from its importance, how the voice is heard is the subject of much debate and disagreement. For instance, Germany is adamant that the child should actually be heard and seen by the judge before any decision can be made and indeed sometimes before they will recognise any decision made by another country. In England we have historically heard the voice of the child through third parties such as CAFCASS. This is itself changing in England.

The EU proposal is that a child who is capable of forming his or her own views will be guaranteed an opportunity to express these views in all proceedings concerning them. This will apply in particular to proceedings on custody and contact and also on return proceedings in the context of abduction. For those countries which presently have no or limited opportunities or indeed facilities for judges to see and hear children, this will be a significant and fundamental change. It will have an impact on judicial time, on judicial training and on rooms needed in court buildings and staff trained for the greater number of children attending family courts.

There are new rules to promote better cooperation between central authorities as the direct point of contact and which play a key role in supporting judges and family justice systems.

There are additional reforms in the public law arena. This includes placing a child in fostering arrangements. It will enable child welfare authorities to obtain information through central authorities from other member states. There will be minimum requirements for requesting a social report and an eight week time period for the authority to respond.


Is it relevant any longer? Perhaps not because these reforms will only be coming into force when the likely Brexit occurs. But actually they are relevant in that they produce a better
child abduction procedure and cross recognition. England and Wales is one of the leading countries in the world in respect of international family law. Even once outside the EU, we will be looking to the highest possible standards and efficiency in our work and joining in cross-border recognition, enforcement and co-operation. Any reforms which can therefore improve matters for children and families is to be commended. It is though a great pity that they have turned their back on crucial, much-needed reform in the context of divorce forum criteria.

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