The Hague 1970 Divorce Recognition Convention: filling an EU divorce gap?

Overview

David Hodson examines this little-known Hague Convention on the international recognition of divorces and legal separations. Might it be the answer to the recommendation by the House of Commons Justice Committee for a system for mutual recognition and enforcement of family court orders?

English family law after Brexit

On Wednesday, 22 March 2017, the House of Commons Justice committee produced its report on the implications of Brexit for the justice system. In respect of family law, chapter 3 of the Report, the recommendation is that the government should seek to maintain the closest possible cooperation with the EU on family justice matters, and in particular to retain a system for mutual recognition and enforcement of judgements. These areas of judgements include orders in respect of children, financial outcomes and divorce. The third is presently within the EU law known as Brussels II. This gives automatic recognition of divorces made by courts across the member states. I wrote an analysis and commentary which can be found here: http://www.iFLG.uk.com/blog/commentary-house-commons-justice-committee-r... [2]

But Brussels II has a number of major difficulties, particularly the forum choice when two or more countries have jurisdiction for a divorce.

The House of Commons Report rightly refers to the controversy in the divorce context with Brussels II. It referred to many witnesses, oral and written, criticising the frequent race to issue. It referred to the FLBA saying that the more legally astute spouse, often the financially stronger spouse, can arrange to win the race in the favoured jurisdiction. Many practising lawyers and judges have condemned this law as very unfavourable on the financially weaker spouse, and being very arbitrary and unfair. Resolution said that it prevents opportunities for families to mediate and reconcile. The Report states that the
FLBA agreed absolutely with my firm’s claim in our written submissions that Brussels II discourages mediation and can accelerate the breakdown of savable marriages. The Report did not mince its words in its criticisms of the forum criteria adopted by the EU and the very adverse consequences of Brussels II.

Might there be another international law which could be used in the context of cross-border recognition of divorce orders, without the baggage of the Brussels Regulation? Step forward from the shadows and historic obscurity the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations. This article looks at this international legislation and how it might have a future role.

The 1970 Hague Divorce Recognition Convention

It’s formal title is the Convention on the Recognition of Divorces and Legal Separations. It was signed on 1 June 1970 and became effective on 24 August 1975.

It regulates the recognition of divorces and legal separations provided they have been performed according to the correct legal process in the state where the divorce was obtained.

There are 20 signatories. These are: Albania, Australia, China in respect of Hong Kong, Cyprus, the Czech Republic, Denmark, Egypt, Estonia, Finland, Italy, Luxembourg, Moldova, the Netherlands, Norway, Poland, Portugal, Slovakia, Sweden, Switzerland and the UK to include Bermuda, Gibraltar, Guernsey, Jersey and the Isle of Man. In other words it covers 12 of the EU member states plus the UK.

The Brussels Regulation supersedes the Convention between member states. Once the UK leaves the EU, this Convention will again be effective between the UK and the signatory member states.

Issues regarding marriage and divorce were one of the first topics of international treaties established by the Hague Conference on Private International Law. The first on divorce and separation was in 1902. The 1970 Convention aims to facilitate the recognition in one contracting state of divorces and separations obtained in another contracting state. It came into English law by the Recognition of Divorces and Legal Separations Act 1971. Therefore it assures divorced spouses that their new status will receive the same recognition abroad as in the country where the divorce was obtained. It simplifies the opportunity of remarriage by the automatic recognition of the divorce. It clarifies the legal relationship of the couple concerned.

It applies to divorces which have followed judicial or other proceedings officially recognised in the state and which are legally effective there, Art 1. Although talaqs and similar religious divorces do not apply to the civil justice systems around Europe, such divorces would be
recognised in England if they were registered with a state approved agency. The definition includes “other” proceedings which might be administrative in some way but still with the official recognition of the country where it was pronounced.

The Convention only applies to the final decree or order of divorce. It does not apply to any findings of fault or any ancillary orders to the divorce, Art 1. Annulment of marriages are outside the Convention. Any registration system of a foreign divorce is left to the country concerned and not within the Convention.

It does not establish direct rules of jurisdiction, unlike Brussels II. However recognition of a divorce is conditional on certain connections with the state where the divorce occurred. These are fairly broad and set out in Art 2. They are the habitual residence of the respondent, the habitual residence of the petitioner along with either one year habitual residence or last joint habitual residence, joint nationality, the nationality of the petitioner along with habitual residence or one year habitual residence in the previous two years, or the nationality of the petitioner along with physical presence at the time of institution of the proceedings and the parties last resided together in a country whose law, at the time of commencement of the proceedings, did not provide for divorce.

For countries such as England and Wales which uses domicile instead of nationality, it provides, Art 3, that habitual residence shall be deemed to include domicile.

Refusal of recognition can occur where adequate steps were not taken to give notice of the proceedings to the respondent, Art 8, or if the divorce is incompatible with a previous decision determining the matrimonial status of the spouses and that decision was in effect recognised in the state in which recognition is sought, Art 9. Recognition can be refused if it would be manifestly incompatible with public policy, Art 10. There are other distinctive provisions on refusal of recognition which rarely arise. If proceedings concerning divorce or legal separation are going on in one country, a signatory state can suspend those proceedings if there are also proceedings going ahead regarding matrimonial status of either party in another contracting state, Art 12.

Once there is recognition under this Convention, a state cannot then prevent either spouse from remarrying on the ground that the law of another state does not recognise that divorce, Art 11.

Reservations are possible at the time of ratification or accession.

Hague 1970 Convention in English case law

The Convention has featured in a number of cases. Since Brussels II was brought into force in March 2001, there hasn’t been the need to refer to it in intra-EU cases. The Convention
has either been relied on or positively supported in the following cases amongst others


The Saudi Arabian husband and Bahraini wife married in a civil register office in London following an Islamic ceremony. The husband pronounced Talaq in Jeddah and presented a deed of confirmation before the local Sharia court. The Talaq became effective according to Saudi Sharia law 3 months after pronouncement. This enabled the husband and wife to register the change of status in the civil register; without doing so the wife would be unable to remarry. Registration was required in Saudi Arabia for a number of practical purposes including obtaining official documents. The court granted recognition to the Saudi divorce as a proceedings divorce within s 46(1) Family Law Act 1986. The purpose and policy of s 46(1) and the Hague 1970 Convention provided a mechanism to afford recognition to a Sharia divorce so that there could be no issue as to whether it had been pronounced. The Saudi process, using the machinery adopted by the husband, had produced a religiously valid divorce, as certified by a religious court, and effecting a full change of civil status in the eye of the State and society in which it was pronounced via the registration mechanism. It was difficult to classify that result and the process by which it was achieved as outside the intention and boundaries of the recognition code

Golubovich v Golubovich [4](2010)

Thorpe LJ quoted from the Law Commission report on the Hague 1970 Convention, Law Com No 34 (HMSO, 1970). Para 11 of the report states that ‘Article 10 says that recognition may be refused if recognition would be manifestly contrary to the public policy of the recognising state and Article 8 deals with two specific aspects of this, namely, where adequate steps were not taken to give notice to the respondent or where he was not afforded sufficient opportunity to state his case. We consider that legislative effect should be given to these articles in order specifically to preserve the power, which our courts have exercised in the past, of refusal to recognise decrees obtained in a manner that contravenes principles of natural justice. While we believe that legislation in the terms of Article 8 alone would cover most of the circumstances in which recognition has in the past been refused on the grounds of public policy, we have, after some hesitation, come to the conclusion that the basis of Article 10 should also be expressly incorporated in the statute, lest cases should arise in which our courts would be forced to recognise a foreign decree in circumstances in which it would seem unconscionable to do so’. 
H v H (The Queen’s Proctor Intervening) (Validity of Japanese Divorce) [2006] [5]

The judge, Stephen Wildblood QC, in para 74 refers to the case of Quazi v Quazi [1980] AC 744 and Lord Scarman’s judgment. At para 823D-824C, Lord Scarman considers the phrase ‘judicial or other proceedings’ and states that it is not possible to restrict the meaning of those words to proceedings in which “the state or some official organisation recognised by the state must play some part in the divorce process at least to the extent that, in proper cases, it can prevent the wishes of the parties or one of them, as the case may be, from dissolving the marriage tie as of right”. No hint of any such restriction appears in the …1970 Convention … ; nor is any such restriction to be implied, if not expressly stated, in a convention or statute the purpose of which is to facilitate the recognition of divorces and legal separations … For these reasons I construe s 2 (of the Recognition of Divorces and Legal Separations Act 1971) as applying to any divorce which has been obtained by means of any proceeding, ie any act or acts, officially recognised as leading to divorce in the country where the divorce was obtained, and which itself is recognised by the law of the country as an effective divorce. Specifically, ‘other proceedings” will include an act or sequence of acts other than a proceeding instituted in a court of law …’


Discussion of the 1970 Hague Convention is at Question 2 of Lord Ackner’s judgment, in which he refers to Quazi v Quazi and relies on Lord Diplock’s assertion in that case that the purpose of the Recognition of Divorces and Legal Separations Act 1971 was to enable the UK to give effect in its domestic law to the 1970 Hague Convention. Lord Diplock described ‘the mischief which the Convention was designed to cure as that of ‘limping marriages’, that is to say ‘marriages that were recognized in some jurisdictions as having been validly dissolved, but in other jurisdictions as still subsisting’:

Lawrence v Lawrence [7] (1985)

Purchas LJ stated that ‘The object of the signatories to the Convention was ‘desiring to facilitate the recognition of divorces and legal separations obtained in their respective territories’. He quoted Lord Diplock in Quazi v Quazi at para 805A that ‘The solution adopted by the Recognition Convention was to require all contracting states to recognize as valid grounds of jurisdiction in matters of divorce and legal separation all three concepts,
nationality, domicile and habitual residence.’ On the assumption that all signatory states have passed domestic legislation in accordance with article 11, any remarriage in a signatory state will be valid by the lex loci contractus and recognized in the United Kingdom. To go beyond this may well cause difficulties. Suppose that the wife had remarried illegally in Brazil, it is unlikely that Parliament intended that the United Kingdom courts should nevertheless recognize such a marriage.’

A serious replacement?

It is undoubtedly a fairly simple legal instrument. It has none of the complexities (and undesirable elements) of the Brussels Regulation, even in the context of recognition of divorces across the EU. For this reason it is simple to use and would not cause any major difficulties. Circumstances of refusal of recognition are fairly limited. There is a general public policy basis for refusal. The invariable objection to recognition is failure of the respondent to have been properly notified and so able to take part in the proceedings, and this is specifically covered.

It’s simplicity should not detract from its simple effectiveness. It does what it says. It provides a basic resolution for mutual recognition of divorces and legal separations pronounced according to the law of the country where it occurs and as officially recognised and legally effective in that country.

It is difficult to understand why this 1970 Convention, already in place and already operating between 20 countries, should not take the place of Brussels II. Of course the EU would have to enter into it on behalf of all EU member states because it demands the exclusive legal and political competency to do so. There is no good reason why the EU should not use this international law in order that UK divorces are recognised across the EU and EU member states are confident that divorces in their countries will be recognised in the UK.

Most crucially this is without the imposed wide jurisdiction rules and jurisdiction criteria of the race to court. It is these elements which have brought the criticism of this EU law. BII is not needed if the intention is only to have the recognition of foreign family court orders, as the House of Commons strongly recommended should prevail.

The UK government is invited to give serious consideration to this international legislation as one way forward in the negotiations for the benefit of international families.

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