

Brexit, non-court dispute resolution, and family justice

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As representatives from each legal field put forward their most pressing concerns for the Government's consideration in responding to Brexit, family lawyers have principally focused on matters relating to cross-border children (parental responsibility), divorce, and finance disputes. Consideration of the consequences for non-court dispute resolution (N-CDR) has been relatively absent.

Perhaps this is because of the difference in nature between Regulations and Directives. Regulations govern the three substantive issues that have been the subject of most discussion, namely the revised Brussels II Regulation (Council Regulation (EC) No 2201/2003) ('Brussels IIa') and the Maintenance Regulation (Council Regulation (EC) No 4/2009). In relation to N-CDR in the familial context, however, it is the Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters (the 'Mediation Directive') that is centre stage. Whilst Regulations are directly applicable in Member States, Directives state objectives for Member States to transpose into national law. It is for Member States to choose the most appropriate form for any implementing national legislation. Or perhaps, relatedly, the lack of attention may also be due to a belief that the Mediation Directive, as the sole piece of applicable EU law on N-CDR and with the status of a Directive, is of limited practical significance in the UK so that little of consequence in this respect will flow from Brexit. Whilst any discussion is necessarily speculative, the following analysis suggests that N-CDR may be one – perhaps, the only – significant area of family law that may benefit from Brexit.

There are three respects in which the potential impact on N-CDR is distinctive. First, in the

shorter term at least, the uncertainty created by Brexit may be more likely to increase the use of N-CDR as a means of achieving certainty, whether of process, outcome, or both. Secondly, in the longer term, the available space for, and drivers towards N-CDR are at least in part consequential upon the rules that apply to determine the appropriate forum or jurisdiction. This is particularly so in relation to the future of *lis pendens*, as adopted in Art 19 of Brussels IIa. Thirdly, whilst the impact on the substantive matters of divorce, parental responsibility, and maintenance necessarily relates to ‘cross-border’ disputes, there may be significant consequences for N-CDR domestically, not least in terms of the attitude toward its use. For this reason, Brexit may have more impact than one might expect on the work of those family solicitors, arbitrators, and mediators whose practice does not tend to have any international elements. In what follows, I will focus on mediation and arbitration, though implications for private ordering via nuptial agreements and negotiations between lawyers will also be briefly considered.

I. Mediation

Brexit may cause changes to three areas of law that particularly impact family mediation: firstly, the regulation of the subject-matter of family law mediation related to the Brussels IIa *lis pendens* approach to conflicts of jurisdiction; secondly, the Council Regulation (EC) No 44/2001 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters (‘Brussels I’) and Council Regulation (EC) No 593/2008 on the law applicable to contractual obligations (‘Rome I’) regimes that govern the choice of jurisdiction and choice of law in relation to agreements concerned with family law mediation; thirdly, the status of the Mediation Directive in domestic law.

1. Brussels IIa and jurisdiction

Brussels IIa does not regulate mediation directly, but certain procedural aspects that relate to

substantive matters over which parties may mediate. The post-Brexit consequences for Brussels IIa, more so in respect of divorce than parental responsibility, may be significant for the future of mediation.

In relation to parental responsibility, Brussels IIa grounds jurisdiction in ‘habitual residence’ (Art 8). This generally works well, taking into account the usual differences developed over time between jurisdictions’ approaches to determining ‘habitual residence’. Assuming the loss of Brussels IIa, the UK may adopt the WTO solution such that the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children would apply. Alternatively, the UK may seek to become a signatory to the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (30 October 2007). These routes would serve to retain a similar approach to jurisdiction to Brussels IIa, hence the opportunity for mediation in this context would arguably remain similar and be neither much better nor much worse than at present.

In the divorce context, by contrast, Brussels IIa grounds jurisdiction initially in ‘habitual residence’, with additional jurisdiction if they share common nationality or ‘domicile’ (Art 3). But where more than one Member State has jurisdiction under the Regulation, it is the court ‘first seised’ that has jurisdiction (Art 19). This *lis pendens* approach creates a well-known problem: the (comparative) generosity of the English regime to applicant spouses means that it encourages a rush to court, which can undermine the opportunity and incentive to engage in negotiation and compromise prior to issuing proceedings. This has a significant detrimental impact on the likelihood that parties will engage in mediation (discussed: House of Commons Justice Committee, 2017, para 22).

What changes might result from Brexit in respect of jurisdiction over divorce? It is possible that, through incorporation, the Brussels IIa approach to preventing parallel proceedings will be retained. Yet, it may well be that jurisdiction will revert to original English law. This would mean

that jurisdiction would turn on either ‘domicile’ or ‘habitual residence’ for one year prior to commencement of proceedings, and that forum conveniens would be used to resolve conflicts of jurisdiction as between European countries. That approach would give English courts the discretion as to whether to hear the case or defer jurisdiction to the competing country. I suggest that, if this occurs, there would be two negative consequences. First, it would increase costs for the parties since a forum conveniens approach forces them to spend more money on the early stages of the case. Secondly, it could increase the attractiveness of English courts for divorce for applicant spouses because of the possibility that the forum conveniens discretion might be exercised in favour of the applicant, who would then have access to the (comparatively) generous discretionary regime under Part II of the Matrimonial Causes Act 1973. The end result may be that England’s – London’s – reputation as the divorce capital of Europe may grow even greater.

But these negative developments may be offset by the potential incentive for mediation over finances as a result of Brexit. If we were to revert to forum conveniens to determine jurisdiction, there would no longer be the same rush to issue proceedings. As a result, parties may feel more able to explore resolution via mediation than under the Brussels IIa approach to jurisdiction. Further, given that forum conveniens is more uncertain than *lis pendens*, it is interesting to consider whether we might see a post-Brexit rise in jurisdiction-free mediation – where parties simply seek to reach a mutually-agreeable outcome – as one way of addressing these uncertainties.

If, as a result of Brexit, there were to be an increase in the use of mediation in cross-border disputes, might we also expect to see that filter down into domestic disputes? The fact that mediation information assessment meetings (‘MIAMs’) were down 5% in January-March 2017 compared to last year (Ministry of Justice, 28, figure 17) suggests that it may take significant efforts to imbed mediation in individuals’ legal imaginations. As I discuss below, public reticence to use mediation may be about more than funding.

2. Mediation-related agreements

The domestic implementation of the Mediation Directive, discussed below, addresses only

certain aspects of mediation. In particular, it does not govern matters such as confidentiality and privilege, which are regulated by any agreement reached between the parties or, in the absence of agreement, by domestic law. The rights and duties arising out of family relationships are excluded from the application of Brussels I (Art 1.2(a)) and Rome I (Art 1.2(b), (c)). This requires us to distinguish between agreements to mediate; mediation agreements; and mediated settlement agreements. As mediated settlement agreements settle the issues in dispute, they are subject to this exclusion and not subject to the general EU choice of jurisdiction and choice of law regimes.

But agreements to mediate and mediation agreements, which govern entry into mediation and the mediation process itself, are not so excluded from Brussels I and Rome I. Most such mediation-related agreements with cross-border aspects contain express choice of law clauses, which govern (Rome I, Art 3) subject to the possibility of additional consumer rights protection in the law of the parties' 'habitual residence' should that be a different jurisdiction (Rome I, Art 6). In the absence of express choice of law, 'habitual residence' governs (Rome I, Arts 4, 6). Choice of jurisdiction is generally also explicitly addressed in such agreements. If not, it is governed by the 'domicile' of the defendant (Brussels I, Art 2), subject to certain exceptions.

How might agreements to mediate and mediation agreements be impacted by Brexit? As most such agreements contain express choice of jurisdiction and law clauses, Brexit may have limited impact on these agreements. However, there is a real risk that, without the reciprocity and comity of Brussels I, proceedings elsewhere may be allowed to undermine jurisdiction clauses in favour of English courts; the Great Repeal Bill has been criticised for its inadequacy in this vital respect (House of Lords European Union Committee, paras 94-95, 97). The uncertainty as to how courts in other jurisdictions will approach this issue post-Brexit is arguably of the greatest concern here. The default English 'habitual residence' approach may mean little change in practice in the Rome I context, though again this will necessarily be accompanied by a degree of uncertainty. It is also important to bear in mind that disputes over agreements to mediate and mediation agreements are rare; of much greater concern is the impact on mediation itself.

3. EU Mediation Directive

As the pre-Directive arrangements were considered compliant with the Mediation Directive in a number of respects, UK legislative implementation via amendment to the Civil Procedure Rules 1998, Family Procedure Rules 2010, and the Cross-Border Mediation (EU Directive) Regulations 2011 (SI 2011/1133) was confined to specific Articles. In contrast to the EU Regulations discussed in relation to divorce, parental responsibility, and maintenance, this implementation means that there is a sense in which the Mediation Directive is now part of domestic law. Yet, since implementation is under the powers contained in s 2(2) of the European Communities Act 1972, the Great Repeal Bill is needed to ‘preserve’ it in domestic law after Brexit (Department for Exiting the European Union, 13). But this does not address the point that the implementing provisions in Pt 35 of the FPR 2010 do so contingent upon the content of particular Articles in the Mediation Directive. As a result, domestic ‘preservation’ is not able to straightforwardly survive EU reform to the Mediation Directive; if any referenced Articles or their wording were repealed or revised at the EU level, the ability to maintain even a superseded incorporated version of the Directive would fall away.

Are there any significant difficulties with the current operation of the Mediation Directive? The Directive itself formally applies only to ‘cross-border’ disputes (though almost all Member States – except for the UK, Ireland, and the Netherlands – extended its scope to domestic mediation: Tymowski, 4). It is not family law-specific, which may be problematic if one agrees with Norgrove that ‘family law [is] very different from other forms of law’ (823) and the ‘processes, language, relationships with other actors, knowledge of outcomes, and feedback largely do not sufficiently reflect the differences between family and [criminal and civil law]’ (824). The debate over the relationship between family law and civil law affects our understanding of the justifiability of not only the Mediation Directive, but N-CDR more generally, hence will be revisited at various points below.

The importance of this theoretical debate also turns on how much the Mediation Directive is

in fact used in practice. Writing in 2016, Singer *et al* note that they ‘still have no information, either from direct experience or from anecdote, that the EU Mediation Directive has required consideration or has had any impact on any family mediation’ (para 35.4). If the Directive is not much relied upon in individual disputes, how significant are the relevant consequences of Brexit for couples and practitioners in the UK?

There are two types of consequence that stem from Brexit: those that relate directly to cross-border mediation and those that relate to the support for and encouragement of mediation and N-CDR more generally, in both cross-border and domestic disputes.

As noted above, if the Great Repeal Bill seeks to ‘preserve’ the Mediation Directive in domestic law, that may not assist in the event that the Directive is reformed in response to the European Commission’s 2015 consultation. This is particularly disappointing given that such reform may well include extending the remit of the Directive to all forms of N-CDR, especially arbitration. Moreover, even if we do not repeal the 2011 Regulations, we will lose the reciprocity on which the EU Directive is premised. As Resolution commented, ‘there may be little point having mirror provisions once the UK has lost access to the infrastructure which is designed to support it and the mutual recognition that underpins it’ (para 13). This loss of comity and reciprocity extends to losing the opportunity to readily influence consistency of practice across the EU, including the introduction and content of agreed minimum common standards in relation to training and accreditation for mediators and arbitrators.

In contrast to the previously-discussed suggestion that the possible change in approach to conflicts of jurisdiction may lead to increased use of cross-border mediation, given how specialised cross-border mediation is, might exclusion from the Directive (or from any revised Directive) make us more isolated in the European context, hence be *more* concerned to have parties rush to court domestically to secure their position against the risk of proceedings in EU Member States? In the unknown territory of Brexit, it is impossible to predict with any certainty which response is more likely.

What of domestic consequences? The Directive applies to cross-border disputes (and that has been understood in broad terms), but the recitals make clear that nothing should prevent Member States from applying such provisions to domestic mediation. In a number of a Member States, the Directive ‘has triggered the establishment of previously non-existent mechanisms and institutions’ (Tymowski, 1, 27). Whilst the UK was one of three Member States to limit its application to cross-border mediation, the incentive to improve domestic mediation and N-CDR more generally, as reflected in Art 1, may be lost as a result of Brexit.

In terms of any uncontroversial benefits of Brexit, might the loss of reciprocity and comity present an opportunity in relation to hearing the voice of the child directly in mediated parental responsibility disputes? The child’s involvement is quite common in the UK, but there is significant variation across EU Member States (Hirsch, 143). Whilst Brexit will mean that we lose our place at the table to influence the EU position, might we instead take Brexit as an opportunity to specifically regulate it domestically? This may prompt us to revisit the effectiveness of the Government’s rejection of the need for a legal presumption of children being heard in every process in which parents make decisions about their upbringing (discussed: Voice of the Child in Dispute Resolution Advisory Group, paras. 205-208; Ministry of Justice, 2015).

Both the potential reform to the Mediation Directive and the need to settle the domestic legal framework for cross-border disputes in the absence of access to the Directive provide a vital opportunity to reflect on the current prioritisation of mediation amongst forms of N-CDR. As Barlow *et al*’s recent work on mediation makes clear, the policy preference for mediation over other types of N-CDR is not empirically-grounded (205-206). Addressing the consequences of Brexit both enables and may require the Government to revisit the ongoing viability and justifiability of that prioritisation.

Broader limitations on post-Brexit mediation

The potential for mediation post-Brexit is limited by two particular concerns: first, access to mediation, including costs; secondly, enforceability of mediated settlement agreements.

The opportunity for mediation to grow as a response to the uncertainty generated by Brexit for cross-border families may be significantly inhibited by financial considerations. First, unlike in relation to solicitors' work, legal aid funding remains available for mediation though subject to eligibility criteria. As Hunter explains, the cut to funded solicitors' work has meant that those clients are no longer being channelled into mediation (193). This has significantly impacted the number of publicly funded MIAMs and mediation starts. Secondly, for individuals who do not qualify for legal aid funding for mediation or litigation, they are more likely to act as litigants in person than self-fund mediation (Hunter, 198). There are two key reasons why they do so: lower costs and the binding status of the court order (*ibid.*); only the first of these barriers can be redressed in favour of mediation. Whilst funding remains for solicitors providing advice in the course of mediation via the Help with Family Mediation scheme, uptake is very low (Hunter, 198). We might take heed from the popularity of mediation in Scotland, which may be attributable to more than funding (see, for example, Kelsey).

In the absence of an adequate alternative for the EU regime, particularly in relation to the Maintenance Regulation, the family court system will likely be under even greater financial pressure (House of Lords European Union Committee, para 136). Given that the Government rejected the recommendation to fund all MIAMs for 12 months (discussed: House of Commons Justice Committee, 2015, para. 158), it is unlikely that any additional direct financial support for mediation will be forthcoming.

The general EU enforcement scheme for mediated settlement agreements does not apply to the family context (Parliament and Council Regulation (EC) No 805/2004, creating a European Enforcement Order for uncontested claims, Art 2.2(a); cf. the same exclusion in Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Art 1.2(a)). Neither does that created by the Mediation Directive (implemented via the Civil Procedure Rules 1998, Pt 78.24). This makes sense in the context of English law since any agreement enforceable without a consent order would risk ousting the jurisdiction of the court

to exercise its discretionary jurisdiction within the Matrimonial Causes Act 1973, ss 23-25. It is for this reason that parties need to apply for a consent order (FPR 2010, r 35.2). But this conceptually coherent approach may be said to be undermined by Art 6.1 of the Mediation Directive, which reads:

‘Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.’

One might argue that this does not oust the jurisdiction of the court insofar as it references the power of the court not to make enforceable an agreement that fails to correspond to the content of English law. Without case law to settle the point, however, I suggest that the starting-point of enforceability in Art 6.1 does constrain the court as it represents a presumption, departure from which requires rebuttal. That said, after the Supreme Court’s decision in *Radmacher v Granatino* [2010] UKSC 42, [2010] 2 FLR 1900, the approach does not look very different to that taken to nuptial agreements domestically, which are to be ‘give[n] effect ... unless... it would not be fair’ (*Radmacher*, majority, para 75). As a result, whilst it is possible that Brexit may enable us to revisit this enforceability point domestically and to achieve greater theoretical coherence in the family context, that coherence is undermined by the approach to both arbitral awards, discussed below, and nuptial agreements, which adopt an attitude akin to *prima facie* enforceability. In any event, it is not at all clear that such coherence around non-enforceability is necessarily desirable given that, as Barlow notes, lack of enforceability is a key reason for some individuals rejecting mediation (214). Brexit may act as the catalyst for revisiting the domestic position on enforceability and whether there is a need to align the approach with that taken to arbitral awards and nuptial agreements.

The UNCITRAL Working Group II on Arbitration and Conciliation is currently developing

a Convention on the enforceability of cross-border mediated settlement agreements. Whereas the United Nations' Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) includes a 'commercial reservation' whereby countries can restrict the scope of its operation, the Working Group II's current Draft Instrument excludes mediated settlement agreements on family matters (UNCITRAL Working Group II (Dispute Settlement), 2016b, II: B.1). This exclusion had been the subject of debate (UNCITRAL Working Group II (Dispute Settlement), 2016a, paras. 55-56), but remains proposed. Brexit serves as a timely opportunity to consider whether we should seek to secure that this proposed exclusion is rejected or at least made optional as in the case of the New York Convention, discussed below. Given both that mediation is a longstanding mainstay of family law dispute resolution, and that there has already been significant development internationally in the form of the Mediation Directive regarding the enforceability of mediated settlement agreements, it is perhaps surprising that family law is set to be denied the benefits of the Convention. If the exclusion becomes part of the Convention text, the Convention would be of no assistance to cross-border family N-CDR post-Brexit, which may serve to increase the attractiveness of arbitration over mediation in the resolution of cross-border family disputes. Whether this holds true turns on the value of the New York Convention in practice, which I discuss below.

II. Arbitration

There is a notable disparity in the current treatment of arbitration. The domestic IFLA arbitration scheme has recently been extended from finance to children issues, whereas the EU has not yet sought to directly encourage or regulate arbitration. There is potential for both the New York Convention and the soon-to-be-launched International Family Law Arbitration Scheme ('IFLAS') (discussed: <https://internationalfamilyarbitration.com/>) to have a significant impact on

the dispute resolution landscape. The consequences of Brexit will be examined within the context of these unevenly-paced developments.

1. The EU context

Arbitration is not directly regulated by EU law. Whilst Article 1 of the Mediation Directive refers to ‘facilitat[ing] access to alternative dispute resolution’ more generally, the remainder of the Directive addresses only mediation. As discussed above, the current process of reviewing and revising the Directive may include extending its more detailed provisions to other forms of N-CDR, especially arbitration. The exclusion of the UK from further involvement in these developments and of access to any revised Directive is a particularly negative consequence of Brexit from an arbitration perspective.

The potential change in approach for resolving conflicts of jurisdiction in relevant areas from *lis pendens* to *forum conveniens* may have significant consequences for arbitration. Within the context of that uncertainty, arbitration may be seen to provide much needed stability. As I discuss below, the extent of any such development may not be immediately visible if this change occurs at least in part via greater inclusion of arbitration clauses in nuptial agreements. Conversely, given that arbitration by its nature is arguably already more straightforwardly inserted into a stay of proceedings than mediation (cf. FPR 2010, r 3.4; Practice Guidance: Family Court Interface with Arbitration [2016] 1 WLR 59, paras 7-10), this may constrain any Brexit-related growth in the use of arbitration.

2. Non-EU frameworks and opportunities

Positive changes are obviously possible outside of the EU framework. What of the New York Convention, the most successful private international law convention? Whilst it is not specific to family law disputes, the only constraint on the recognition of awards is that the award must be ‘patrimonial’ in nature, or capable of compromise in other words (Art II). This is a matter of domestic law. In addition, however, a number of EU Member States and other jurisdictions have incorporated the optional ‘commercial reservation’ (Art I(3)) which restricts the Convention’s

operation. With Brexit, we lose any opportunity for working within the EU to see those reservations removed. This is particularly unfortunate for the future of cross-border recognition and enforcement of arbitral awards. Yet, perhaps that lack of influence as a consequence of Brexit is less detrimental than it appears because ‘[o]n any view, attempted reliance on the New York Convention to enforce a family arbitration award abroad will raise significant issues and what may well be insurmountable obstacles’ (Singer *et al*, para. 3.198). As Singer *et al* note, there are no countervailing reported instances of parties seeking to enforce in another jurisdiction a family arbitral award made domestically (para 3.200). Might Brexit provide the impetus for greater examination in practice of the value of the New York Convention?

In the civil law context, the expert evidence received by the House of Lords European Union Committee ‘saw arbitration as a chief beneficiary’ of Brexit (para 66). Such arbitration could continue to be specified to take place in London and applying English law. Given that multiple witnesses before the Committee emphasised the role of the New York Convention in enabling the growth of arbitration, it seems likely that those benefits could extend to family disputes amenable to arbitration. Whilst this straightforwardly includes finance disputes, what of children cases? Whether children issues would be vulnerable to the ‘patrimonial’ restriction on the operation of the Convention is an open question.

In the context of the exclusion of family law mediated settlement agreements from cross-border enforcement mechanisms, discussed above, the nascent IFLAS, scheduled to be launched in September 2017, may further increase the likelihood that it is arbitration, not mediation, that will come to be seen as offering the necessary post-Brexit certainty. Whilst the scheme is focused on forum arbitration, parties who opt for, and benefit from the approach will arguably be more likely to be channelled into domestic arbitration over the substantive matters.

Whilst arbitral awards cannot oust the jurisdiction of the court, the domestic judicial attitude has been to ‘adopt an approach of great stringency, even more so than it would in an agreement case’ (*DB v DLJ* [2016] EWHC 324 (Fam), [2016] 2 FLR 1308, Mostyn J at para 27). As a result,

even if absolute certainty would require an ‘incorporating order’ or consent order, internationally via the New York Convention (and the award being made under the domestic IFLA scheme) and domestically via this judicial threshold for intervention, individuals can arguably feel more confident in the certainty of arbitral awards than mediated settlement agreements. This perspective on enforceability further supports the view that the relative certainty of arbitration may be seen as increasingly preferable to the uncertainty generated by Brexit and the potential change in approach to conflicts of jurisdiction. This further underlines the need to encourage other jurisdictions to remove their reservations to the scope of the New York Convention.

In relation to domestic arbitration, I have suggested elsewhere that there remains a concern that it risks undermining the aims of family law, at least as currently configured. Family law’s vision of individualised, fact-specific justice in relation to decisions about finances and children is contingent on a sufficient number of both cases resolved via a final court hearing and judgments published. Arbitration avoids this, principally out of respect for the parties’ autonomy. I have asked whether individuals should ‘benefit from public, state recognition of their relationship as a status whilst together, only to be able to privatise the consequences at the end?’ (Ferguson, 101). Further, the House of Lords European Union Committee concluded that it was ‘conscious’ of the importance of ‘open law’, which is founded upon the principles of justice, such as openness and fairness (para 70). But with the uncertainty of the consequences of Brexit possibly driving more family disputes to be resolved via arbitration, might these doubts about arbitration be overtaken by practice? If the Government creates a situation of uncertainty for all those with cross-border family disputes, resort to arbitration may be better understood as more straightforwardly rational than any obvious assertion of autonomy against the state.

Nuptial agreements and negotiation between lawyers

The broader context of private ordering merits brief comment on any potential consequences from Brexit for nuptial agreements and negotiation between lawyers.

Might nuptial agreements offer a valuable response to the potential uncertainty of Brexit?

The Law Commission posited three ‘strong arguments’ for introducing binding nuptial agreements (paras 5.27-5.39): autonomy; certainty and the cost of discretion; and alignment with the approach taken in other jurisdictions. Autonomy was seen as an argument that ‘raises concerns’ (para 5.34), whereas the certainty-based rationale was suggested to be ‘much stronger’ (para 5.35). As harmonisation may be significantly more difficult to achieve post-Brexit, particularly in the European context, the argument from certainty looks set to become the predominant driver for law reform. Given the uncertainty likely to be introduced, at least in the short term, by the potential change in approach to conflicts of jurisdiction, might this provide added impetus to legislate for binding nuptial agreements?

The impact of Brexit on nuptial agreements may be more pronounced now before the Brexit process is concluded and its terms settled. Most immediately, the status of nuptial agreements concluded that contain choice of jurisdiction clauses under Article 4 of the Maintenance Regulation may be ‘thrown into doubt’ (House of Commons Justice Committee, 2017, para 23). Ahead of any possible law reform, might more cross-border families choose to enter into nuptial agreements to achieve relative certainty against the backdrop of Brexit-related uncertainty? Moreover, might there be an increase in nuptial agreements more generally for couples who might not have otherwise not signed them, in order to find at least some certainty? Might there be more mid- and other post-nups signed than one would expect without the uncertainty of Brexit?

Predictions in respect of the content of nuptial agreements are much more difficult. Might there be an increase in mediation clauses that are explicitly jurisdiction-free, so as to avoid the risk of jurisdiction-specific clauses in favour of English courts being undermined by proceedings elsewhere? Or, for similar reasons, might there be an increase in arbitration clauses that require arbitration by an arbitrator from a third country, as posited in the new International Family Law Arbitration Scheme in relation to forum disputes? Or, again for similar reasons, might there be an increase in choice of jurisdiction clauses that prefer jurisdictions other than England and Wales, as anecdotal evidence suggests is occurring in the commercial context (House of Lords European

Union Committee, para 40)? Such discussion is necessarily speculative, but what is certain is that Brexit will result in changes to practice.

In terms of resolution via negotiation between lawyers, the uncertainty triggered by Brexit in cases with cross-border elements may make parties more willing to work to reach outcomes that they consider fair and just as between themselves without any strict regard for the position of the competing jurisdictions in which legal proceedings might take place. As with the possible impact on mediation, we can only speculate on how parties may wish to find certainty in the context of the uncertainty of Brexit.

Domestic developments

In addition to the impact of cross-border disputes on domestic practice, domestic developments may themselves affect the landscape for post-Brexit N-CDR in relation to familial disputes. In his recently-published 17th view from the President's Chambers, Sir James Munby proposed the de-linking of divorce and financial remedies – *ancillary* relief no more. The currently-piloted move to establish a national network of Financial Remedies Courts ('FRCs') (discussed: O'Dwyer *et al*, 625) represents a core means by which this de-coupling can be achieved. FRCs provide the opportunity for increased consistency of approach – both in terms of outcomes reached (discussed: Hess and Miles, 1336) and integration of N-CDR, where appropriate, in the court process in both cross-border and domestic disputes. This may result in increased use of N-CDR more generally. To be effective, however, additional funding would be required. Such post-Brexit efforts (and funding) should not be directed toward N-CDR alone, but focused on fostering a truly integrated family justice system, which encourages movement between different forms of dispute resolution as warranted by the parties and each individual issue between the parties.

Whilst any examination of the implications of Brexit is necessarily somewhat speculative, family lawyers should take heart from the House of Commons Justice Committee's recommendation 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 judgments’ (2017, para 25). Nevertheless, given the range, seriousness, and complexity of matters raised by Brexit for the legal system as a whole, there is a real risk that family law may be overlooked in the process. Indeed, the House of Lords European Union Committee concluded that it was ‘not convinced that the Government has, as yet, a coherent or workable plan’ for its impact on family law (House of Lords European Union Committee, para 98).

If the response to the uncertainty generated by Brexit leads to a preference for N-CDR in disputes with a cross-border element, Brexit may become the unlikely impetus for the development of an N-CDR culture in relation to family disputes more generally. Within N-CDR, there is greater opportunity for certainty to be attained post-Brexit through arbitration than through mediation, not just because of the nature of the two processes, but also because of the role for the New York Convention and the IFLAS compared to the proposed exclusion of family matters from UNCITRAL’s current work on mediated settlement agreements. Any move from Brussels IIa *lis pendens* to common law *forum conveniens* may provide greater space within which parties will feel more able to engage in mediation, but the benefits of arbitration within that vision of the post-Brexit regime may mean that parties are no more likely to take advantage of that increased opportunity to mediate than at present.

The conceptual heart of Brexit for N-CDR in the family context

Family lawyers need to make a significant strategic decision – whether to push for separate consideration of family law matters in respect of N-CDR, or seek to capitalise on any benefits for family law N-CDR being taken together with civil law N-CDR.

How beneficial might a distinctive family law approach be? In this context, might focus on family law’s place within N-CDR more generally be a means of ensuring greater attention on critical issues that affect the practical resolution of family disputes? Furthermore, increasing use of N-CDR, especially arbitration, may be due to developing family law solutions alongside and within the frameworks developed for the civil rules. Perhaps we would not want to risk that by seeking to separate out family law’s N-CDR.

By contrast, the critical opportunity to address concerns about the ideological withdrawal of law from intimate family life to promote a vision of ‘autonomy-as-justice’ (Diduck, 2016), arises only if family law N-CDR is parsed from civil law N-CDR. Developments in respect of enforceability are of critical importance for the future of N-CDR in the context of family disputes. The approach taken to arbitral awards and nuptial agreements highlights the narrowing view of what it means to oust the jurisdiction of the court. An attitude akin to presumptive enforceability is no longer considered to do so.

Diduck characterises the evolving role for N-CDR as entailing a shift in the nature of family disputes from ‘legal disputes’ to ‘relationship problems’ (Diduck, 2014, 616) in a ‘reconstructi[on] of family law claims... [the] resol[ution of which] has less and less to do with law and principles of justice...’ (617). But it is the court that binds itself to respect the content of the arbitral award or nuptial agreement and, potentially in the future, the mediated settlement agreement. For this reason, perhaps the better view is that the newer ‘autonomous system’ of family justice (Diduck, 2016, 133) is in fact no more so than in the past. Lawyer-led negotiations and informal, direct discussions between the parties comprise the conventional content of consent orders.

Are the newer forms of N-CDR and private ordering and their impact on the broader legal context so distinct that they have transformed the nature of family justice? The moment of enforceability becomes critical, both practically and theoretically, in any response to this question. If court involvement is required for enforceability of resolutions reached via N-CDR and private ordering, but the court chooses to bind itself to the content of the parties’ resolution other than in very limited circumstances, does this represent an application of principles of justice or a decision to allow the parties to opt out of justice?

Does the view we take of the relationship between N-CDR and family justice mean that we need to reach a similar conclusion regarding the implications of N-CDR for civil justice? This speaks to the issue of the separation or cohesion of family law and civil law N-CDR, as well as of N-CDR and notions of justice driven by CDR. It also crucially informs the justifiability of both the

UNCITRAL Working Group II's current intention to exclude mediated settlement agreements on family matters from their Draft Instrument, as well as the recent, family law-specific recommendation of the Hague Conference on Private International Law's Experts' Group on recognition and enforcement of agreements in family matters that the Council develop a new Hague Convention to facilitate binding family agreements in Contracting States. Brexit invites examination of this strategic and conceptual dilemma that cuts to the heart of family justice. Whilst the question of the relationship between family and civil law and their accompanying notions of justice has long required resolution, we have allowed piecemeal developments domestically and internationally to each implicitly suggest their own answer. The stakes in Brexit, however, compel us to directly confront the correctness of Norgrove's conceptual assertion, discussed above. How 'very different [is family law] from other forms of law' (823)? How 'very different' is N-CDR in the family context from other forms of N-CDR?

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