MINISTRY OF JUSTICE

REVIEW OF THE BALANCE OF EU COMPETENCIES

CALL FOR EVIDENCE:

FAMILY LAW

David Hodson

Executive Summary

England is the most international family law jurisdiction in the world. It has more international families than any other jurisdiction and more active connections with other jurisdictions. It has more international cases in its family courts. Moreover these international family law cases are spread across the entire country and not confined, as in many countries, to a few metropolitan cities. These cases involve children, modest assets and very substantial assets. England is the creator and ongoing supporter of common law with many historic ongoing family law ties throughout the common law world. Yet England politically and legally is part of the EU. This is dominated and driven by civil law. It has an active, evangelistic and expansionist family law policy. This has been primarily since March 2001 but with increasing laws and practices from the EU

This government initiative in looking at the balance of EU competencies and powers is absolutely vital and hugely important in family law. The EU has brought tremendous benefits with harmonised practice, laws and processes for the benefit of EU families. But in its refusal to engage in active consultation about controversial laws contrary to good family law practice and its determination to press ahead regardless of impact in practice has meant dramatic injustices, unfairnesses and grossly disproportionate powers. We want to continue to be part of an EU family justice system but not at any cost and specifically not in the direction it is now going and the powers it is assuming. It must draw back on its insistence of competency to deal with non-EU cases. It must review laws imposed without consultation and having very bad impact in practice on family life in our country

Introduction

I am a specialist English family law solicitor with particular expertise in international aspects of family law. I am also a mediator and arbitrator and since 1995 have been a DDJ at the PRFD. I am also an Australian solicitor and barrister. I am a partner at The International Family Law Group LLP in Covent Garden, London, a specialist law firm working primarily with international families and international children. We receive many enquiries on an almost daily basis from individuals and law firms in England and abroad struggling to deal with the complexities of international family law especially the EU aspects. Accordingly I am well placed both personally and through my firm in responding on these elements. Further details are in the appendix

This is my response to the Ministry of Justice Review of EU competencies and powers. I am aware this is a wide UK government exercise of which the Ministry of Justice is one part and of which family law is a smaller part. Nevertheless family life is at the heart of every community including England and Wales. EU powers and laws in family law significantly affect the family life of our country and are therefore of vital concern to our government. Moreover within family law and its relationship with both the EU and the rest of the world there is a microcosm of dealings and relationships in many other elements of legal and national life.

I welcome hugely this UK government initiative. Over the past decade, family lawyers have frankly felt powerless, disenfranchised and without our government or any EU organisation willing to listen to us including hearing our experiences of the impact of EU law and powers.

There has been no real consultation in advance of EU legislation and no acknowledgement subsequently of the damages created by various laws and exercise of EU powers.

This response is in my personal capacity and does not represent the opinions or views of any law firm or organisation with which I am involved. I do have a high profile in international family law matters and I have assisted both the Law Society and the Bar in their family law responses; there have been very beneficial discussions about these issues in advance of the responses. I have directly and publicly encouraged family lawyers across the country to respond.

I am aware this is a UK initiative but in family law matters there is sometimes a distinctive between England and Wales on one side and Scotland in particular but also other UK countries on the other side. Many of these remarks apply to Scotland and have support from Scottish practitioners. Nevertheless by way of caution I limit my remarks to England and Wales.

I am following the questions in the consultation however they are not particularly well directed to the outstanding issues which affect the family law community. I apologise therefore if there is any artificiality in the content to the specific questions.

At the end I set out case studies by way of some illustrations. This report presumes a good knowledge of existing international family law within Europe and non-EU

1 What are the advantages and disadvantages to individuals in the UK of EU judicial civil judicial cooperation?

I fully support a European, EU and Lugano, set of cross-border procedural and similar family laws. There has been significant benefit. We see this in practice. Examples include EU laws in respect of taking of evidence, service, transmission of legal aid, mediation, identical divorce jurisdiction, enforceability of maintenance orders and similar. I would not want to lose this but, as below, the EU must concede on major issues which go to the heart of English legal traditions and sense of fairness.

It is also worth recording that these cross-border laws are in any event mostly available via Hague Conventions, Lugano Conventions and similar. There has been a frustration in England that the EU has prevented us from throwing more support and weight behind initiatives of the Hague Conference on Private International Law. This is not just EU. The Hague is worldwide and has a significant common law component. It is also collaborative and cooperative rather than compulsive imposition. Provisions from The Hague on taking of evidence, service, reciprocal maintenance and similar are operated by many jurisdictions worldwide who do not have access to EU laws. So it must not be thought that England must accept the EU impositions only because we would lose the benefit of the favourable cross EU border legislations and mechanisms. They exist anyway

<u>Applicable law</u>

There are many EU families in England and Wales. I am perfectly aware of the EU perspective that families crossing EU borders without any restrictions should be always aware of the law which will apply to their family situation. I agree. The EU solution is that

the couples' law should travel with them, otherwise known as choice of law or applicable law. This is a civil law solution. However it is not acceptable for many reasons and has been one of the primary fault lines between us and the EU which has constantly tried over the past decade to impose applicable law on us. There are other solutions, better solutions, workable solutions and nationally acceptable solutions but the EU persistently refuses to contemplate them.

Amongst the problems with applicable law is the great uncertainty for English practitioners on the law being applied, the vagaries of the likely outcome and the simple injustice of identical cases, back to back in a divorce court list, having dramatically different outcomes because different laws are being applied. Introduction of applicable law would dramatically increase the costs of cases as English lawyers, without a long tradition of applicable law, ascertain what is foreign law. It is far less likely that English lawyers from common law tradition will simply accept that the relevant foreign law can be found on a few pages of an EU website, however excellent has been the exercise in the creation of that website. Our policy is often to obtain an opinion of law from a foreign practising lawyer, which will add to the costs. Introduction of applicable law will also add to the delays in settling cases.

There is difference around the EU about whether applicable law should only be the actual law itself or also the procedural law as well. Many countries use their own internal, local, procedural law e.g. disclosure obligations and enforcement powers, even though applying the law of another country. Again, English family law expectation is that this will produce a dramatic clash of legal cultures and expectations.

The English family law justice system is creaking with the public service cuts and is too often overwhelmed by the volume of work. To impose additional judicial demand of applying foreign law would be too much.

Finally there is the intrinsic unfairness of two identical families in identical circumstances having dramatically different outcomes yet being heard by the same judge on the same morning or afternoon in the same court, only because different laws are being applied. England has a highly developed sense of fairness, with gender equality, supporting the financially weaker party and highly anxious about the best interests of the child in the justice system. To impose applicable law which would in some instances go against these fundamental tenets would be entirely wrong

I do see the need for more certainty and predictability for families travelling across the EU borders especially between very different legal traditions. This has been compounded by the chaotic situation created by the EU in Brussels II, with the laudable common divorce jurisdiction across the EU but with the dreadful principle of first to issue to which I refer below. The solution given by the EU to the first to issue principle is applicable law. It is not. Even with applicable law there is forum shopping. Instead I and others have over several years put forward a solution to both applicable law and the first to issue principle which would overcome these many difficulties. Although representatives of the EU have personally told me they can see much sense in it, they will not adopt as a reform measure. I refer more below

Instead the EU continuously produces legislation for the entire EU which is based on applicable law. The EU Maintenance Regulation is in essence a very necessary piece of legislation to enable cross-border reciprocal enforcement of needs-based maintenance

provisions from family courts. But it was delayed for many years because of wranglings over the question of applicable law and only resolved, in effect, from assistance from The Hague. Another piece of legislation, EU Marital Property Regimes Regulation is presently being discussed and yet also follows the applicable law route.

A solution in principle is needed between the UK and the EU on this issue. There is simply no point having another 10 years or so of disputes on this subject. No other jurisdictions with which we have significant international family law traffic e.g. the US, Australia, Middle East, Southeast Asia etc, will impose applicable law just because the EU requires it. There will remain countries which only apply their own laws. England wants to remain loyal and close to our common law colleague jurisdictions. Yet the EU relentlessly pursues this policy, targeting the UK as the most obvious resistant country.

It has an ancillary effect which is very unwelcome. As set out above, many of us as practitioners are very supportive of a good number of EU family law initiatives. Indeed, we are quite enthusiastic to encourage them to go further forward more proactively and vigourously. Yet because of our constant resistance to applicable law and because of the EU insistence of imposition on us, we lose out in our opportunities to get involved, to be seen to be positively and constructively making suggestions and proposals. Wrongly, we are viewed as the continued troublemakers. If the EU were to withdraw from this battle, we from the UK would have better opportunity to take a meaningful and positive proactive involvement, which we wish

As part of this Review of competency and EU powers, the UK should be abundantly clear. **We must not accept the imposition from the EU of applicable law in family law matters and attempts to do so through EU legislation should end.**

Cross-border common jurisdiction

This is highly beneficial and I consider one of the most important elements from the EU. For divorce jurisdiction, it is found in Brussels II from March 2001. Although I have strong opinions about the importance of a hierarchy, as below, overcoming the many different jurisdictional requirements for divorce in each country was fundamental. I praise the EU for this

Similarly and ancillary to jurisdiction, I do recognise the EU had to find a way to deal with cross-border forum disputes other than the common law process of discretionary criteria. I support such discretionary criteria in non-EU cases but I recognise the importance across the EU of some more certain criteria. The EU was warned by English family law solicitors in advance of March 2001 of the problems of the first to issue principle, referred to below. It ignored us and only now admits there is a problem. Subject to the solution, I agree with the EU that it had to find a particular device to overcome what would otherwise be unnecessary forum disputes

I support the EU in its harmonisation of jurisdiction in respect of maintenance matters. I am adamantly opposed to the limitation in respect of sole domicile, to which I refer below and which relates only to non-EU cases. But as a general principle it was very right and commendable. The Hague in its 2007 Convention is running this in parallel.

So this is a significant advantage to individuals in cross-border EU family law measures

Children matters

Brussels II revised has brought considerable benefit to cross EU border children cases. There is beneficial common jurisdiction. There has been realistic enhancement to the 1980 Hague Child Abduction Convention. Although used more significantly by the UK, the trumping provision has been invaluable in restoring opportunities for the state of the parent whose child has been abducted. The European Judicial Network has built on the Hague network judges significantly promoted by Lord Justice Thorpe from England.

I do consider that the European Court of Justice has been too slow to respond to the Neulinger series of cases from the ECtHR which has caused consternation in the UK and among many non-EU leading jurisdictions. I understand it will now be looking at the jurisprudence. This is much needed. By concentrating unduly on issues of human rights rather than the best interests of the child being found in the almost automatic return of the abducted child, they have ill served both international children and international child abduction law.

In December 2011, the EU unilaterally imposed a demand that it alone could accede to new signatory states to the 1980 Hague child abduction convention. This was entirely wrong and I refer to it below and has been one primary driver in recent unhappiness with the extent of EU powers and competency especially beyond EU borders. In as far as it has been an indication of where the EU considers its role and powers, it is highly dangerous and wrong

Brussels v The Hague

If the international family law world was only the EU then competency might be less of an issue. For EU families travelling only around the EU, the EU law is sufficient. But many EU families travel outside the EU, including work commitments, or come into the EU from outside the EU. For them, our law is a mixture of EU legislation, their national law or the law of the country outside the EU with which they have a connection, and Hague Conventions. It is here where problems arise. It is felt very keenly by family law jurisdictions outside the EU.

Brussels runs an increasingly combined jurisdiction of 500 million citizens. This is significantly greater than the US and any other combination of countries outside the Islamic world. Moreover through its political structure, the EU central organisations have been given powers to impose on EU member states. In this regard the UK opt out has been of fundamental central importance to us and must never be abandoned or limited.

The consequence is that Brussels is pressing ahead with its particular policy regarding family law matters, imposing legislation even against opposition, with a highly civil law dimension and not having to trouble itself unduly about lack of cooperation and collaboration. Apart from a few countries such as the UK, its constituent members have a very similar judicial system being codified without use of precedent, with no particular strong commitment to conflicts of interests and very easy with joint representation.

In stark contrast the Hague Conference operates across the entire world, includes both common and civil law as well as religion based jurisdictions, and works slowly and cautiously through collaboration and cooperation.

The Hague cannot keep pace with the EU. This is creating a two speed two tier international family law. It is seen in some real divisions. This comes especially to light when the EU tries to impose its law on non-EU countries especially in dealings between EU member states and other jurisdictions. The extra EU competency is not just wrong for member states. It is directly imposing upon the good work of The Hague. I have no knowledge of the politics between Brussels and The Hague. I do know that it is not working for the benefit of international family law. It could be so much better and so much more beneficial for the interface between the EU and the non-EU jurisdictions

2 What is the impact of EU civil judicial cooperation on UK family law?

In short, very substantial. It has affected domestic cases without any international element. It has significantly affected international non-EU cases in ways which I consider are thoroughly wrong, unnecessary and EU excessive. Naturally and rightly it has affected EU cross-border cases.

The power of the EU to impose directly into national and domestic law is acknowledged. In itself I do not have a problem. However it should only be limited to cross-border EU cases. It should not impact on our cases with non-EU countries. In this regard and as an example of the increasingly expansionist attempts by the EU, I refer to the limitation by the EU Maintenance Regulation to allow maintenance claims in the context of sole domicile jurisdiction

EU Maintenance Regulation sole domicile jurisdiction

The EU Maintenance Regulation in force from June 2011 has had an impact in non-EU cases which was wholly not needed and causes much injustice. It is a law too far. There was no advance information or consultation across the profession about the extra EU effect

The Regulation itself is too civil law orientated but this is so with much EU family law legislation. The Regulation itself has good aspects and is much needed. But the family law profession was unaware in June 2011, and for at least another six months or so after it came into force, that the Maintenance Regulation had extra EU effect i.e. in cases with non-EU countries. It is now the case that our family law courts have no power to make "needs" based orders i.e. additional to sharing half the marital assets, if the only basis of jurisdiction is sole domicile. England has had this power for a long time and it has been very important for many international families with a continuing connection to England based on domicile. It does not apply in cross EU border cases where another EU country has an involvement because sole domicile is not then available as jurisdiction. It is highly relevant in many English/non-EU jurisdiction cases. It has caused much hardship and injustice

This change in the law was never anticipated. There was no consultation with the profession. It is quite wrong. It has left many English people (living abroad) without the opportunity of needs-based divorce claims in England. It has left some people without any jurisdiction in the world in which to bring "needs" claims.

It has created a very unlevel playing field where other jurisdictions outside the EU have the power to make needs-based outcomes, but we do not. It means there will be the equivalent of

Part III MFPA 1984 claims abroad after an English divorce on the basis that England has made "inadequate" provision. This is insulting to our English family law heritage and reputation.

The profession was never told in advance or was aware for some time thereafter. We had no idea that the EU was now taking upon itself the power to make laws to restrict the opportunity of our family courts to produce fair and just outcomes in cases where a non-EU country is involved. It is one of the indices by which family lawyers regard the EU as dramatically exceeding its powers and going into areas which are unnecessary, not needed, and were working satisfactorily already by producing much required remedies for English domiciliaries facing divorce in some countries abroad.

(In passing, I am told the UK government tried to secure different jurisdiction rules but failed. Perhaps if practitioners were involved and could have commented on impact in practice, there just might have been a difference. Moreover I am told the UK government believes that a particular Article 7 of the Maintenance Regulation saves the day as it will be given a broad interpretation and allow claims even on sole domicile. All practitioners with whom I have spoken including QCs believe the courts will give a very narrow interpretation and it will be no help at all. There has at times seemed sadly a disconnect between policy and practice, and one lesson of this Review may be for greater openness and information from government about possible reforms and to involve practitioners better to inform the profession, which has felt in the dark, and receive their comments about likely impact in practice. This Review itself was not known originally by many.)

My firm now has several cases where hardship is being caused to an English domiciled spouse who finds herself unable to bring needs-based claims in England and without adequate remedies abroad.

There is no justification for this policy imposition limiting needs claims to sole domicile in non EU cases. It is a direct detriment to the UK in relation to non-EU jurisdictions. **The EU Maintenance Regulation has had an impact in non-EU cases which was wholly not needed and causes much injustice. It is a law too far. This imposition by the EU of its powers to make laws governing non-EU cases should never have been permitted and should be repealed immediately. This Review must categorically state that the EU should not create or impose laws governing member states with non-EU jurisdictions. Sole domicile as a basis of needs claims should be restored in non-EU cases**

3 How is civil judicial cooperation necessary for the functioning of the internal market? What aspects support or hinder it?

I have pointed out above the necessary and important work already undertaken by the EU in respect of EU cross-border family law work. This is necessary for the proper functioning of the internal market. But it should not go beyond EU borders. Moreover it should respect and listen to traditions of all EU member states and jurisdictions, not just civil law.

4 Are there any areas where EU competence in this area has led to unintended or undesired consequences for individuals in the UK?

Unfortunately there are several and I include not only in their own right but as an illustration of where I believe the EU has gone too far outside EU borders and where the EU has imposed entirely inappropriate laws

The 1980 Hague Child Abduction Convention

This is probably the most successful piece of international family law legislation. It has over 80 signatory countries. Most have international network, liaison judges. It is based on the very simple premise namely that it is in the best interests of an abducted child in almost all instances to be returned to his or her home country of habitual residence where issues of the welfare of the child can be dealt with. The UK has been one of the most proactive countries supporting this legislation. We have actively encouraged other countries to join and the FCO have consistently over many years done an excellent job in supporting this work through their foreign connections. The Central Authorities of the various UK countries are perceived worldwide as the leaders in the way they work and operate. New countries joining the Convention come to the UK to find out how it should best be working including meeting with specialist child abduction lawyers here.

From time to time we have become very dissatisfied with the way some countries have operated the Convention especially either non-return or very slow return. The Hague itself has no policing role. So the UK has led in holding various binational conferences, educating judges and convincing of the importance of the early return.

The EU added an extra layer in Brussels II revised which was well received in the UK. It added certain demands e.g. six-week turnaround of applications. In England we changed our family court listing structure to give priority to these cases. A good number of other EU countries continued very slowly and ignored the EU. In England we felt the EU was doing nothing with those countries to encourage them to comply with the requirements of EU law

So we are rightly proud and should be proud of our work in this area.

Accordingly we felt mightily aggrieved when in December 2011, albeit that practitioners only heard about it later from the Ministry of Justice, the EU unilaterally stated that thereafter EU member states could not enter into the 1980 Hague Convention with new signatory states even though they were not themselves EU members. I have made enquiries and it has not been very easy to ascertain the background to this especially as lawyers in other EU member states are critical of the UK government.

My understanding is that although there had been some talk that the EU might impose this, it was nevertheless a surprise by the UK government. In as far as we had not entered into agreements with then newly signatory countries such as Singapore, we were completely caught on the hop and could not now do so. Yet we have very close dealings with Singapore. Other EU countries in Western Europe had already entered into agreements with Singapore and were not caught by the EU imposition. It has caused the UK massive embarrassment with Singapore and similar countries with which we have close historic and family law ties.

I understand the UK government has objected to the imposition, saying that it was without power. However legal advice given to the UK government was not to oppose on its own or to enter into agreements in breach of the imposition, but to form alliances with other dissatisfied member states. The problem was that in 2012 and the first half of 2013 there

seemed no progress whatsoever. The perception from practitioners is that the UK government was hoping someone else would take a lead. We were not told that the UK government was taking a lead. In late July 2013 we have been told that the matter is being taken to the European Court of Justice for submissions although no certainty it will come before the court itself. We do not know who is making submissions on behalf of the UK government. We do not know who is leading the opposition amongst the EU member states. We are told 18 member states are in opposition. This is two thirds of the member states of the EU. Some are strongly in opposition.

In this Review of EU powers and competency, a major question has to be asked about the EU where it imposes a unilateral denial of national sovereignty to enter into bilateral agreements with non-EU countries about matters which affect children abducted to and from the member states and in circumstances where at least two thirds of EU member states oppose their action. I suggest this is yet more evidence of the EU going much too far in its powers, demands and impositions.

The impact is that children abducted to these countries, signatories to the 1980 Hague Convention but with whom we are prevented by the EU in acceding, are treated as if they have been abducted to a non-Hague country. There is no access via the Central Authorities and no expectation of automatic returns. The costs are much greater and the delays longer. It is contrary to all best interests of children. My firm has recently been involved in a case, reported in late July in the High Court, in which attention was drawn to the high costs. This was materially in respect of child abduction proceedings with Singapore which had to be treated as outside the Convention.

There is an even more adverse impact. Many of us are actively encouraging Japan to join the Convention. We have met with practitioners, judges and policy advisers. We have talked with them about their anxieties concerning the Convention. We have explained how the system works in England. We have hopes they will come on board in Spring 2014. We hope India may follow. These are countries with which we have a lot of international children traffic. We want them within the 1980 Convention. But they will look across to us in Europe and see that we are powerless as individual countries to sign up with them. They will see that since December 2011 the EU has not signed up with countries like Singapore on behalf of all EU member states. So where is the strong incentive for countries not yet within the Hague 1980 Convention family? This is another adverse element of the EU imposition

The UK should actively take a prominent role in opposing this imposition and should have done so since December 2011. If it has done so and is doing so, no one knows within the family law profession. In the absence of such knowledge, there is unfortunately a perception that we are following on the coattails of others. This may be wrong and unfair. The answer is more openness.

In this Review the UK government position should be clear. **The UK must state openly and clearly that the EU December 2011 imposition that member states had no power to enter into agreements under 1980 Hague convention with non-EU signatories states was completely wrong, excessive in that it dealt with non-EU matters and should be overturned forthwith.** The fact that the EU even contemplated that it had this power and it was appropriate to impose this power is a further reason why many consider the EU powers should be materially curtailed and proscribed and has got out of hand

5 What are the advantages and disadvantages of the opt-in for the UK?

The opt-in has been absolutely essential in ensuring the UK could avoid the worst excesses of EU laws. We know other EU countries have been envious of our position and have complained about some EU family law legislation although, unlike us, have had to accept it.

It would be unthinkable for our national family life and family law interests not to have the opt-out and is a paramount consideration that it is retained

6 What are the advantages and disadvantages of the cross border requirements for UK national interests

In this regard I refer to the distinctive feature in Brussels II from March 2001 to introduce lis pendens, the first to issue principle, then wholly unknown to English family law.

Lis pendens, first to issue

The "first to issue", lis pendens, principle in Brussels II is absolutely contrary to all best practice approaches to family law, to encouraging reconciliations, agreements, mediations etc. It is found also in other laws such as the Maintenance Regulation. With financial outcomes so different around Europe and with many international families having the opportunity to issue divorce proceedings in more than one country, all that matters to obtain the most favourable outcome is to issue first, irrespective of having a much lesser connection in that country than another EU country.

It is probably the most anti-family piece of legislation anywhere! It is an encouragement to issue fast without any reflection on mediation, reconciliation, possible agreements, information before issuing and general reflection and consideration. It has been strongly condemned by lawyers and marriage support professionals and others

It favours the spouse breaking up the relationship, the one who is wealthier and more used to dealing with lawyers, with funds to pay for those lawyers and without any willingness to consider alternative dispute resolution. I acknowledge it plays into the hands of sophisticated family lawyers with international connections and often charging premium rates. It directly disadvantages the more vulnerable spouse financially

In that the UK government wants to encourage saving saveable marriages, this EU law directly encourages the fast issuing of proceedings for financial gains without reflection and consideration. It is very anti-family life

England now requires couples to obtain information about mediation before commencing most forms of family court proceedings. This cannot apply in an EU case where issuing first is all that matters. So, again, another piece of domestic law based on domestic priorities fails because of EU law

The first to issue principle applies in no other set of local connected jurisdictions anywhere in the world. The EU was warned by practitioners before the legislation was introduced and they belittled warnings and only now belatedly accept there is a problem. However they

refuse to countenance its abolition and believe the answer is applicable law. It is not. This is demonstrated above

Proposals made by me and others to the EU over the years since March 2001 to find a solution to first to issue (and applicable law) have been rejected without almost any consideration. I proposed a most obvious solution namely a hierarchy of jurisdiction, instead of simply choosing one of several countries which have jurisdiction which thereby sets up the conflict for forum races. A hierarchy would then be known across Europe in which country proceedings would take place in the country with the highest place on the hierarchy (and therefore invariably the strongest connection). That country would apply its own local law and so there would be no need for applicable law. Also there would be no need to rush to issue.

The hierarchy would start with joint habitual residence for the length of the relationship, then over a period of years, then after several hierarchy stages joint domicile or nationally then sole residence etc and down to much lesser connections, so everyone had a forum opportunity

The EU will not countenance it. Yet this solution is found in other EU family laws. This gives every impression of the EU pursuing a particular agenda and dogma rather than looking at what is best for international families

The UK government should insist steps are taken now to replace "first to issue" as a forum criteria and search of other solutions which are not so destructive of family life and good family law practice, perhaps through a hierarchy of jurisdictions.

7 What impact might any future enlargement of the EU have on civil judicial co-operation?

I do not see this as an issue. I know there are some concerns if a pro-Islamic jurisdiction were to be a member. I am of the opposite opinion and would actively welcome this

8 What future challenges and opportunities are there in the area of EU civil judicial co-operation?

I believe there are several components

<u>Family law professions across Europe</u>

The EU is rushing through its policy with highly complicated and quite cumbersome pieces of legislation without ensuring that there are specialist family law professions across Europe who can cope with it. England is fortunate in having a highly specialist profession with many lawyers relatively aware of the EU aspects. Across many EU countries there is complete ignorance of even the basics of EU family law which naturally disadvantages international families and children. Yet, more pieces of EU family law legislation are still being proposed and passed.

The EU must assist in the creation of specialist family law professions in each jurisdiction around Europe and educate those professions in EU law. Occasional day

conferences at a very high cost in central Europe are not the answer. Until there are the legal practitioners able to operate and implement its laws fairly and proficiently for all EU citizens, the EU should pause before imposing new laws

Family law justice systems across Europe

The EU wants to create a cross border EU family justice system. This is laudable and many specialists support in principle. But many countries around the EU have systems of family justice which are slow, procedurally cumbersome, archaic, favouring the national citizen and disadvantaging the non-national, ignore some EU laws with apparent impunity and which sadly leads to much injustice and cross EU inconsistency. The EU has itself publicly condemned some countries. But nothing has happened. **The EU should concentrate its efforts on improving the family justice systems across the EU before imposing new laws, especially new laws which affect the UK and non-EU countries**

Support for intentional families across Europe

One of the major difficulties for international families is that they have no obvious representation, apart from individual lawyers at the micro level and the European Union at the macro level. Too often national governments have found it too easy to put national families and national family life first. Often these international families have no suffrage where they are then living and working. Yet they are many in number and increasing.

For many of them, they are living in an international community, working in an international market place, trading in an international shopping mall with international brands, with their children attending international schools and taking internationally recognised exams, preferring to use international currencies and keenly aware of international political and religious/ethnic issues. They deserve better from their relationship breakdown than what is still sadly a xenophobic hotchpotch of:

- Directly conflicting laws on outcomes
- Directly conflicting laws on jurisdictions, certainly outside of Europe
- Directly conflicting (and/or very unsatisfactory) laws on stays
- Directly conflicting laws on divorce
- Directly conflicting laws on child support
- Directly conflicting laws on the financial outcome
- Directly conflicting laws on working out the best arrangements for children
- Laws which favour the first party to break up the marriage
- Laws which favour the wealthy
- Lesser qualified and/or inexperienced judges dealing with international cases
- Major difficulties in international enforcement
- General jingoistic nationalism

International families have no constituency, no lobbying group, no uniformity and often very little interest beyond their own family affairs. Yet they now represent a not insignificant percentage of the world population, at least in the developed world. Considerable work is needed to improve the situation for international families and their children. Indeed there are now millions of international children within Europe, crossing international borders with their families as parents travel for work, for financial betterment, to live in the home country of the

other parent, for lifestyle reasons and simply because the opportunity allows international travel.

When family relationships break down, international children particularly suffer. There are issues of international child abduction, child relocation permanently from one country to another at the request of one parent leaving the other parent behind and absent geographically from the child, enforcement of contact orders when parents are in different countries, international child support, and other matters directly affecting the welfare of the child of international families.

International families and international children deserve better than the international family law which presently exists. There is an important role for specialist family lawyers dealing regularly with international families and their children to bring to the attention of national governments and international governments the real issues in practice affecting international families.

Yet the European Union, in a special place to look after the interests of international families, seems driven by continental European ideas and traditions which are very out of step and contrary to the culture, norms and values in the English family law system and English family life. Almost certainly over the next decade, this will be the primary clash of cultures and reform within family law. Specialist practitioners have a vital part for international families.

But the EU has to accept and play an important role and look after family life as a precursor to the work of family law itself on relationship breakdown

9 What are the advantages and disadvantages to the UK of the EU's powers to act internationally in this area?

I presume this refers to extra EU laws based on supposed powers to make laws imposed on EU member's states which affect dealings between an EU member state and a non EU state.

I am adamant that this is a key area where the EU has gone much too far

I understand that following the EU concluding the new Lugarno Convention, the ECJ confirmed in an opinion of 1/03 of 7 Feb 2006 that the EU had exclusive competency to conclude international agreements on, in effect, all family law matters with non EU countries on behalf of EU member states who specifically no longer had this power. (If I have misunderstood, I apologise. I have tried very hard to understand the position from the Ministry of Justice in an area of much mystery as perceived by many practitioners, to which I refer separately)

The EU should not have (or attempted to create or exercise) external, extra EU powers and laws. The extension of EU law beyond EU cross-border cases and families is unknown by the vast majority of UK family lawyers. There has been no consultation with the public or profession. There has been no consideration and reflection on its impact on family life or family law practice. There is no reference to it within Article 81 but this note is not an analysis of EU law. (Many family lawyers would have no issues with Art 81.2 as it relates to intra EU matters.) But the EU taking on powers and making laws for extra EU cases works great injustice. I suspect it would be opposed by the vast majority of the UK public (and

many politicians) if they knew of it and its consequences. Non-EU countries are not reciprocating so it is one-way traffic causing prejudice and hardship. It is compounded, unfortunately, by a lack of any advance consultation or information. In summary, it is an extension of the EU in family life and family law realm far beyond that which is reasonable, necessary, beneficial to the UK or advantageous to international families and children. The EU should deal alone in this area with EU cross-border matters.

The July 2009 Competency Regulation (664/2009) for family law followed as a direct consequence of the EU taking on and assuming EU powers and law in respect of non EU cases and law. This was entirely unannounced to the professions until years after the event, never consulted upon, never informed to any degree and is still largely unknown and unexplained. The Regulation (which sets out how a EU country seeks the permission from the EU to enter into a bilateral arrangement with a non EU country) was not known, or barely known across the profession, for the primary reason that the taking or assumption of these powers by the EU was not known so the need for the accommodating Regulation was not known.

The EU stops us entering into bilateral family law arrangements with countries with which we have many family life and family law connections e.g. US, Australia and common law jurisdictions (unless we go cap in hand for special permission, which is unlikely to happen!) There was never a mandate from the family law profession or the public for it.

The UK government should be very clear that the EU has no power and competency to bind us in our dealings with non EU sovereign states in family law matters which do not affect other EU countries. The EU is exercising its powers to see how much if at all the member states would object. The UK must do so and it is highly regrettable that it seems the UK government has not done so thus far, as far as we know

10 What are the advantages and disadvantages to the UK of action being taken at an international lever rather than EU level?

There are significant advantages which follow from the UK being a centre of international families from all over the world rather than just the EU. I suspect most EU countries have the bulk of their international families from across land borders in the EU. Ours are also from historic connections such as the US, Canada, Australia and NZ as well as Hong Kong and Singapore and the Caribbean, there are large communities from the South Asia subcontinent, we have many from the Middle East, Russia and South East Asia and countries such as Japan and China. In my experience, other EU countries simply do not have this range or the same numbers.

We are in the EU but we are a worldwide family law country. Giving so much emphasis to the EU element is not fair on these international families. We need greater Hague/worldwide international laws and not so much dominance by EU laws especially with their civil law emphasis

Conclusion

In conclusion, the EU has gone much too far; in imposing laws which have no relevance for cross-border EU cases but only adversely affect non-EU cases, in restricting our national

powers to award needs-based outcomes in non-EU cases, preventing us entering into child abduction conventions with new signatory states and imposing a very anti-family life law without acknowledging the warnings of practitioners and then refusing to contemplate any replacement.

There are very many international families and children within the UK. We are probably the most international family country in the EU, possibly even the world. We have some of the very best family court judges and family lawyers. We have a highly specialist profession. We are one of the most committed to out-of-court resolutions of various forms. We are very proactive internationally. We are keen to find the best solutions for problems facing international families and international children. We are mostly very supportive of a cross border EU family justice system. But not if it inhibits non-EU cases and/or imposes very anti-family life and other laws which directly work against the best interests of international families and international children and good ADR and settlement orientated practices.

The EU competency and use of powers has gone too far; unchecked, without consultation or meaningful review, in non EU cases. It must now be pulled back in significant ways. What remains will continue to work well and to considerable benefit

Case studies

All case studies are genuine but countries changed for anonymity

1 Romanian nationals living in Surrey for many years. Husband issues first in Romania to his advantage. Romania deals with divorce and finances. Romania does not have power to make orders against foreign property including modest home in England. So there is no order in respect of English assets. Therefore there are separate proceedings in England regarding those assets, with extra costs and delay and far less satisfactory than if all proceedings were ongoing in England which has the closer connection. Solution: EU requires member states to have family court power in respect of offshore, foreign assets or, better, removes the first to issue principle and creates a hierarchy of jurisdiction so that this case would have been dealt with in England where both are habitually resident and there is the closer connection

2 Child abducted from England to Singapore. As the EU says England cannot enter into 1980 Hague Convention with new signatory countries unless it gives approval, English courts and the English-based parent has to treat Singapore as a non-Hague country. We cannot use the Central Authorities, government departments in each country set up to coordinate the return of abducted children, even though England has an excellent Central Authority and there is a central authority in Singapore set up when Singapore joined 1980 Hague. There has to be cumbersome wardship proceedings in England and much slower and uncertain proceedings in Singapore. Outcome: it is much easier successfully to abduct children as a consequence of the EU ruling and it is much harder to secure the return of abducted children

3 English husband and Malay wife and child live in Southeast Asia throughout married life moving around in connection with his executive work. He issues divorce proceedings in

England on his sole domicile. Consequently the wife cannot seek maintenance (needs) claims in England for her and their child. The husband refuses to make any provision for her. Wife cannot issue divorce proceedings anywhere else in the world as she does not have sufficient residency period in the country in which they are now living when the relationship broke down. At best she can claim in a country in Southeast Asia for financial provision after the English divorce on the basis that England has made "inadequate" provision for her. This is an insulting state of affairs for English justice. The only place in the world for a divorce which the husband chooses for his divorce should be able to provide for the needs of the wife and child, but cannot because the EU law prevents needs-based claims on the jurisdiction of sole domicile

4 English wife and Egyptian husband marry in England then live in southern Africa throughout the marriage on his executive work. They have a handicapped child who is receiving excellent care and support with established infrastructure in the African country. Marriage breaks down. Neither party wants to have the divorce in the African country. Husband issues in Egypt. The wife can issue a divorce in England on her sole domicile but will not get a needs-based outcome to provide for her and the child for the future so is reliant on the proceedings in the other country. This is unlikely to be adequate for the relatively exceptional and high needs for the next 10 years or so and perhaps much longer for the child. Solution: EU should not have imposed this sole domicile restriction law on member states for non-EU cases and should repeal immediately

5 Italian nationals living in England for 20 years with all financial arrangements here. Unbeknown to the wife, the husband has an affair, learns he will get a much better financial divorce outcome in Italy and it will take many years until he has to make any payments to her. He issues in Italy first on joint nationality when the wife is unaware of relationship difficulties. Wife has no choice but to accept Italian courts dealing slowly with financial matters and almost certainly giving her a much lesser financial settlement than England where the parties have chosen to have their marital and financial lives. Solution: abolish first to issue and create hierarchy of jurisdiction so England would deal because of joint habitual residence

6 Australia has a forum jurisdiction law which is acknowledged as favourable to Australians and Australian courts dealing with a case. New Zealand has recently negotiated a treaty with Australia to soften this law in Australian/NZ cases to a more balanced forum test. The UK, after New Zealand, has most international family traffic with Australia yet we are powerless to do the same as the EU prevents us. It is nothing to do with the EU.

7 English couple live in Spain. Wife returns to England during a difficult marital period and after six months i.e. has gained jurisdiction, issues in England and is first to issue. During the six-month period when the husband could have issued immediately in Spain, he had seen a Spanish lawyer who totally failed to spot the risk of the wife issuing at the end of six months. The Spanish lawyer, similar to many in the EU, did not know about EU laws. Husband is informed that he has no prospect of a negligence action against the Spanish lawyer because of the state of Spanish law even though such a claim would exist in England. All assets are in Spain with complicated valuations and need to understand the present difficulties in the Spanish real property market yet the provincial County court in England has to deal with these Spanish financial matters.

David Hodson

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David Hodson is a family law dispute resolution specialist. He is a English solicitor (1978 and accredited 1996), mediator (1997), family arbitrator (2002), Deputy District Judge at the Principal Registry of the Family Division, High Court, London (1995) and an Australian (NSW) solicitor (2003) and mediator. He deals with complex family law cases, often with an international element.

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He is the author of "The International Family Law Practice", (Jordans 2012), probably the leading textbook on international family law. He was Family Law Commentator of the Year 2011 and is nominated International Family Lawyer of the Year 2013

The International Family Law Group LLP is a specialist law firm providing services to the international community as well as for purely national clients. iFLG has a special contract with the Legal Services Commission for child abduction work and is regularly instructed by the UK Government (Central Authority). It acts for international families, ex pats and others in respect of financial implications of relationship breakdown including forum shopping and international enforcement of orders. It receives instructions from foreign lawyers and, as accredited specialists, acts for clients of other law firms seeking their specialist experience.

iFLG is situated in Covent Garden near the Law Courts. Its mobile telephone accessible website includes valuable information, podcasts, a government approved child abduction questionnaire and formulae as a starting point for calculating fair financial settlements. It has emergency 24 hour contact arrangements. Contact at www.iflg.uk.com