Commentary on the House of Commons Justice Committee Report on implications of Brexit for the justice system

Overview

David Hodson analyses and comments upon the Parliamentary reports published this past week on the implications of Brexit for the justice system. The House of Commons report is carefully worded and recommends retention of a system for mutual recognition and enforcement of judgements. David Hodson makes a plea that with the publication of these reports, family lawyers, like the rest of the country, should move on from the pro remain or pro leave agendas and work to the best of national and global family law in the future.

The House of Commons report

On Wednesday, 22 March 2017, a week before the UK gives notice under Article 50 of the intention to leave the European Union, the House of Commons Justice committee produced its report on the implications of Brexit for the justice system. This followed several months of taking evidence, oral and written, and detailed consideration by a number of MPs. My firm, iFLG, was pleased to give written evidence and our submissions were favourably quoted by the committee in the report as was Kingsley Napley and several barristers.. Two days earlier, a similar committee of the House of Lords rather confusingly produced a Report on the same topic with far narrower evidence taking, but it has less broad relevance

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*. This must be right. But it stopped short of saying EU law should be part of national law and entirely reciprocated. The recommendation is carefully worded and carefully balanced.

The Report says that Brussels II and the Maintenance Regulation *are improvements over their default alternatives.* But *they are not without fault: races to issue resulting from Brussels II's divorce provisions are particularly undesirable. Nevertheless, mutual recognition and enforcement of judgements in family cases is of demonstrable value in resolving cross-border instances of child abduction and non-payment maintenance*

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The Report deals with the complex relationship between EU law and Hague Conventions in respect of child abduction. The former takes precedence over the latter. The Report refers to evidence from Resolution that EU law provides greater speed than the Hague Convention although my firm's considerable experience in child abduction work is that the English High Court invariably deals with child abduction cases under EU law or Hague Convention law with the same timetable and same vigour. The FLBA gave evidence that the existence of EU law had discouraged updates to the Hague Conventions. If this is so and it is not necessarily evident that it is so, then this is very disappointing and worrying for the world because the significant majority of signatory countries to the 1980 Child Abduction Convention of the Hague (and the recognition provisions in the 1996 Convention) are non-EU countries having no dealings with EU law. They require updates irrespective of what is going on within Europe. Evidence in favour of EU laws and not the Hague was also given, as stated in the Report, that the EU has the benefit of Central Authorities and the European Judicial Network. Again this is potentially misleading as, across the world, governments have set up Central Authorities to work with child abduction cases, and not just within Europe. Moreover whilst there is undoubtedly the EJN, there is a very active network of Hague Convention judges, significantly promoted and encouraged by Mathew Thorpe when our international liaison judge. So I am not convinced, on the evidence to which the Report refers, that there is such a significant difference in child abduction work undertaken in England between EU law and Hague law and practice. Indeed, the new form of Brussels II intended to be introduced by the EU in the next couple of years includes a new timetable to take account of the slower EU member states whereas the UK is one of the fastest across Europe.

It was very surprising to see no reference to public law elements yet this is a vital and increasing aspect of the present operation of Brussels II, involving many local authorities and children in care. It would have been anticipated that, at the least, there would have been reference to the need for transitional arrangements for public law cases. Resolution rightly drew general attention to the need for transitional provisions although no work can be started until it is known what will be the final outcome in law and practice.

The 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.

Resolution is in a paradoxical position. Probably more than any other organisation over the

past three decades, it has encouraged and facilitated ADR in its various forms including mediation. Yet it is promoting, to government, legislation which a government report finds has *particularly undesirable* consequences as working against mediation, Resolution has had criticism from some faith-based organisations for not being supportive of marriage to which the chair has robustly responded that it it is supportive. Yet it is promoting, to government, legislation which accelerates the breakdown of savable marriages. Perhaps there should be a review of this potential policy disconnect. Perhaps their answer could be to support a policy of mutual recognition without the baggage of anti-mediation, anti-reconciliation provisions of Brussels II

The EU Maintenance Regulation was described as *similarly contentious*. The intention, quoting favourably from Kingsley Napley, is to *produce clear and consistent rules on where the parties can start proceedings* with *detailed rules to assist enforcement and recovery of maintenance across borders*. However the FLBA observed a conflict with Brussels II which could result in an English court not having jurisdiction over maintenance claims in respect of a divorce case it was hearing. The Report referred to my firm's submission that the EU law enforces *inappropriate prenuptial agreements* i.e. where there has not been independent legal advice or disclosure. But the Report said the Regulation had no natural replacement, based on the evidence of some witnesses. It described the 2007 Hague Maintenance Convention as a *powered down version with orders only enforceable in certain circumstances* . The FLBA claimed *most people did not know the 2007 Convention existed* and it was *little used*. The Report consequently said this would support the UK *remaining a party to the Maintenance Regulation if possible, at least in the short to medium term*.

A Parliamentary Report, like a court of law, is only as good as the evidence received. I was at the session in mid-December when oral evidence was taken. The Justice Committee was not told that, within a month, the USA would join the 2007 Hague Maintenance Convention. Indeed the USA was one of the original promoters of the Convention. This major country joining is anticipated to bring many more countries on board. I had the benefit of meeting on Friday, 24th March in The Hague with representatives of the Hague Conference on International Law and I understand that in the coming year a number of other countries should become signatories. So the fact that it is little used, in December 2016, does not mean it will be little used in April 2019 when we leave the EU. Moreover the fact that a worldwide law is little-known, a feature more of information and training within a profession, is not a reason to ignore it. I refer more to the Hague below

At the moment the UK is subject to orders of the European Court, CJEU. It's jurisdiction will end in law on Brexit. The Report says that *if the UK and the EU could continue their mutually beneficial cooperation in various ways, without placing any binding authority at all on that court's rulings, this would be ideal*. This must be right on any basis of international judicial comity and respect for opinions of other courts, whether national or international. The Report goes on to say that *a role for the CJEU in respect of procedural matters including jurisdiction, applicable law and enforcement in recognition of judgements is a price worth paying to maintain effective cross-border tools of justice*. I suspect many would want to

understand much more what would be the parameters of this before making further comment.

The Report concludes with a recommendation that there should be four principal aims of government's approach to justice matters in Brexit negotiations namely:-

- *Continuing cooperation on criminal justice as closely as possible;*
- *Maintaining access to the EU's valuable regulations on interstate commercial law;*
- *Enabling cross-border legal practice rights and opportunities; and*
- *Retaining efficient mechanisms to resolve family law cases involving EU member states and the UK.*

The House of Lords report

On Monday of last week, 20 March 2017, the House of Lords Justice Committee produced its own report. I think many were confused in the autumn about the interrelationship between these distinctive enquiries. No law firms made written submissions nor were solicitors called to give evidence, unlike the House of Commons report. Some excellent barristers gave evidence. However in this arena, many international enquiries and consultations are dealt with by solicitors, but often not reach counsel. Sometimes thoroughly deserving cases on their merit have no prospect of court proceedings because of the EU laws and the parties seek redress abroad. Solicitors see many cases which do not go to court. To have a report without material input from solicitors is incomplete.

The Report refers several times to what may be alternative arrangements put in place. It draws attention to the fact that there must be reciprocity from the EU if placing EU family laws within national law. It must be open to doubt whether there will be this reciprocity and what terms may be possible

The Hague Conference on Private International Law

The Hague is the big loser from the House of Commons Report. I consider this is unfair, unjust and seriously worrying for global family laws.

The Report refers to the EU Maintenance Regulation as an improvement on the 2007 Hague Convention. But they were drafted as part of the same exercise and The Hague law does not have some of the problems of the EU law. By April 2019 it will have many signatories worldwide and it includes all EU member states. A number of governments have put resources into the iSupport cross-border case management system and digital sharing of

information created by the Hague. It must always be remembered that the Hague applies worldwide whereas the EU laws are obviously only member states within Europe. The USA and other significant countries worldwide are or soon will be signatories. Perhaps if the Committee had had this information, it would have formed a different conclusion. It may now be for the Hague Conference to make representations direct to the UK government.

The Report rightly refers to the need for mutual recognition and enforcement of family court orders, which includes divorces. This is covered around the EU by Brussels II at present but with the huge baggage of the race to court and the discouragement to mediation and reconciliation. The Report does not refer to the 1970 Hague Convention on Recognition of Divorces, of which there are at least 20 signatory countries including the UK and which could be extended by April 2019.

More widely, I worry considerably that the implicit criticism in this UK government report, based on some evidence given to them, of Hague laws in contrast to EU laws could discourage other countries from joining into Hague family laws. A lot of work has occurred with countries such as Russia and Japan recently to bring them on-board. Much work is ongoing to join in other areas of the world including Islamic jurisdictions. Many English lawyers are very prominent in that work, both children and finance. Yet here is a UK government report saying that EU laws, which clearly have serious faults even admitted according to the Report itself, are nevertheless an improvement over the default alternatives namely the Hague laws. I consider this could damage the expansion of Hague laws. The comments in this Report must not stop the work of producing global international laws.

Indeed, although it may not have been within the brief of the Justice Committee, it was disappointing that the opportunity was not taken to set out the significant place of the UK in family law worldwide and the leading role it has played, and post Brexit will play, in global family law developments. For this it will need to work closely with the Hague Conference in producing international, rather than just European, family laws and practices and then to make sure they operate well in other countries.

The EU referendum vote has occurred: time to move on

Quite often it has seemed thus far that family law arguments in respect of Brexit have been a re-run of the EU referendum. There are those who supported the UK staying within the EU who, with others, have argued for all EU family law as it presently exists to be within English national law and reciprocated with the EU. There are those who supported leaving who, with others, have argued for no more EU laws. This may have been conscious or unconscious, deliberate or inadvertent.

But just like the country as a whole, this has to end. There now needs to be a coming

together. The Referendum has happened. The Supreme Court has decided. Parliament has enacted. Notice is being given. We are moving onwards. Both sides and neutral sides must find ways forward

The Report has very helpfully magnified in its recommendations the importance of cross-border recognition and enforcement. Surely most will support this, on both sides of Brexit. It is a fundamental need across the world generally, including within the EU specifically. But does this require the UK to bring all present EU law into national law and enter into distinctive relations only with EU countries. With the strong criticisms of some elements of EU laws, is it possible to focus on the cross-border recognition and enforcement and to leave behind the more divisive and contentious elements such as forum criteria on divorce, restrictions on sole domicile as a grounds for needs-based claims and the very adverse elements of marital agreements contrary to English law. Moreover do we still need the divorce jurisdiction found in EU law, which is predicated on a race to court and use of civil law concepts of applicable law.

The English family law debate should now move on from the referendum and proceed on the foundation of this helpful House of Commons Report and discuss how mutual recognition and enforcement can go ahead to help international families without arguably the unhelpful baggage of some other elements of EU law. Perhaps neither side of the Brexit argument will be necessarily happy. But in the best tradition of family law negotiations, it should hopefully produce a beneficial outcome; for our country, for Europe, for Hague laws, for the world and, most important, for the very many international families.

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