resolution
first for family law

Back to the future…

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As a potential hard Brexit looms again, urgent questions need to be answered soon if we are to avoid a deadzone for UK-EU cross-border cases while post-transition treaties are hammered out

And so, as we start to emerge from the tunnel caused by the great pandemic and return metaphorically or even physically to our desks, we discover the UK's withdrawal from the EU is imminent. It is obvious to any observer that Covid-19 has caused more than death and economic destruction: it has distracted us all from matters that were pressing in February and now demand our immediate attention. "Brexperts" throughout the country are starting to gear up again and it is becoming apparent that the original lack of planning, at all levels, in preparation for a "YES" vote, back when the Referendum took place on 23 June 2016, has continued in recent times and we are moving inexorably to a hard exit from Europe.

Surely the "transition period" leading up to December 2020 did not allow for a pandemic and the collective downing of tools across Europe? Perhaps there will be a short extension, even though some may bridle at this phrase (because it may have implications for the next round of contributions to the EU budget in early 2021), to ensure that every attempt has been made to create a seamless changeover? At the time of writing this article, Michel Barnier (the EU's chief negotiator) and his UK counterpart, David Frost, are about to enter into the fourth round of talks, a 12th phase of negotiations, where a trade deal is still to be agreed and where, let's face it, family law issues are unlikely to be high on the agenda. It is understood that the insistence on a comprehensive package is hindering the ability to hive off and agree certain issues such as family law.

In a recent article in *Family Law Journal*, I wrote the following:

> "It is obvious that, eventually, negotiations will result in mutually beneficial treaties between the UK and the EU (which holds the sovereignty of the member states to enter into treaties) but that can only take place after a relatively 'hard' Brexit has occurred. We need to 'wipe the hard drive' and start again from a strong negotiating position. It will work because it has to, and this country, which has faced far worse situations in the past during its long history as an island state, will succeed in achieving stability within a new European framework. The sky is not falling in, we are simply in need of some blue-sky thinking, which historically, this country is very good at."

But the problem with this optimistic and arguably jingoistic approach is the effect of an international legislative vacuum on family law and on families themselves, while new bilateral and multilateral treaties and other instruments are being negotiated, well past the 11th hour.

When a couple decide to go their separate ways or when a child is at risk of abuse to the extent that the state is having to step in, the situation on the ground is often a dynamic and fast-evolving one. If one adds a dispute over international jurisdiction, because there is cross-border litigation, one ends up with a combustive mix. In that scenario, any lack of clarity over which country has jurisdiction, and what rules are applicable, could affect individuals and children when they are at their most vulnerable. Obviously the ideal situation would be for there to be a bespoke, modern panoply of bilateral and multilateral treaties that continue or are based on the current legal EU infrastructure. However the problem with the European model is that there is a supranational body at its apex, namely the Court of Justice of the EU (CJEU), and by contracting out of the Union, it would be perverse to continue to regard its rulings as binding, even though the "buck stops here" approach of that court has been welcomed in most circles.

So imaginative, practical solutions will have to plug the gap while the law makers set up binding agreements with other states and agree on who is ultimately to interpret and enforce them, when countries differ over any given issue. Who better than the judiciary to apply a "common law triage service", while the other two limbs of the state work fast (we hope) to ensure that the best aspects of European regulations (eg surely the enforcement of orders concerning children and the ability to transfer proceedings to another country) are salvaged, and the less useful provisions (eg *lis pendens*) are discontinued?

The ratification of a treaty (fulfilling the national legislative requirements) that has been signed can often

be a long-winded process. But as Laws LJ pointed out in *R v O* [2008] EWCA Crim 2835 – a criminal matter involving the Human Trafficking Convention, which at the time had been signed but not ratified – "the United Kingdom is accordingly obliged by Article 18 of the Vienna Convention on the Law of Treaties to refrain from acts which would defeat the object and purpose of the Trafficking Convention".

Yes, that's right – there's a treaty dealing with treaties, which we are bound by. But while the UK signs up to these new treaties, the interregnum needs to be carefully managed so that family cases do not fall between jurisdictional stools and individuals, especially children, are not harmed by delay, international red tape or poor decisions.

How then will the practical-minded judge ensure that the impact of us leaving the EU together with its attendant ambiguities do not place people in more vulnerable positions when there is a cross-border issue? Here are some suggested steps to add to the debate:

- We must use what we already have and focus on what is already available and achievable: ie the 1996 Hague Convention, the 1980 Hague Convention, the 2007 Hague Convention, and the 1970 Hague (Divorce Recognition) Convention, if the EU signs it. (I am grateful to David Hodson of The International Family Law Group for alerting me to these treaties).

- The focus will start shifting to *forum conveniens* arguments, which will simply be more common because for almost two decades they have been the province of cases only emanating from outside Europe. A statutory instrument where forum is based on the closest connection has already been approved and is ready to be deployed the minute we (actually) leave the EU.

- Case law from the senior courts might result in dicta which establish a short-term continuation of the spirit of regulations such as Brussels II bis. If senior courts create a line of authorities which reflect the central tenets of EU Regulations in incoming cases – eg respecting and enforcing orders from other EU states in the same way they have been doing when Annex III and Annex IV certificates have been attached under Brussels II bis – even if it is on grounds of the "overriding objective", then common law lessens the impact of Brexit.

- The problem would then rest with outgoing cases and needing to rely on EU countries similarly using common law and comity to "plug the gap" when Regulations no longer apply, because the UK is no longer in the club of EU States. But because of the codified system in other countries and the lack of reliance on common law, this is unlikely to happen readily, especially when some of those EU States have already not applied article 11(6)-(8) Brussels II bis, for example in cases emanating from the UK to those countries. A specialist judiciary in the UK has been very useful in concentrating the expertise in the area of international family law. For example, in English and Welsh cases, only judges sitting in the Family Division deal with 1980 Hague cases. If they are not too moribund by centralised EU policy, it is hoped that the EU specialist judges will (using the European Judicial Network) continue to work in partnership with their UK judicial colleagues to resolve particular cases while the diplomats set up more formal structures.

- Similarly, there is the International Hague Network of Judges, which can assist with a brand of "judicial activism" that can preserve the links that have been forged between the courts of EU countries and those of the UK while the latter was still in the EU.

- A final question is: where would be the venue for a final appeal court (one which would command the respect of all EU countries)? No doubt the EU would say the CJEU, but if that is not acceptable for the reason mentioned above, and it needs a replacement for EU/UK cases, then perhaps the Hague Conference could assist in setting up a bespoke appeal system?

All these avenues and more need to be investigated now, if we are to avoid carefully crafted European regulations (that allow lawyers and courts to communicate meaningfully within Europe about the children and assets of separating and separated couples and about children who are at risk of significant harm), being destroyed at the stroke of the midnight hour on 31 December 2020.

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