

Report of European Conference, Belgium, December 2008

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The Council of Bars and Law Societies of Europe in conjunction with the Academy of European Law ran a conference entitled "Practising family law in Europe" on 11th and 12th December in Brussels. It provided an excellent opportunity for practising family lawyers to learn about present developments and EU reforms of family law across Europe and to debate, discuss, argue and network.

I attended a similar conference 3 years ago, in Luxembourg. There were at that conference less than 50 delegates, a good number sent by their governments, with actual practising lawyers few in number and most of us practising well before the European Union started its involvement in family law affairs. It was a helpful conference but no more. Evidence of the seismic shift that has occurred across European family law in only a couple of years was now found in this conference in Brussels in December 2008. There were over 150 practising lawyers from almost all European Union jurisdictions, and a few from further afield with dual qualifications. Even more encouraging, many were from the younger generation of family lawyers, whose practice will be more European and international than national.

The sessions on the first day were devoted to information provision on what was happening in EU family law. Perhaps the most fascinating was Diana Wallis, a member of the European Parliament who has taken a particular interest in family law matters. She spoke about the Maintenance Regulation and the many good elements it will bring for European residents seeking to enforce maintenance orders across the European Union and further afield. However her presentation was particularly interesting where she explained the areas where she along with a number of other MEPs had hoped that the Regulation might have been extended and could have produced more merits and benefits. She highlighted, in a theme throughout the conference, the sheer political and policy realities of the family law legislation coming from Brussels. There was a lot more which could have been included in the Regulation although she accepted that some might have been controversial in some jurisdictions.

Fernando Pereira, Head of the unit at the General Secretariat of the EU Council dealing with family law matters, spoke authoritatively about the present state of play with Rome III, with the possibility for enhanced cooperation. Whereas some commentators have felt that enhanced cooperation either will not succeed or might have a very limited application, he and a few other (pro applicable law) speakers felt that Rome III might yet thereby be saved, at least for a good number of the European Union jurisdictions. Rome III would have been the EU wide imposition of applicable law in divorce and financial matters, a matter very strongly opposed by a few North West Europe jurisdictions, including Parliaments and family law professions. The question of applicable law was an ever present spectre hovering over the conference room and plenary workshops. It is deeply embedded in the entire consciousness and way of working of many continental European Union countries. Yet it is so thoroughly alien in other countries and will lead to perceived dramatic injustices and unfair outcomes. The conference gave no clue about how the issue will be resolved as far as legislation was concerned. The very gathering of the family law practitioners from many jurisdictions might probably be the key to a realistic resolution, although perhaps not in the fast timetable which the EU in Brussels would prefer.

On the second day of the conference, there were a number of parallel workshops, allowing the opportunity for debate. Frederick Rendstrom of Sweden led a highly informative and thoroughly practical and realistic workshop highlighting the major problems with Brussels II bis pendens, first to issue. There were many contributions from the countries represented. One issue which arose was the quite different interpretation in some countries of key elements of Article 3, the jurisdictional requirements. The very nature of the development of the law by way of appeal hearings in individual cases means that sometimes cases simply cannot or do not go to the final appeal whether nationally or within Europe. Thereby perhaps unsatisfactory decisions of national courts, perceived as out of step with decisions elsewhere in Europe, become the law in those countries pending any appeal in any other case. As a consequence there remain unresolved differences and difficulties of interpretation of Article 3 between European Union

countries. This is a thoroughly unhelpful state of affairs and goes to the whole heart of the Brussels regulation which was intended to produce uniform jurisdiction for divorce across the European Union. It sets practitioners and clients against each other, each trying to follow conflicting national interpretations of international legislation. Brussels II, *lis pendens* and uniform jurisdiction, is a large edifice on shaky and insecure foundations, being opposed by many politicians, family law professions, the media and others. If the edifice itself has internal conflicts and tensions, then it has a very uncertain future. This is in part a great pity as the concept of unified jurisdiction is the only way forward

One of the most lively presentations, clearly touching at the core of the separate professions within France and elsewhere, was by Michel Benichou, a senior practising family lawyer from Bordeaux. He highlighted an issue for civil law professionals and which has been a source of unease and disquiet for many years by common law professionals, namely the role of the notary. He explained that about 95% of the civil law divorce settlements are dealt with by notaries and are not challenged. He explained that notaries had a quasi-monopoly on, for example, drawing up documents, that they are more expensive than solicitors who undertake the conventional representative role and that there was a quota of notaries in that only a limited number could qualify. He said they did not produce certainty nor necessarily guarantee a good outcome. He had other criticisms. He said there was a distinctive benefit and value in documents being drawn up and drafted by a representative lawyer rather than by a notary. He explained that the European Parliament was favourably disposed towards notaries and indeed strengthening and consolidating their role. He said this was very unsatisfactory for clients and for justice. Lawyers from jurisdictions where there is a much more distinctive representative role, each party always having separate independent legal advice from their lawyer, have very considerable unease about the role of the single lawyer acting for both parties, especially for the more vulnerable, weaker, less financially secure party. In such cases where there has been no independent advice, common law countries have tended to give little or no weight to such agreements. It is often difficult to comprehend how one lawyer such as a notary can fairly represent the interests of both parties when there is inherently a conflict in those interests. The sense of the meeting was very supportive towards Michel's remarks calling for a thorough reconsideration of the respective roles of the notary and the representative lawyer, with the call for many more agreements and other steps taken in the division of matrimonial property to be undertaken by the representative lawyer.

This debate led inevitably onto the work of representative lawyers in preparing agreements for clients, such as pre-marriage agreements. Beatrice Weiss-Gout, chair of the group within the European Council of Bars and Law Societies overseeing family law, spoke of a small group being set up to investigate and consider this matter. One of the most useful ways in which family lawyers across Europe can move forward is for standard omnibus precedent agreements, such as pre-marriage agreements or separation of goods agreements, to be created into a small library of precedents; models which can be used across Europe and recognised by the family law professions across Europe as of a particular standard and comprehensiveness. This would make sure that the parties had had the benefit of separate representation and advice and yet also make sure that the drafting was of a good standard. It would incidentally also reduce costs as naturally use of precedents avoids having to recreate the document every time for every case. This was just one illustration of how the coming together of the family law professions from each jurisdiction may be able to make much better and more surer progress in practice than the imposition of unwelcome legislation from Brussels.

Tim Amos QC and Isabelle Rein-Lescastereyres of France led a debate on the divergences and convergences between common law and civil law jurisdictions. Again what could have been a very theoretical debate was based in practicality and realism by looking at several financial case studies which inevitably highlighted the dramatic differences of outcomes between neighbouring jurisdictions within Europe. Whilst European Union jurisdictions are bound together by the *lis pendens* in the Brussels regulation and common divorce jurisdiction, financial outcomes remain as far apart as March 2001. It showed yet again the irresponsibility of introducing the *lis pendens* and common jurisdiction without first having made good progress on financial outcomes across Europe. This session highlighted those

differences. Yet most session participants came away not so much with the very big differences in financial outcomes, which was well known to the specialist family lawyers present, but the convergences in a number of key areas. This was one of the predominant themes coming out of the conference of practising family lawyers across Europe. Whilst the imposition of legislation from Brussels, such as perhaps that anticipated on matrimonial regimes, may be either welcome or thoroughly opposed, the increasing coming together of practising lawyers is tending to create a much better understanding and appreciation of aspects of fairness and justice on the outcome on family relationship breakdown. Naturally there are differences, and some very big differences. However practitioners in one jurisdiction are seeing identical family breakdowns as those in other jurisdictions and there are often only a limited number of practical solutions, especially taking high regard for the interests of the children for the future. Many practitioners across Europe have similar senses of fairness and justice on family breakdown. There was a feeling that perhaps much more progress could be made through the coming together of the family law professionals across Europe and the gradual working out of solutions in practice than the imposition of contentious legislation on jurisdictions.

A final workshop of the day was on alternative dispute resolution led by Rachel Kelsey of Scotland and Emma Ries of London. Emma spoke of the advances in collaborative law and its possible usage in international cases. There were a considerable number of French delegates who were in the process of training. Rachel spoke more generally on mediation and other forms of ADR and how this can be expanded to assist in the international context, particularly taking account of the very important EU Mediation Directive signed in spring 2008 and due for implementation in 2011. It was a fitting end to the conference to look at how in practice matters can be resolved amicably and without the necessity of final court hearings.

There was much information and discussion throughout the conference. It has moved on dramatically from being a poorly attended conference to now becoming a focal point of European family law practice. The networking of practitioners, discussing how particular problems and situations are dealt with day by day in each jurisdiction and sharing benefits and disadvantages, was probably at the heart. It is clearly of fundamental importance that there must be much more coordination and communication between practitioners across Europe, working at all levels, from the wealthy clients and lawyers well represented in the IAML across the spectrum to those pursuing relatively modest maintenance orders and seeking to enforce contact abroad. The European Union family law reformers should take note of the real sense of many lawyers present at the conference that much good progress can be made through working at solutions at such gatherings rather than the imposition, often unwanted imposition, of legislation.

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