



HOUSE OF LORDS

Select Committee on the European Union

Sub-Committee on Justice

Corrected oral evidence: Civil Justice Co-operation after Brexit

Tuesday 25 February 2020

10.45 am

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Members present: Lord Morris of Aberavon (The Chair); Lord Anderson of Ipswich; Lord Anderson of Swansea; Baroness Deech; Lord Dholakia; Lord Gold; Baroness Goudie; Baroness Hamwee; Lord Polak; Lord Rowlands.

Evidence Session No. 1

Heard in Public

Questions 1 - 11

Witnesses

[I](#): Dr Helena Raulus, Head of Brussels Office, UK Law Societies; Mr Christopher Hames QC, the Bar Council; Professor Nigel Lowe QC (Hon), Emeritus Professor, Cardiff University; Jacqueline Renton, Barrister, 4 Paper Buildings.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of witnesses

Dr Helena Raulus, Christopher Hames, Professor Nigel Lowe and Jacqueline Renton.

Q1 The Chair: Good morning, ladies and gentlemen. A transcript will be taken and made public. Witnesses have a chance to review their own evidence before it is published. The session is broadcast live and will be available on the parliamentary website. Members of the Committee should declare any relevant interests. I welcome the very distinguished panel before us and we are grateful to you for your attendance. Two of you have appeared before the Committee before and I am sure you had the same welcome on that occasion when I was not here. We will finish at 12 o'clock, and we have allocated questions. Perhaps you will introduce yourselves in turn to the public.

Dr Helena Raulus: I am head of the UK Law Society office in Brussels.

Christopher Hames: I am a family law barrister practising in international children and finance law. I am also chair of the Child Abduction Lawyers Association and I sit as a recorder in the North Eastern Circuit in the family court.

Professor Nigel Lowe: Good morning, everybody. I am an emeritus professor at Cardiff University. My specialism is child law with a particular focus on international cross-border issues. I am a long-time member of the UK's International Family Law Committee.

Jacqueline Renton: I am a barrister specialising in international children law, and I am a more recent member of the International Family Law Committee.

Q2 The Chair: Thank you very much. Again, I welcome you and thank you for giving up your time. I am sure that your evidence will be extremely valuable.

I will open the batting by asking the first question, which is about the Brussels relationship in our lives. Can you provide examples illustrating the role played by the Brussels regime of EU regulations in the lives of UK citizens? It is a very general proposition which I hope will provide the background to the more detailed questions that my colleagues will put to you.

Dr Helena Raulus: The Brussels regime is more of an ecosystem of different regulations and directives that play a very important role for UK citizens. The Brussels I Regulation is the recognition and enforcement of judgments in civil and commercial matters. Of course, that applies mostly to businesses as it is about commercial law, but it also applies to consumers, so anything like consumer contracts and cross-border litigation would fall under Brussels I.

My distinguished colleagues are much better suited to talking about the Brussels II Regulation on family law, but on the more commercial side I would also like to mention the other directives that have been adopted in the EU, such as the motor insurance directive. That, in combination with the Brussels I Regulation, helps those who are the victim of a motor accident while they are abroad as a tourist so that they can pursue insurance companies in their home courts. It is a big ecosystem of

rules that not only provides the rules covering commercial activities but protects individuals in relation to where they can sue and how those judgments would be recognised and enforced.

Jacqueline Renton: In the children sphere, I can give two examples. One is that of parents who have a divorce in Spain and litigate in relation to their child. The father obtains an access order, known as a contact order, which under the Brussels II (revised) regime can be automatically enforced in England. That allows a streamlined approach and the ability for the father to have certainty of contact, between Spain and England in that example.

Another example is in child abduction. Let us give the example of a child who is abducted from England to Poland. The left-behind parent whose child has been abducted can start a 1980 Hague Convention application, which also has Brussels II (revised) as an EU overlay of that international convention to secure the child's return. If that parent is unsuccessful under one of the defences under Article 13 of the Convention, they have what we colloquially call a second bite of the cherry under Article 11(7) of Brussels II (revised). So even if the parent loses in Poland they have the ability to ask the English court to override that decision and for the child to be returned on a welfare basis. Those are two examples that provide remedies that are unique to Brussels II (revised); they are not replicated in any of the other international instruments.

The Chair: If they fail in one country and then try again in another country, is there anything to stop them?

Jacqueline Renton: No. The regime of Brussels II (revised) specifically allows them to have a second bite of the cherry and to apply. If they then return to secure the return of the child from, in my example, the English court, that can be automatically enforced under the Regulation in Poland. By virtue of that mechanism they secure the return of the abducted child.

The Chair: Is that working well?

Jacqueline Renton: It works well, yes, and it provides a remedy that, as I say, is unique to Brussels II (revised).

Baroness Deech: I wonder whether it is in the interests of the child if a parent can go from country to country trying to overturn the original order.

Professor Nigel Lowe: That is a slight misunderstanding. The override provisions are very particular. You have to have made an application under the Hague Abduction Convention. The abduction court must have said, "No, we're going to refuse the return". That court must then notify the child's home court and give the opportunity in effect to agree a hearing. It is true that if the home court decides to override the refusal, that order must be followed. It is not a carte blanche to go around from one European country after another until you get the right result.

That is a very particular point. In my experience and from the research I have read, the override provisions are not used very often and are not an everyday occurrence. Do not think that you can whizz round Europe saying, “Ah, Poland will give me a return order. If not, I’ll go to Latvia or wherever”. You cannot do that.

Dr Helena Raulus: From our perspective, when you have a Hague regime, which exists in a lot of cases relating to children, you can use the Hague Conventions because they are already applicable, they are there. Then you have the EU regime. The big difference between the EU regime and the Hague regime is speed. A court-to-court action rather than an action through the central authorities is speedier and more effortless.

On the more civil side, this shows its power in another way. Let us say that you have an SME cross-border business that has a dispute to settle. If the business has a judgment from an EU country, that judgment will hold. We have anecdotal evidence that it holds so well that you do not even need enforcement proceedings. You do not need to bring second proceedings in another EU country to enforce the judgment. Companies comply with these judgments because they know that enforcement throughout the EU is automatic.

Lord Anderson of Swansea: Professor Lowe, you said that re-hearings are relatively rare. In cases that are rare, is that the end of the matter or is there an appeals procedure to go back to the original court if there has been new evidence or whatever? What are the procedural positions?

Professor Nigel Lowe: The idea is that the overriding order is exactly that: it overrides everything, no further litigation is possible, and the abduction court in the recipient country has to follow it.

Christopher Hames: The point is that the abduction court will apply the Hague Convention scheme as augmented by the Council Regulation.

On the second bite of the cherry procedure, if it is the English court, the English court decides the child’s best interests, because in this example it will be the English court that has the primary jurisdiction to make that determination. That is why you cannot go round each country until you get the decision that you want.

The Chair: Thank you. We move on to the next question.

Q3 Lord Dholakia: Can I take you to the difference that we saw in relation to the October Political Declaration, which in effect had a single reference to future co-operation on family law? The issue seems to have been completely left out of the Prime Minister’s statement and the Commission’s draft negotiating mandate, which was published in February. What has gone wrong in between?

Christopher Hames: Speaking for the Bar Council, we are extremely concerned about the absence not just of family law but of civil law generally from the October Political Declaration. There are moves afoot by the Bar Council, using its contacts throughout Europe but particularly in Brussels, and I am told that, although I am

only a family lawyer, I can supply further materials to what the Bar Council is trying to do to refocus political attention on that very worrying deficit in the October Political Declaration and, indeed, in other speeches that we have heard since.

Lord Dholakia: Have you taken this matter up with Downing Street yet?

Christopher Hames: I am not sure whether that has been the Bar Council's direct approach. Actually, yes, I think it has. I am told that it has been taken up directly with Downing Street. I can confirm that.

Dr Helena Raulus: The Law Society, of course, is also very concerned about this development.

On the other hand, under the draft European Union mandate—we should see the final version today; unfortunately, I have not seen it yet—there is essentially co-operation in three areas: the general governance provisions on the future institutional relationship and the EU-UK dispute settlement mechanism; the economic relationship, which is based on the FTA—free trade agreement—model; and the security co-operation, which includes criminal law.

If you look at it from this perspective, there is no FTA arrangement that includes civil justice co-operation or family law co-operation. Where is the home for civil justice co-operation or family law co-operation in the big picture model that has been coming through from the UK as well as the EU?

This does not prevent some solutions. The EU mandate, for example—as head of the Brussels office, I am much more familiar with that process—says what can be negotiated as part of the EU-UK agreement. However, there are other conventions that can be used to bridge some, but not all, of the gaps. In civil and commercial law in particular, it is the Lugano Convention. The Lugano Convention does not need to be in the EU mandate because it is a separate, self-standing convention that can be agreed between EU/EFTA states and the UK, should they all agree.

Lord Rowlands: Could you identify for us some of the major sticking points that you have seen which would make an agreement difficult? There is the question of jurisdictional issues and the role of the Court of Justice, which the Government do not like.

Professor Nigel Lowe: That is a difficulty. Staying with the revised Brussels II Regulation, of course the overseeing court is the European Court of Justice, and, as you have just said, the UK does not really like that. I have to say that, from a family lawyer's point of view, that court has behaved extremely well; it has interpreted the Regulations sensibly, and it has done so very quickly. So it is a matter of regret, but we cannot deny that if we stay with Brussels Regulations the final court will be the Court of Justice.

Lord Rowlands: Would the European Union move on that issue?

Professor Nigel Lowe: It is extremely unlikely. The only possibility, if we stuck with it in family law is if we could invent a new family division of the Court of Justice that has a British member on it, although I do not see why they would agree to it.

It is possible, and I would have thought that, if we were negotiating, that is something we could ask, but whether we would want it or they would do it I do not know.

Dr Helena Raulus: This is not only about the Court of Justice, which is often used in a simple manner. From the EU side, it is also about how they can change, update, modernise these regulations. As internal market legislation goes forward, so does civil justice legislation. If the UK had simple access to these, it would also have to negotiate provisions to negotiate to change them. That is why, from a legal perspective, something like the Lugano Convention works a lot better; it is because the international mechanism for changing the regulations already exists, should the parties want them changed.

In that sense, the ecosystem built by the European Union and the United Kingdom in the European Union will continue to be built in the EU. The question here is how to govern and interpret that ecosystem.

Christopher Hames: From the family law perspective, the Lugano Convention would not work as well as the existing Council Regulation systems, particularly with regard to the jurisdictional issues that you mention. I see a particular difficulty in divorce and in children work; there may be jurisdictional rules, but then who is to decide between competing jurisdictions? The husband in a couple may be French and the wife English, and they can both get divorced, one in France and one in England.

At the moment we have Article 19 of the Council Regulation, which provides a very clear mechanism for resolving that dispute. I have not seen any published statutory instrument that will deal with that. It may be that we apply the old common-law rules that we apply with non-European Union countries that provide for discretionary stays, but there is a real difficulty there.

As for the CJEU in family law, the Supreme Court almost inevitably pays great respect to the decisions and the judgments in the CJEU, so on a practical basis it is difficult to see how our law will diverge greatly in the interpretation of family law in this particular field. There remains the question which court will authoritatively rule on these competing jurisdictional issues, which is a real concern.

Q4 Lord Anderson of Ipswich: I declare an interest as a practising barrister and a former member of the Bar Council's Brexit working group.

We have heard from both the Bar Council and the Law Society some concern that issues of continued participation in this Brussels ecosystem may have fallen between the cracks when it comes to the negotiating priorities of the parties. I wonder whether that is particularly on the civil and commercial side.

Perhaps this question is mostly for Dr Raulus, since your ear is to the ground in

Brussels. Has the assumption developed that we will all settle for Lugano? I think Norway, Iceland and Switzerland indicated recently that they would be happy for us to join the Lugano system, which just leaves Denmark and the EU to go. If there is an assumption that Lugano is the answer, I would particularly value any further comments that you might have—it was very useful to hear from Mr Hames—on its adequacy or otherwise on the civil and the commercial side.

On the maintenance side, my understanding is that there is provision in Lugano to cover maintenance-related claims, but how far is that an adequate substitute for the Maintenance Regulation?

Dr Helena Raulus: Let me put it this way. Even Lugano is not granted at this point. There is a discussion going on. We do not know what the European Union thinks. We know that the opinions coming from the European Union point to the direction that Brussels I and the Brussels ecosystem are linked to the Single Market.

Whether that is the case for Lugano we do not know, because the parties to Lugano are only the countries that are in the Single Market. We would argue that this is not the case: you can invite other parties to join in with Lugano. It is a process whereby the Lugano parties invite others to the negotiation and then all the parties agree to the accession of that state.

In the case of the United Kingdom, I see that the EFTA states have indeed already given their invitation and it would almost be a missed opportunity if it is not taken into consideration at this point. Given how short the time period for the negotiations for the next stage is, and if we do not have a clear indication of civil justice issues being part of the negotiation agenda in the EU/UK FTA, Lugano is the logical next step.

We are hearing from our members that it is not as good as Brussels I, of course, which is the so-called gold standard. However, for civil and commercial matters, Lugano can achieve the continuing recognition and enforcement of judgments in the EU-EFTA area. That is important because, without it, civil and commercial law would fall fully under national law. It will be possible to enforce UK judgments in some countries, but it is much more complicated and much more costly for the parties to have exequatur, to have appeals through the process and to get those judgments verified and accepted in courts.

In other countries, it will no longer be possible to enforce UK judgments without a bilateral agreement, and that is where the Lugano Convention will become almost the logical next step if we have one year to negotiate something. We recognise that it is more cumbersome and its procedures with regard to *lis alibi pendens* are not as good as with Brussels I. It has gaps, and we worry about those gaps in family law, in divorces in particular.

As such, the first instinct should be to ensure that there is a mechanism to revise the convention. There are then mechanisms to work within the Hague Private International Law conference on further co-operation, and with the EU on further

co-operation. But let us say that if civil justice co-operation is not part of the negotiation, Lugano should be the next step.

Lord Anderson of Ipswich: Just before we leave civil justice, may I ask a supplementary? Is it right that the United Kingdom has bilateral treaties with six countries for the enforcement of its judgments: Austria, Belgium, France, Germany, Italy and the Netherlands? I am looking at a paper by David Wolfson QC, who says that it may well be the case that enforcement in those six countries alone will meet the needs of the vast majority of commercial disputes. Do you subscribe to that view?

Dr Helena Raulus: I am aware that the Netherlands-UK convention is valid and applies, because it still applies to certain parts of the Netherlands Kingdom that do not belong to the EU. In Germany, a German lawyer told me that this convention has been overridden by statutory law.

Essentially, the answer is that it may be, but we do not know whether these conventions can be revived and whether they are, as it were, alive in both countries. As you say, that would resolve the position in six countries out of 31, if we include the EFTA states. The most problematic countries are the Nordic countries where there is no enforcement of judgments without a bilateral convention. As the EU has exclusive competence in this area, following the Court of Justice's opinion on the Lugano Convention you cannot make any new bilateral conventions either.

So what we have here is essentially the necessity to reach some kind of agreement with the EU if we want to have continued recognition of the enforcement of judgments.

The Chair: Before we move on, do colleagues have any brief comments to make on this issue?

Jacqueline Renton: Not in the civil context, no.

Christopher Hames: I find that in the family context the maintenance regulation works well. It provides a workable and comparatively cheap mechanism to enforce maintenance in this jurisdiction. There is nothing like it in Lugano, even if it were to come into force in all the relevant countries. I will mention Ireland in particular, because there are a lot of families in the UK who have close relationships with Ireland, so that is another country that needs to be considered if we are going to deal with this country by country. The Maintenance Regulation has provided a gold standard and it would be far preferable if something like it could be negotiated.

Q5 **Lord Rowlands:** We have already touched on some of these issues, but if alternative arrangements cannot be made, how significant will the loss of EU legislation be for the UK? Will it be felt more in the field of civil commercial law or in family law?

Jacqueline Renton: In the field of international children law, there will only be a loss. Everything that has come out of the European Union has been aimed at further protecting children and families, so the positive overlay of the European law will be

lost. In some respects, some of it is replicated by the 1996 Hague Convention, which was the predecessor to Brussels II (revised) anyway, but there are some important differences that we could perhaps discuss more in due course.

However, some things are completely lost, including the overlay of protection by the EU law for children who have been abducted, given its speed and certain safeguards that are put in place to ensure that things are more streamlined as well as some aspects of the enforcement of orders and some aspects of jurisdiction.

On a more conceptual level, there are obviously significant issues when we talk about what the law would be in terms of sovereignty and the Government's priorities in that respect. However, in EU law, family law, as distinct from civil and commercial law, is very much more procedural as opposed to substantive. So, ultimately, the law is still normally applied and interpreted by the domestic court. Probably only a handful of cases have ever gone to the Court of Justice of the European Union in international children law or in the divorce sphere, because ultimately it is our court that normally interprets it. That is really important when we think about how we would take the European law that is so positive and protects children and families going forward when we think about post-transition as compared with how it may be able to be approached with the more substantive aspects of civil and commercial law. That is because it is quite different in practice.

Professor Nigel Lowe: I would prefer to come back to this when we look at the 1996 Hague Convention on the protection of children. That convention will do some of the work of Brussels II, but as Jacqueline has just said it does not do it all.

In answer to your general question, I would have thought that we should very much care about the protection of our families, particularly children who are caught up in cross-border disputes. You cannot really quantify it, but it is an important loss.

Lord Rowlands: Take maintenance, for example. Anyone who has dealt with maintenance orders knows what a headache they can be; they can become nightmarish. Whereas the Maintenance order Regulation under the EU law has worked really very well because it is the gold standard. What can we put in its place?

Christopher Hames: There would have to be some protocol or agreement with as many of the other European Union states as can be achieved.

Lord Rowlands: But you will have to negotiate with each individual state.

Christopher Hames: If you could not work with the European Union as a whole. There is no reason in principle, or conceptually, why there could not be some bilateral reciprocal maintenance regulation process or protocol between the European Union on the one hand and the United Kingdom on the other. That would be preferable, but if that was not possible I suppose it would have to be done bilaterally with the countries whose citizens have most contact with the United Kingdom; I have already made the point about the Republic of Ireland.

Lord Rowlands: Could we remain in the maintenance order, even if we do not remain in the other two?

Christopher Hames: The Maintenance Regulation is a European Union instrument, and it requires reciprocity, so it could not just be repeated in UK law; you would need to have some arrangement with the European Union so that our maintenance orders are recognised and enforced there and theirs are recognised and enforced here.

Lord Rowlands: So at the moment it remains in our law. We have retained all these regulations in our law and there is retained procedure. If that carries on and there is no agreement in January, would it be worthless?

Christopher Hames: It would mean that someone here could not go to a European Union country to seek to enforce a maintenance order made by an English, Welsh or British court.

The Chair: Coming back to the earlier question, that would have to be negotiated, obviously. There would have to be negotiations to fill that gap.

Christopher Hames: Yes, there probably would, and some thought would also need to be given to the role of the CJEU, I suspect.

Dr Helena Raulus: In family law, it is indeed possible to have bilateral constructs, unlike in civil and commercial law. There is a specific EU regulation allowing EU Member States to form bilateral agreements with third countries, which could be a very useful mechanism. The Commission will need to be informed about this, but in most cases—Poland and the Baltic States, for example—it could be possible, if nothing is included and if we have Lugano and the maintenance provisions there prove inadequate, which is a bit of a hypothetical debate at this point: as we discussed earlier in the corridor, we do not actually know how the Lugano maintenance provisions would work; there are very few examples on that.

By contrast, in civil and commercial law it is an exclusive EU competence; you need EU agreement, or you need EU agreement to go bilaterally. This is the consequence of going back to the 1950s or 1960s in enforcement processes. If the Lugano Convention is not there, this area is not governed by the Hague Conventions in any adequate respect.

The only thing we have on the civil and commercial side is the Hague Choice of Court Convention from 2005. However, even that starts applying only from the point when the UK becomes an independent member, so only the choice of court agreements agreed after that date fall within the scope of that convention. So we have a truly big gap there where we fall fully under national law. That is why we are very concerned, not for big business but for SME and consumer activity. Arbitration is always a possibility, but how many businesses currently in cross-border dealings with Europe will be able to do arbitration at this point? We do not know, because these tools are available.

Lord Anderson of Ipswich: Picking up on that and on Lord Rowlands' question, if I may, Dr Raulus, you I suppose represent to some extent the English legal profession in Brussels, including the large solicitors' firms. Can I put to you a view that has been expressed by some quite distinguished people, for example Professor Adrian Briggs, that if we lose Brussels I and do not even get Lugano, and are thrown back on the common-law rules, so far as jurisdiction is concerned we would be doing ourselves no harm at all, and indeed might even benefit, because under the Brussels I Regulation, as you know, one is normally bound to sue a company in the place where it has its seat—whereas without the constraints of Brussels I, it would be open to the English courts to apply their much more inclusive long-arm jurisdictional rules. To put it bluntly, we would end up with more litigation in London and in the UK generally. What is your assessment of that argument?

Dr Helena Raulus: It depends, because jurisdiction is only one part of the game. What you actually want to achieve is the enforcement, and if you fall under national law you can face a lot of procedural obstacles. Particularly if you are using long-arm jurisdictional rules, you can face procedural obstacles in the enforcing country. What is the value of a judgment if it cannot be enforced? This is the question we keep asking, and it is why, for the Law Society at least, continuation in Brussels I and Lugano would be far preferable—because essentially it allows the UK judgments to keep their value in Europe.

These procedures are easy, effortless and cheap, which means that a much wider variety of business can continue to engage in cross-border business without fear of litigation or without what happens as a consequence of litigation.

Lord Gold: Following up on Lord Anderson's question, this in effect is a matter of bargaining, and I would have thought that our ability to take jurisdiction where at the moment we cannot might be a little worrying to the EU. What we have been discussing—I am sorry I was a little late—is papering over the cracks. The key issue is why we cannot agree the present regime for the future.

As I see it, the simple answer is who determines where there are disputes. The role of the European Court is a very big issue. Bearing in mind what commentators think are quite strong negotiating positions for the UK, how far do you think the European Union would move in agreeing an ad hoc, maybe arbitral, arrangement—a panel? It is not beyond the imagination to think very easily of a system of dispute resolution that would certainly be acceptable to the UK, but would it be acceptable to the EU? In which case, all this stuff about whether Lugano works or not we do not need to worry about. The rest of it should not be terribly contentious, as I see it.

The Chair: Any brief comments on this before we move on?

Dr Helena Raulus: As I said earlier, it is not simply about the Court of Justice; it is about how to modernise the Regulation in the context of the EU—it is about the whole environment of how to change, enforce, interpret those rules. We focus quite often here on the Court of Justice, but it is not about that; it is about the EU's ability to decide how this framework is developed further.

On that Court of Justice point, the Law Society has published a paper stating that, as the UK is no longer a member of the European Union and no longer has judges in the Court of Justice, it should not be the Court of Justice that decides the interpretation of those rules, whatever the agreement. That has never been agreed with any other state either. The EEA agreement, which is the agreement that goes furthest, the EFTA Court and the EFTA Surveillance Authority do not fall under the jurisdiction of the Court of Justice. Similarly, Switzerland has no link to the Court of Justice. There has been protracted negotiation about it, but it does not exist.

We have therefore proposed alternative models, and we would be very happy to send them to the Committee if you would like to see them again.

Q6 **Baroness Goudie:** Recently, the President of the Family Division warned that the UK's family courts are experiencing the highest recorded volume of private law cases, many involving litigants in person. What impact will the loss of BIIa and the Maintenance Regulation have on the UK's family court system?

Jacqueline Renton: I would have thought there was the potential for more delay. It has taken a while for Brussels II (revised) to filter through into the mindset of lawyers and judges, and it has now become a very workable piece of legislation. But for the 1996 Hague Convention, which was really the main replication for the Brussels II (revised) that we would use on a day-to-day basis, it is all very new.

I imagine that it will take judges and litigants some time to get a handle on the 1996 Hague Convention. If you throw into the mix litigants in person in that context, I imagine that it will take even longer for there to be a proper resolution, which in particular in a children's case is totally inimical to a child's welfare because every piece of law, whether it is domestic or international, mandates a swift resolution so that a child has certainty about the future.

When we go down the route of leaving Brussels II (revised), if that is what happens, more legal training at all levels will need to be put in place by the Government so that at least the judiciary is as familiar as possible with the 1996 Hague Convention. Then, faced with a novel convention or a difficult point of law and two litigants in person, let alone two legally represented parties, they will be able to sort out a case and deal with things as swiftly as possible.

The other point is that there are obvious gaps in legal aid, so enforcing an order under Brussels II (revised) has means and merits-tested legal aid. There is no legal aid to enforce an order under the 1996 Hague Convention. That is just one example. But obviously the absence of legal aid is only going to compound the issue of people appearing in person and then compound the delay as well. But, hopefully, those are gaps that could be plugged relatively easily by the Government, given adequate funding.

The Chair: The growth of litigants in person is a general problem that is perhaps exacerbated in family law because of the absence of legal aid.

Jacqueline Renton: In some areas, yes.

Professor Nigel Lowe: I thoroughly endorse what Jacqueline has just said. The 1996 Convention has not been tested, because we have relied on the Regulation, so everything will have to be tested again. In the short term, there is likely to be quite a lot of litigation and, given the nature of things, a lot of litigants in person. Given that, I wholeheartedly agree with the points that have just been made.

Baroness Deech: I read somewhere that the majority of children who are abducted are not taken to the EU but to the United States and Pakistan. What happens in those places? There must be procedures for dealing with that.

Professor Nigel Lowe: You would rely on the 1980 Hague Convention, but let me just give my view of the statistics. About two-thirds of all our abductions are with fellow EU Member States, and a lot of those are from eastern Europe. It is true that when we deal with the USA, Canada and Australia, we rely solely on the Hague Convention. In abduction terms, we can contend with the 1980 Hague Convention. We lose the supplementary provisions, but we do a lot of that ourselves.

Coming back to Lord Gold's point, you have to accept or understand that, particularly in the field of family law, you are talking about co-operation. It is not just a matter of looking to the EU Court of Justice for a settlement of certain disputes. The UK may be able to make an order, but will Belgium follow it? That is the beauty of having these co-operative instruments, and at the moment I would say that Brussels II does the best job. But if we do not have that, we will have to look to some of the alternatives. The penalty of doing that is that they will have to be tested.

The Chair: Following Baroness Deech's question, what is the volume of abduction cases within Europe as opposed to outside Europe? Are there any figures for that?

Professor Nigel Lowe: From my studies of 2015 applications, I would say that over half of all abduction cases under the Hague Convention are within the EU on both sides. From the EU's point of view, the UK is a big player. It has a lot of cases—whether that is a good or a bad thing, I do not know—so our absence will be felt. As far as abduction is concerned, everybody will still use the basic 1980 Hague Convention, but it will operate slightly differently if Brussels II does not apply.

Q7 Lord Polak: We are now discussing the question that I was going to raise. Jacqueline Renton, earlier you referred to the loss of the provisions dealing with child abduction. I hear what you say about the 1980 Hague Convention, but will anything replace these provisions? Are there any other instruments of international law other than what you have just mentioned to deal with this? How adequate is the alternative? I ask that, because child abduction cases need to be sorted out in a timely way. These are children who are in danger. Is there going to be a gap or will something fill it?

Jacqueline Renton: The first point to make is that there is nothing that replicates the child abduction rules in Brussels II (revised), but it is fair to say that some of it is incorporated into our domestic law anyway. It is things that we would do in any

event. We are objectively very developed in our jurisprudence, and often our jurisprudence is relied on by other states, so as Nigel says we are a big player in that respect.

I can give four examples. The overriding provision that we discussed earlier—the Article 11(7) second bite of the cherry provision—is not replicated anywhere.

We have what we would call the assumption of protection under Article 11(4). In a child abduction case, you look at whether the child can safely go back to the other country if a grave risk of harm defence is raised by the parent who is being abducted from. We have assumptions in that we assume that Spain or Portugal could protect the mother or father and the child. That is not replicated, but we pay respect anyway to all states that are signed up to the Hague Convention because the point is that they have signed up to this international convention, so there is comity. However, we still have to assess what the protection is. That perhaps is a small difference.

There are certain provisions that would be bolstered under Brussels IIa recast as well in terms of hearing the voice of the child, but we do that anyway as part of our UNCRC obligations and as part of the general thread of how our domestic law has developed in terms of enfranchising children. That is Article 11(2).

Article 11(3) is the six-week rule, which is a very important reminder to the Hague court that you have to get on with things very quickly. In any event, the Hague Convention mandates things being got on with very quickly. From a practitioner's perspective, we normally talk about the six-week rule, whether we are Brussels II (revised) or not, because we are urging the judge to remember that they are dealing with a case that mandates a quick resolution.

So there are some losses, but there is a silver lining in the sense that it is what we would do anyway and how we have developed our law.

Lord Polak: Can I make this much more practical? Is there going to be a problem for a particular child who is in danger, whatever the situation may be? When all this takes place and we lose that, will it make it worse for the child? Will any individuals be in more difficulty as a result of this?

Christopher Hames: Any child abducted from a European Union state will be in a more difficult position after Brexit than before, but it is fair to say that that child will be in the same position as a child from a non-European Union country that is still a signatory to the Hague Convention, the abduction convention. That extra protection, those extra devices and processes—the second bite of the cherry, as Jacqueline has explained—will all be lost to a child from Ireland, from France or from another European Union country.

Dr Helena Raulus: From the Law Society perspective, we know that this entails longer procedures. When procedures are longer, we have discussed whether it is in the interests of the child to be returned if the procedure takes so long that the child

has essentially already been established or has become resident in another country. These are the issues that will be lost, but the position will be the same as it is under the 1980 Hague Convention framework.

Lord Anderson of Swansea: Understandably, we are dealing with formal legal instruments: protocols, conventions, regulations and so on. However, a range of informal contacts have developed between judges that allows for greater speed and so on. I recall Baroness Shackleton, who presumably many of you will know, telling us about this. She said that she could simply pick up a telephone and contact her counterparts in other countries. In your judgment, is there a danger that these sorts of informal arrangements, which can be of such great benefit to a child, might fall away?

Jacqueline Renton: You will lose the traditional European network post Brexit, which is a wonderful tool for all the reasons you have set out. It allows for co-operation on a level that this sort of international law mandates and which really helps families and children to reach a proper resolution.

However, it would be possible to put in place something similar; to have a judicial network with the UK and with the European Union. You would have thought that we would be able to construct something like that. We in this country have international judicial liaison with other countries—with America and so on—but it is all very ad hoc and it runs through our judicial office. But we should be able to construct something. It would also be possible to think about constructing something similar for all the signatories to the 1996 Hague Convention so that you would have that network.

Lord Anderson of Swansea: Obviously it would be in the interests of children if that were to happen. Is it your judgment that there is good will on the part of the judiciary in other EU countries to facilitate the continuation of such arrangements?

Jacqueline Renton: I don't think I can speak for other judiciaries but certainly our judiciary is very keen as I understand it because we have always promoted international judicial liaison as a country

Christopher Hames: Wearing my CALA hat as its liaison officer, we are seeing a German judge, as well as lawyers from Poland and Bulgaria, who will come to our next meeting to be held in London. I have spoken at a conference organised by LEPCA, which is an association of European abduction lawyers, and I will speak to a European Union-funded workshop in Milan next month—hopefully. At the lawyer level there are a lot of these informal arrangements, but the real issue is the loss at the judicial level.

Lord Anderson of Swansea: It has to be underpinned, in any event, by conventions and formal legal instruments.

Professor Nigel Lowe: There is a Hague judicial network as well, but it is not as well resourced as the EU. I would have thought that one thing we could negotiate is

continued membership of or at least access to the European Judicial Network. Since 1 February, we have had access to the portal, so we know what is going on, but we do not attend meetings. I would have thought that this was something we could negotiate and indeed that we should negotiate.

In answer to your general question, there is a lot of good will among the judges, because of course they recognise that, in the field of child law, that is the way to deal with children as best you can. It is an apolitical thing, but it is not the best organisational way of working. You are quite right to emphasise this area, and in my view it would be a serious loss if we just abandoned the EJNI.

Q8 Lord Anderson of Swansea: I have distracted myself. In 2018, Professor Bailey-Harris warned us that, “We are not just talking about reciprocity and international cases ... [Article 3 of the BIIa] is our domestic divorce law, the court of first call, and similarly with the Maintenance Regulation, whether it is a case with an international dimension or not”. What steps have the Government taken to address the situation described by Professor Bailey-Harris?

Christopher Hames: Parliament has legislated in regulations for establishing or re-establishing jurisdiction both in divorce cases and children cases. There are rules and there have been amended rules. But as far as I can see, what has not been provided for is where you have a dispute over which state has jurisdiction, whether that is in the area of children law or divorce law. That has to be looked at.

Lord Rowlands: Does the EU agreement cover any of the issues that we have been talking about?

Jacqueline Renton: No.

Dr Helena Raulus: No, none of the free trade agreements include anything about civil judicial co-operation and family law co-operation.

Christopher Hames: Canada is in the 1980 Hague Convention, but that is all.

Q9 Baroness Deech: My question has pretty much been covered. It is about whether the Hague child convention will fill the gap and what problems you anticipate. We have heard quite a bit from you about that, so what I have been thinking about follows on from what Lord Anderson and indeed Lord Gold have said. Are there not anxious lawyers, judges and families in Europe worrying about what will happen if their children are abducted over here? Surely we have exactly symbiotic relationships. They must be desperate, if they care about children—and we have to assume that they do as much as we do—to conclude agreements with us.

I have also read the papers that we have been given by Adrian Briggs and David Wolfson from which the message is that things will not be that bad. I would like to know whether you agree about that. What do you think the Europeans are worrying about? The other thing I have read about, which I had not heard of before, is the ‘Italian torpedo’. Apparently, this means that there is now a rush to be the first one to serve the papers. If we leave Brussels, there will be a more moderated decision

about where proceedings should be started. I am trying to look at this from the other perspective, and I wonder if you have any comments to make on it.

Lord Gold: They can sink the torpedo.

Dr Helena Raulus: My comment is about the negotiators understanding the issues involved. The problem is that we have so many live issues in the negotiations. To look at this from the Brussels perspective, the Law Society office in Brussels has engaged with several business stakeholders and several Member States, our European Bars, in a multilateral as well as a bilateral manner. We keep talking about these issues, but there are so many big picture issues at stake in these negotiations. This is often an area which the businesses involved do not know about—who will have to pay the bills, essentially.

This is not an area which the negotiators who are looking at the different types of FTA arrangements know about either. I take this view because I did my doctoral studies on the area, but this is an area that even lawyers do not know very well. This is partly because it works so well and it is not problematic. In civil and commercial law, as I said earlier, it works so well that often enforcement proceedings are not even brought in another country, or the companies simply comply with the judgments without relying on those European regulations.

Baroness Deech: Sure, but I am worried about the children. Surely they are worried about the children.

Dr Helena Raulus: Yes they are, but they see this as one part of the big sea of loss, and they regret this, but they do not understand where this fits in the architecture of things. As I said, there is the FTA type of relationship that limits the possibilities for co-operation. There are discussions about security arrangements and criminal law that may be the door to it in the future.

Christopher Hames: I have no doubt that other European lawyers will want to put in place the same reciprocal arrangements that are currently in place with the Council Regulation and the Maintenance Regulation, because, as it says on the tin, it is all about reciprocity. For every French child in England who is affected, an English child in France will be.

Jacqueline Renton: Conceptually, I worry that family law is under the umbrella of civil justice and that civil justice is so much part of all the other issues with trade and commercial that family law is just seen as a small part of that, when actually it should be conceptually very clear that it is completely different, because the ramifications of it going wrong are arguably, dare I say, much more significant than a trade deal going wrong.

Baroness Deech: So our message should be, “Treat the family separately”.

Jacqueline Renton: Absolutely.

Christopher Hames: It does not have the political heat, may I suggest, of other issues involving trade.

Lord Rowlands: Practically, but that again will have to be negotiated.

Professor Nigel Lowe: Yes, it will, but practically it seems to me that there would be good will to take the advantages of Brussels II and try to come to an agreement on how you operate the relevant Hague conventions. As I see it, that meets our red line, because it does not follow EU law directly and it will not be subject to the Court of Justice. It is in everybody's interest to operate these conventions for the benefit of families and children in particular, so there is scope to negotiate. Whether there is time is another matter.

Lord Gold: I would go beyond that to the whole thing, actually. It seems to me that if both sides truly want to find a solution to this, there are more difficult things in the world to negotiate. This is possible. We have a system that has been working extremely well, and I would have thought that if effort was made to deal with the issues that stem between us, as long as that good will lasts we should be able to achieve that. But maybe I am naive; I do not know.

Professor Nigel Lowe: We can achieve it only if we put it on the agenda.

Jacqueline Renton: Absolutely.

Christopher Hames: Absolutely.

Lord Rowlands: Why do you think Ministers have not put it on the agenda? They must be conscious of the issues of family law and the problems of children; they are not oblivious to these issues. Do you have any idea why they are not making this a priority or a central piece of the programme?

Dr Helena Raulus: As far as we know, the priorities are not set. We are waiting to hear from the Prime Minister what the priorities are, but at the same time we are of course engaging very strongly on including civil and commercial matters as well as family law in the programme.

Q10 **Baroness Hamwee:** This is a sweep-up question, but it follows on precisely from which other areas of co-operation on civil justice we should be getting into. I wonder if I can tack a couple of other things on to this. Listening to you talking, if I were a practitioner I would be quite anxious about getting my head around—I think that was the term you used—or maybe getting a handle on, all this in time. How I would advise clients, I just do not know, and I would be grateful for any comments that you have on that.

Finally—it is bad practice to sweep all this up together, but you can pick and choose, if you like—have we lost sight of the importance of the UK, or I suppose England and Wales, as a market for legal services, and should we be thinking about that in this context? Perhaps we should not; I do not know.

Dr Helena Raulus: As this is about civil and commercial justice, our key focus at the moment is indeed on Lugano. It is one of the things that the UK Government should be asking, because we know that the EFTA countries are willing to have a conversation with both the UK and the EU about the UK's continued participation.

It would be beneficial in many ways, because it would prevent a gap in application between different regimes. If we move to a new form of convention, there would be a gap between the judgments in the old regime and the ones in the new regime, and this could be a way to tie quite a lot of the judgments together and move them to the Lugano side, so to speak.

Yes, there is the 'Italian torpedo', which is the *lis alibi pendens* rule in Lugano, which existed in Brussels I at the time and which says that if two courts are in conflict over which should start the proceeding, the first court will need to decide on its jurisdiction before the second court can proceed. If we have a choice of court agreement that clearly indicates the second court, why do we have to wait for the first court? In Italy, it can take quite a while. In Brussels I, this rule has been set aside. It still exists in Lugano, but it is a minor inconvenience that could be tackled once in the Lugano Convention. It is not the gold standard; the Brussels I is the gold standard. But if that is not in the negotiation, we need to look at Lugano.

I would like to amend my earlier statement a little and say that there is something else in civil and commercial justice, the 2019 Hague Judgments Convention. I quite often do not think about it simply because it has not yet been ratified by a single country. It opened up for ratification in July 2019. If Lugano cannot be achieved, that could be another mechanism to solve multilaterally the question of the recognition and enforcement of judgments in civil and commercial matters.

We prefer Lugano, because we know how it operates and it is the same argument given by Professor Lowe earlier. It takes a while before we know how new conventions operate. This is not yet operational, so we do not know exactly how the enforcement will happen. It has some serious gaps. IP law judgments and competition law judgments are not included in it. We also worry that once you have that convention, other forms of deeper co-operation with the EU are no longer possible because of the conjunction clause that is included in Article 23.

We implore the UK to ratify all of these, but in the right order. Lugano will need to be sought first, and after that we would look at the Hague Judgments as well, because that would open up the recognition and enforcement of judgments to a broader global context.

I shall finish by saying that whatever we can get would be good, because all these provide tools for lawyers who are seeking the most efficient solutions for their clients. That is what the Law Society is interested in: making it possible to have arbitration, litigation and mediation within the right context. All of these provide the tools which lawyers can tailor to fit a particular situation, and of course making that enforceable is the important thing here.

Lord Anderson of Ipswich: Colleagues have made a compelling case for the logic of maximum participation and integration on both sides. You have given us some rather discouraging answers about the classic trade agreements, but can you tell us how that logic is played out in the context of association agreements—for example, with Turkey, and perhaps most relevantly in the context of Switzerland, which in some ways looks like being the closest comparator to how the UK is going to be. One would have thought that there was an extremely strong logic there for applying all these instruments to Switzerland. How has that worked out in practice? I am thinking particularly of the family law side.

Dr Helena Raulus: Switzerland is in Lugano on the civil and commercial side.

Lord Anderson of Ipswich: But not on the family law side.

Dr Helena Raulus: No.

Professor Nigel Lowe: Switzerland is in the Hague conventions that we have been talking about. We operate the 1980 abduction convention with Switzerland without any supplementaries—as we do with Denmark, incidentally. It is also in the 1996 Convention, as indeed are all the EU Member States, so there are alternatives.

Lord Anderson of Ipswich: But they are not in Brussels IIa. And what about the European Judicial Network, which you mentioned? Is there space in that for somewhere like Switzerland?

Professor Nigel Lowe: My understanding is that they can be invited to go to it, but only as observers. There is some precedent for non-EU members to attend. That is all I can say, I think, on that.

Q11 The Chair: Thank you very much. Is there anything you wish to add that we have not covered? We have had a very informative and educational session this morning, and you have illustrated the gaps such as the need for further negotiations, with a particular emphasis on the importance of family law. That will create enormous difficulties unless we have the proper machinery in place.

Jacqueline Renton: I would like to add that if family law is not put higher on the agenda and we simply run out of time, given how important the changes are going to be, if there is a way of continuing with the transitional arrangements for longer for that so that proper thought separate from the other areas of civil justice can be given to how it would actually work could only be beneficial, because a significant amount of work could be done to make things as helpful to families and children as possible. I worry that if we are the tail end of the negotiation, those provisions will simply be lost and we will be left in a situation of having been one of the main players in this area to falling down the ladder in what we can offer by way of legal protection in family law.

Christopher Hames: I see no reason in principle why agreement should not be reached with the rest of the European Union, because it is self-evident: we all have children. It should not be controversial.

Perhaps I may add something on the technical level. I should have said in answer to a question from Lord Rowlands that there is another international instrument in the field of maintenance, the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, which the UK is a signatory to. The European Union is also a signatory to it, but it does not apply within the European Union.

The Maintenance Regulation built on this convention, but as far as I am aware it is completely unknown in the UK. We would have all the difficulties with litigants in person who are trying to pursue maintenance claims having to come to grips with a wholly different and distinct process. For the sake of completeness, however, it is another potential model that could be looked at to try to achieve some sort of reciprocal arrangement with the European Union.

Professor Nigel Lowe: I will just make a final point that augments what Jacqueline has said. The recast Brussels II Regulation does not come into force until August 2022. That gives us a window. Taking up Jacqueline's point, it could give us a little extra time for family matters, because it makes sense in European terms up to August. It would mean that it does not fall down a hole. I think the point we have all been making is this: please put it into the negotiations, because it is too important to leave out.

Dr Helena Raulus: My final comment is "Mind the gap". Essentially, if we need to move from one regime to another, that will create a gap. It will introduce a lot of complexity for the litigation that is happening at that point. Having transitional and bridging provisions will be extremely important in this area.

The Chair: Thank you very much for the evidence that you have given today. Obviously, we will have to think about it and make our report in due course. This has been a very valuable session. Perhaps I may ask Mr Hames one question. Does the Bar Council still have its office in Brussels?

Christopher Hames: Yes, it does.

The Chair: I actually opened that office. My private secretary took me to Paris on the wrong train and we had to race back to Brussels to get there on time. We arrived in good time, and I am glad to know that the office is still there.