

Select Committee on the European Union

Justice Sub-Committee

Corrected oral evidence: Brexit: civil justice co-operation and the CJEU

Tuesday 17 January 2017

11 am

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Members present: Baroness Kennedy of The Shaws (Chairman); Lord Cromwell; Baroness Hughes of Stretford; Lord Judd; Baroness Neuberger; Baroness Newlove; Lord Oates; Baroness Shackleton of Belgravia.

Evidence Session No. 5

Heard in Public

Questions 29 - 37

Witnesses

I: The Rt Hon Sir Mathew Thorpe, associate member of 1 Hare Court; The Rt Hon Sir Richard Aikens, member of Brick Court Chambers.

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Examination of witnesses

The Rt Hon Sir Mathew Thorpe and the Rt Hon Sir Richard Aikens.

29. **The Chairman:** Welcome. How very nice to see you both. I am very grateful to you for giving your time to come and give testimony before us. Given your great experience, I know that it will be invaluable. I will start by saying that the session is open to the public, although they do not seem to be crowding in. A webcast of the session goes out live and is subsequently accessible on the parliamentary website. The transcript that is made of the evidence will also be put on to the parliamentary website. Before that is done we will send it to you and you may change anything that you feel is incorrect. Please let us know of any corrections as soon as possible. If you leave thinking that you forgot to mention something that you think is important, do not hesitate to send it through in a written form and we will add it for inclusion in our report.

You are well known to us all here, but please introduce yourselves for the record.

Sir Mathew Thorpe: I am Mathew Thorpe and my expertise is in family law, both domestic and international, but particularly international.

Sir Richard Aikens: I am Richard Aikens. My expertise is in commercial law, particularly cross-border commercial law. Having sat in the Court of Appeal I now work as an arbitrator, and it may be of interest to the Committee to know that I am also one of the contributing editors to *Dicey, Morris & Collins*, the leading textbook on the conflict of laws. I am responsible for the chapter on jurisdiction.

30. **The Chairman:** Thank you very much indeed. I will start this session by asking your views on the importance of the Brussels I recast, the Brussels IIA Regulation and the Maintenance Regulation. Can you in answering give us some examples of the ways in which they have had an impact?

Sir Richard Aikens: On the Brussels I recast, I know that the Committee does not particularly like the rather boring names, so I will call it BIR, if that makes a welcome change for you.

The Chairman: I am not sure that helps at all. I have a vision of the viewing public sitting on their sofas thinking, "What?"

Sir Richard Aikens: BIR has a sort of "Star Wars"-like feel to it, which is perhaps a little more encouraging. It is very important. It is not just concerned with commercial cross-border disputes; it deals with all civil and commercial matters, so it can deal with anything, such as a dispute that arises out of, let us say, a car accident on a motorway in France involving English or Polish passengers. The question is: where are you going to resolve the dispute that arises, if there is one, about whose fault it was and which insurance company is going to pay for the damages that ensue out of this unfortunate accident? BIR also has provisions for

dealing with consumer contracts, with personal employment contracts, and with insurance matters. It goes right across the board.

Essentially, Brussels I recast is a set of rules for deciding which courts in which country of the member states of the European Union will resolve civil and commercial disputes in the wide sense that I have described where there are cross-border issues. That is to say that it is not just France, Britain, Poland or whatever that is involved but the kind of mixture that I mentioned a moment ago. So it is very important and it goes right across the board. It does not deal solely with commercial disputes, as I said. I can give you many other types of example, but the motorcar accident is a straightforward one.

The Chairman: Sir Richard, one of the witnesses who came before us suggested, although he is pretty alone in this, that we could all fall back on the common law and that it would do us just as well. Do you share that view?

Sir Richard Aikens: No, I do not share that view. With respect, it is not right to call it the common law anyway. Rules for dealing with a case that you want to bring in England and Wales but the defendants are outside the jurisdiction was dealt with until the Brussels Convention by rules of court. They are not common-law rules as such; they are rules that have been made by statutory instrument since the 19th century. They have evolved—that is true—and they have evolved through case law, but in fact there are rules of court that govern them.

It is true to say that if the time comes when we leave the EU and we have not resolved the issue of whether or not we should carry on with some kind of arrangement that is BIR, we could go back to those rules of court; or we could change the rules of court and simply embody the existing BIR in the English rules of court. That would not be very satisfactory, because the whole point about BIR is that it is not just to deal with jurisdiction; it is to deal with the recognition and enforcement of judgments. That, to my mind, is the most important part about it.

In short, you could go back to rules of court, but it would not be satisfactory, it would create an enormous amount of uncertainty, and for all areas of the law it would not be helpful.

The Chairman: Sir Mathew, your field is different. What do you feel about the Regulations that impact on cross-border family matters?

Sir Mathew Thorpe: There is so much to be said in favour of this Regulation that I would weary you if I covered all the points that seem to me to be relevant.

The Chairman: Time is not with us, so if you could loom in on one of them, that would be helpful.

Sir Mathew Thorpe: Let me start by saying that international family law pre-Brussels rested on the Hague Conventions. There is the oft-heard argument that if we lose the Brussels Regulation we still have the Hague

Conventions. That is a fair point, but it does not recognise that when Europe decided to regionalise family law and to put in place a European regime that takes priority over the Hague regime, it had the laudable ambition to achieve better justice for European citizens where the issues cross the border of member states. The Regulation has been broadly successful in the fields of dissolution of marriage, parental responsibility, enforcement, recognition and local authority co-operation, but it is important to take note of the process of recasting that is now under way.

It is very significant that the United Kingdom has opted in to the process to recast the Regulation, because there is no doubt that the Commission's proposals for recasting will result in a stronger modernised Regulation. With the experience of 10 years, we see the deficits in the Regulation introduced in 2005. There is a general commitment to meet those deficits and introduce improvements. That is a very important point: to take note that the recasting of the Regulation will result in a much better instrument. We are part of the process of negotiating that improvement.

The point I really want to make, which may not be so self-evident, is that in family justice, unlike in other areas of litigation, the job of the decision-maker—the judge, the court—is to arrive at a welfare decision. It is seldom about applying or interpreting law. During the course of my judicial career we established that achieving good results depends upon interdisciplinary collaboration. When we move into international cases, that remains true, but in a sense it is even more important because it is even more difficult. Of course, interdisciplinary collaboration in a domestic scene is relatively easily directed and achieved. However, it is obviously more difficult if you are trying to ensure that a judge in, say Ipswich, and a judge in Gdansk are talking to each other and working collaboratively. It is even more so if you need collaboration between the social services in the English locus and those in the foreign locus. What has been so important, which is not generally known or recognised, is the achievement of the European Judicial Network, which has been fundamental in promoting this interdisciplinarity through its regular meetings.

The ancillary point is that Europe has the money to fund those meetings. The regular meetings of the EJM would be completely beyond the budget of the Hague, which struggles on meagre funds. The EJM has been extremely helpful to the Hague conference in taking on joint projects such as a shared conference. The EJM provides the money and the Hague provides its expertise. We have gained hugely from the development of collaboration through the EJM at a judicial level, at a central authority level and at all levels of expertise. It would be a great loss if that were to go.

The Chairman: We have seen the tabloid press suggest that judges taking part in any collaboration with judges in other jurisdictions of the European Union somehow makes them *parti pris* in the great political debates. There seems to be a mythology out there, promulgated a lot by

the media, that somehow law all comes at Britain from Europe in a great wash. To what extent do both of you feel that Britain played an important role in the development of European Union Regulations and law?

Sir Mathew Thorpe: The evolution of European family law in the last 15 years has seen the United Kingdom in a very privileged position. When something is proposed by the Commission, we have the option not to take part in the negotiation and to avoid being bound by the result. But at the same time we can sit back and watch the negotiation. If the product of the negotiation is something that ultimately we think tolerable, we can opt in. That really is having your cake and eating it. As a result, quite a lot of developed European family law that we have not liked the look of we have not negotiated and have not been bound by. And sometimes we have abstained from negotiation but in the end decided that it was all right—the Maintenance Regulation is a prime example of that. Thus there is a section in the corpus of European family law that we chose to adopt and another section that we chose not to be part of.

31. **Lord Judd:** I have a very basic political question following what you said. I take very seriously the UN Convention on the Rights of the Child. That gives us a responsibility in all our legal and administrative matters to give primary place to what is best in the interests of the child. In the interests of the child, I ask you directly: would it be better for us to stay where we are rather than go off on an adventure on our own?

Sir Mathew Thorpe: One of the great developments in my judicial career was the elevation of the importance of the United Nations Convention. Earlier in my judicial career, if counsel came in and said, “Well, I’m relying on the Convention”, the answer would be, “But it’s not part of our law”. That has completely changed, so that now we all recognise that it is as effective and important as if we had incorporated it into domestic law. That is equally recognised in the making, application and interpretation of European law.

The Chairman: Sir Richard, is there anything you would like to add from the commercial side?

Sir Richard Aikens: The position with regard to the Brussels I Regulation is different, because we started off with the Brussels Convention in 1968, which was, as it were, a ready-made thing before we joined what was then the EEC. We agreed to that, but it was not something that we had any particular part in. We have had input subsequently into what became Brussels I in 2000-01. There was a great deal of input into the moulding of the BIR in particular, and the changes that were made, from British lawyers and judges. I will not name any names, but some very distinguished people among the judiciary and lawyers took a lot of time and trouble to put, as it were, the British position. Of course, ultimately it is a European Regulation and it emanates from Brussels—from the Council and the Parliament—yet the final result owed a great deal to British input.

However, I will add something in relation not to jurisdiction but to two EU Regulations concerning applicable law where you have elements of, say, the UK, France or Germany and the question is which law will govern the substantive dispute. Will it be English, French or German law, whether it is contract or tort? Again, the two Regulations are given very boring names: Rome I and Rome II. They came into force in 2009, and, again, the British input into those was considerable. So although, formally speaking, they come from Brussels and might therefore be said to be imposed by Brussels, in fact they are very much the result of input by the United Kingdom. Particularly in relation to contract, in fact, they are very much modelled on the English common-law rules that existed for many years beforehand.

32. **Lord Oates:** You clearly set out the significance of these Regulations. Are there specific aspects of them that you would be most concerned to lose when the UK leaves the EU? What would you regard as absolutely essential to retain in any new regime?

Sir Richard Aikens: I think the importance is in ensuring that judgments will be recognised and enforced across Europe. If they are not, even if you have a jurisdiction system that appears to work it is a major disadvantage if a judgment is produced by an English court that cannot be enforced in other European Union states. That also works the other way of course: French or Italian judges will want their judgments enforced in the UK. After all, we have the City still sitting there, and often in commercial cases many assets are based there. There may be an insurance company with such assets in the type of car accident case that I talked about a moment ago. You need to enforce this. So in many ways the most important aspect is ensuring that there is what is described in the Regulations as the "free movement of judgments". Perhaps that is not a very happy phrase, but you know what I mean. It means that it is actually of some use to you; you can do something with it and use it.

The Chairman: I think it might be best to invent something new.

Sir Richard Aikens: So that is what I think we must aim to keep.

Lord Oates: And in the family law field?

Sir Mathew Thorpe: In family law, it is also true that the enforcement of orders is absolutely crucial. It is no good obtaining a judgment here in London in relation to contact with children in Spain if that is not enforceable in the country of habitual residence. One of the proposals in the recasting of the Regulation is to extend the area of automatic enforcement and do away with the burden of *exequatur*, which has been the tradition in many civil law jurisdictions heretofore. Recognition and enforcement are crucial.

Lord Oates: I have one follow-up question. In other, non-EU jurisdictions, for instance in Commonwealth jurisdictions or with the United States, what enforceability of judgments do we have? Is there an alternative model?

Sir Richard Aikens: Yes. There have been statutes that are the result of international agreement for the enforcement of judgments with various different countries, particularly in the Commonwealth, since the 1930s. In other countries such as the United States it much more difficult to do so. Equally, the standard way of trying to enforce United States judgments in this country is that you must bring a separate action on that judgment. That gives rise to some difficult problems, as I can recall from various cases when I was at the Bar. We do not have an international system of enforcing judgments that is more widespread than the existing EU system. There is some in place, but it is in no means worldwide. We cannot fall back on that.

33. **Baroness Shackleton of Belgravia:** I think my question has largely been answered. Will we be poorer if we divorce ourselves from the European justice system? Can either of you think of any positive reason why we would be better off if we were divorced from this system and opted out?

Sir Mathew Thorpe: There are contrary arguments. To begin with, there is presently the loss of competence to recognise accessions to Hague Conventions because the European Union says, "Well, that is within our area and therefore individually member states cannot act. We must act collectively, all or none". That has been an irritation that would be removed. Arguably, the Court of Justice of the European Union looks at issues of international family law with too regional a perspective. It would not pay heed to decisions, for instance in relation to the 1980 Hague Convention, reached by the Supreme Court of the United States. The whole process of developing the law of the Hague Conventions is founded on the collective wisdom of the appeal courts of the world, and not just a regional court.

You could also mention simplicity. At the moment, practitioners must decide whether they are using a European Regulation or a Hague Convention, or how the two interact. Of course, if you got rid of European family law we would simply apply the global law. There is also an argument that our Supreme Court would have a freer hand to participate in the process that I already described of the development of the law of the Hague Conventions.

So, yes, there are contrary arguments, but if you put them in the scale pan the weight comes down heavily against them in favour of what we have.

Sir Richard Aikens: In the civil and commercial field there are perhaps three aspects to this. First, under BIR, and the whole history of Brussels since it started, there is a history of creating a system of fixed rules for jurisdiction: that is, where you go to decide the matter. There is precious little, if any, flexibility in it, whereas the common law, through the rules of court, had for many years the doctrine—I am sorry; it is Latin—of *forum conveniens*. I do not know whether that means anything to the Committee, but in other words, "Where is it actually sensible to have the dispute tried"? It might look as though it ought to be tried in England

because it is an English contract, but if all the witnesses are in Germany and so on and so forth, maybe it is better to have it there. There is not that element even in BIR. There is just the tiniest inkling of it in relation to third-party states other than EU ones. That is certainly something that we have lost and which we would regain.

Baroness Shackleton of Belgravia: May I ask a question? Judges in the Family Division are now deciding this at a lower level from the beginning of proceedings. They are not necessarily super-trained in that argument, because we run a first past the post system to choose jurisdiction. Will there not be an immense practical difficulty in international cases taking up more of a court's time, with people less able to deal with them?

Sir Mathew Thorpe: There is an argument that the Brussels rules to establish jurisdiction in areas of divorce are crude, because it is simply a case of first seised. When this was proposed, practitioners in London said that this could not be wise, because it would impact upon negotiation and mediation and people would rush into court and not try to resolve their disputes consensually. However, it has the huge advantage of clarity. Forum conveniens ruled before, and I think both of us remember cases that involved a great deal of expensive litigation, admittedly for people who could well afford it, in trying to establish which court was the more convenient. Of course, even if the litigants can afford all the expense it still takes up court time.

The Chairman: Sir Richard, I will go back to you, because you had three points that you wanted to make.

Sir Richard Aikens: There were two others, very briefly. The first is the fact that under the BIR regime the English courts have been prevented from using the kind of weapon that was used to try to prevent people from evading choice-of-court clauses, the so-called anti-suit injunction. Say the parties agreed to try cases in the English courts but, by way of example only, an Italian party thought, "That's not a very good idea. I'm going to start it in the Italian court". Before Brussels, the English court could issue an injunction against the Italian party, saying, "You're prevented from doing that. You must stick to your contract". The European Court of Justice said, "No, the English courts can't do that. That's wrong. It's for the Italian court to decide whether or not that should go ahead". So that weapon was lost, and a lot of people have said that it would be a very good thing if we could have it back, because it is useful not only in relation to court cases but in relation to arbitration. It is perhaps more useful in arbitration than in anything else. That is the second aspect.

The third is the European Court of Justice. It is, with great respect, not very good on private international law. I am not alone in saying that; Professor Adrian Briggs, who is an expert in this area and has written books on the Regulations and so forth, has said on many occasions that it is not at its best in dealing with private international law. So not having that impediment might be a good thing.

34. **Lord Cromwell:** My question is to both witnesses and is business-of-law related. The experience of Brexit is creating a lot of uncertainty as to which rules will be used for cross-border dispute resolution. The suggestion has been made to us that it will lead to business bleeding away from London to other centres. Is that your view? Who will benefit from that? One of our previous witnesses mentioned, for example, English-language courts being set up in Holland, Germany and elsewhere. Do you have any anxieties, if I can call them that, or views on that?

Sir Richard Aikens: I have heard the same thing said by more than one person. There could be a problem with uncertainty, but ultimately the question is which court you regard as the best for deciding your substantive law disputes. In many cases, particularly in commercial cases, the parties have decided that they want their disputes resolved by English law and by English courts. It is very difficult to get around that. The only problem might be if they wondered whether, having got the judgment, it would be difficult to enforce it somewhere. Usually they choose English law and English courts because it is likely to be enforceable easily enough in the United Kingdom. The fact that there is uncertainty has led to a number of other countries saying that they may be able to jump on this. It would be difficult, though, unless it is resolved in accordance with Dutch or German law, because you then have the problems of having evidence or lawyers who are versed in the English law from dealing with it in a court.

On the other hand, English courts also deal with cases that involve foreign laws. Both Mathew and I, I am sure, have had to look at foreign laws on occasions and decide foreign-law issues. Ultimately, however, the beneficiaries might actually be the arbitrators. I have heard it said in City law firms and elsewhere that all this can be avoided if you put an arbitration clause into your contract. You can specify arbitration in London, Geneva or wherever, have whichever law you want, there can be no question about it, and you can enforce it under the New York Convention, which deals with enforcement of arbitration awards, and there is no problem.

I think uncertainty will create some anxiety, but that the remedy is really quite simple: get on and make sure that you do a deal. Frankly, it is not beyond the wit of sensible and rational people to do a deal, and two years should be plenty of time in which to do it.

Lord Cromwell: Let us hope that we have an abundant supply of sensible and rational people, in that case.

Sir Richard Aikens: Well, I know. They have to be found somewhere.

Lord Cromwell: Sir Mathew, in family law, where perhaps people do not sign contracts and write in which jurisdiction will apply, how do you respond to the question that I put?

Sir Mathew Thorpe: I do not think that your question has much response in family law, because the rule that is becoming almost

universal is that habitual residence determines jurisdiction. If the child is resident here, that is that. A big distinction between Richard's field and mine is that in family law we never apply foreign law. Applicable law provisions that have been rooted in the evolution of European family law have always been a no-go line for the UK. If we see that a coming European Regulation requires the court to apply, say, Turkish law or Saudi law, we do not want it; in family law we apply only our own law, the *lex fori*.

35. **Baroness Neuberger:** What do you think the alternatives are for post-Brexit UK co-operation with EU member states? Do the Danish model or the Lugano Convention offer any alternatives, and might those alternatives be any kind of adequate replacement for what we have at present?

Sir Richard Aikens: I think the best model is actually the Danish one. I can see no difficulties with it except one: what will be the position of the Court of Justice of the European Union?

Baroness Neuberger: Exactly.

Sir Richard Aikens: I am sure the starting point would be that if you are going to have that model, the CJEU must be the court that interprets, so if there are any issues on interpretation of BIR or its development, it has to be subject to the CJEU. That might be a red line on the political front.

Baroness Neuberger: Absolutely.

Sir Richard Aikens: Indeed, I would have reservations about that, as you have already gathered. I think the answer is to do what is being done with Lugano and the non-EU states that are party to the 2007 Lugano Convention. It is interesting, because there in effect you have two systems. If an EU state is involved, and it is the EU state that raises a question as to the interpretation of Lugano, it has to go to the CJEU. If it is a non-EU state, it does not have to send things to the CJEU; it is just bound to have regard to the CJEU's decisions on the interpretation of Lugano.

My argument would be that if you can do that with Lugano, why can you not do it with BIR and say that the UK courts must have due regard, or whatever phrase you like to put in, as with the Human Rights Act and Strasbourg decisions, to the decisions? The normal position would be that UK courts would follow what the CJEU has said on things unless they thought that the decision was barking, in which case they would say, "With due respect, that cannot be right and we will go our own way". Again, if everyone is rational about this, and having seen the example of Lugano, why cannot we do this? Perhaps I am being overoptimistic.

Baroness Neuberger: Given the Government's apparent objection to any role for the CJEU, you might be being overoptimistic, or perhaps you think they could take that position.

Sir Richard Aikens: I think the sensible position is the one I advocated: namely, that you accept that you must have due regard to it. Frankly, even if you do not have anything in the legislation, the British judges would immediately look at what the CJEU has said in the past and would be inclined to follow that or at least have the greatest respect for it, unless they thought it was barking. It would happen anyway.

The Chairman: Sir Richard, it seems as if this option finds most favour when one talks to practitioners, once it is acknowledged that this is the direction of travel. I just wondered whether Sir Mathew agreed that Lugano might provide us with some way forward.

Sir Mathew Thorpe: From a family law perspective it is important that the global Convention is the 1980 Hague Abduction Convention. Brussels II revised imported all that, so European states are actually applying the 1980 Convention. The only article in the Regulation that effects the 1980 Convention is Article 11, when the European nations agreed what was in effect a European protocol to the 1980 Convention, which was designed to enable it to work more smoothly in the European region than it would outside the European region. The 1996 Hague Convention on child protection was largely taken as the model for the other parental responsibility provisions in the Brussels Regulation. So if we were to do away with the Brussels Regulation we would fall back on the 1980 and 1996 Conventions because every member state has acceded to them. So I think we are in a slightly different position—

The Chairman: —in family law.

Sir Mathew Thorpe: If you will permit, I will make two small points in relation to the management of the European regime. First, the Hague Conventions are in effect fossilised the moment they are negotiated internationally and come into being. The 1980 Regulation, 36 years on or whatever it is, has never been amended or revised because there is simply no process for amendment or revision. Contrast Brussels II, which in Article 60-something or other mandates a revision process in 2012, although it has taken all those years beyond. That demonstrates that in the smaller, regional community there is the capacity to revise and improve Regulations with the advantage of experience of their operation. That is one point.

The other small point is that the European Union has been very effective in judicial training and the development of judicial expertise through the creation of a sort of core of specialist judges in international family law. The money that it has made available over the 10 or 15 years is very considerable. We have hugely benefited from it, and the Hague can do nothing comparable.

The Chairman: If you could deal with this briefly, what role do you see for the CJEU in family law post-Brexit? That is the piece of this. There is the very strong repeated position that we want nothing to do with the Court of Justice. The model that is being suggested by Sir Richard is that we give due regard to decisions that come out of the Court of Justice.

Would that work for the family area?

Sir Mathew Thorpe: I would say yes. Richard criticised the standard of judgment in conflict of laws. I know little about conflict, so I would accept all he said. Yet in family law the quality of the judgments of the Court of Justice of the European Union has been uniformly high. We benefitted from its exposition on a fundamental issue: what do we mean by habitual residence. Although that is a universal term, nobody ever gave it statutory definition. We have brought our domestic concept of habitual residence into line with the concept developed by the European court.

36. **Baroness Hughes of Stretford:** You both suggested ways in which in practice the UK could accommodate the withdrawal process from the EU and still maintain some of the advantages of these Regulations, having due regard and so on. On the day we are to hear something about the Prime Minister's priorities in the negotiations, first, do you think that there will be a focus on these issues in those priorities? Secondly, what strategic approach would you advise the Government to adopt in trying to get to a satisfactory resolution in terms of the benefits to citizens in maintaining some of the advantages of the Brussels Regulations and so on? Will this be somewhere in her list of priorities, and how would you advise her to go about negotiating these issues?

Sir Richard Aikens: It is obviously very difficult for either of us to have any indication of where in the Prime Minister's list of priorities issues of cross-border disputes concerning civil and commercial or family law matters will sit. All one can say is that, with the movement of people, whether it is free or not free, and with trade with Europe both being as evident and important as they are, it is inevitable in the civil and commercial sphere that there will be cross-border disputes of all sorts. I am sure that the same must be true with family disputes as well. To dismiss from your priorities list the question of how we are to deal with cross-border disputes seems to me to be, with respect, irrational, so I hope that it is on the list somewhere.

Certainly so far as the civil and commercial aspects of that are concerned, plenty of bodies have been putting the importance of this under the noses of civil servants and politicians over the last six months. COMBAR, for example—the Commercial Bar Association—focused on this and wrote a report on it. The judges got a committee together under Lord Justice Hamblen that also produced a report on it. So it is there on the relevant desks, and I hope attention is paid to it.

How can we assist in putting this forward in any negotiations? It should not be too difficult to organise within a short period of time, so why not say that this is one of the things that we can deal with quickly if we concentrate on it? Then you have something in the bag. It must be a good idea for both sides to have agreement on that. That should be the approach.

Baroness Hughes of Stretford: This is a specific question to Sir Mathew. You mentioned that we are in the middle of a recasting process

on the Regulation, that Britain has opted into this and that this will involve some necessary and positive modernisation of the Regulation from the experience of using it as it is. I do not know the timescale for that recasting process. Are there any implications, either for triggering Article 50 or for the ongoing negotiations that will ensue, of our continued involvement in that recasting process and the outcome of it?

Sir Mathew Thorpe: The point is that Brussels II revised, which we have been talking about, is moribund. It is in the process of dying a death. Phoenix-like, it will be replaced by a new Regulation. So it would be completely pointless for us to hold on to the existing Regulation, because by the time we Brexit nobody else in Europe will be operating it; they will all be operating the recast Regulation.

The Chairman: The question is really: when will the new version come into being, and will it be before the two years is up for negotiation?

Sir Mathew Thorpe: If anyone had the ability to forecast the timescale of negotiations in Europe, they would be—

The Chairman: Well said.

Sir Mathew Thorpe: The point is that the consultation preceding the Commission's proposal was extremely extensive. What they proposed, last June, is the product of an immense amount of international discussion.

The Chairman: It included British lawyers and judges.

Sir Mathew Thorpe: The process of discussion of very detailed, concrete proposals has started. How long will it take? I would guess somewhere between 12 and 18 months.

The Chairman: But it might be one of those things to which, when it comes into being, we might find ourselves giving due regard.

Sir Mathew Thorpe: My guess is that it will be in operation while we are still members of the Union, and we will operate it as such.

The Chairman: Lord Judd, you wanted to come in. You might want to incorporate your question.

37. **Lord Judd:** First, this has come up before with previous witnesses. You are talking in rational language and very pragmatically about things as they are and as they might be. We are unfortunately operating in a completely irrational, emotional and post-truth environment. Are you confident that those doing the political negotiations of the deal will want to understand what you are saying, will understand what you are saying, and will act thusly, or will they reject it as just a lot of sentimental nonsense?

Sir Richard Aikens: That is an almost impossible question for me to answer, because, first, I do not know who will do the negotiations in this area. Secondly, even if I knew who they were, I would probably not have

a very big insight into what drove them. You must be correct in assuming that those who enter the negotiations are unlikely to have experience of dealing with this sort of dispute and to understand the importance of having a system to deal with it, as others might. That is a shame, but it is perhaps practical. In the old days when you had international negotiations on Conventions, where it was to do with family law or commercial law, you had British judges sitting there in the conferences and Conventions that dealt with and finalised these things, doing the negotiations. Maybe that is what we need for this specific area, whether it is family law or commercial and civil law. I think the answer is that there will have to be an education process. I hope that one can, by education and persuasion, demonstrate that it is no good being emotional, irrational or post-truth about it; you must deal with the world that is actually there. Perhaps I am being too rational.

Sir Mathew Thorpe: I have an anxiety as a rare individual whose professional life is centred on international family justice: how on earth will this seem to be of any importance to the politicians who must negotiate the big issues? Even the future of Brussels II could depend on the future of Brussels I. To the Government, Brussels I will be much more important. So I have an anxiety. But there is, here in London, the international family law committee, chaired by Lady Justice Black, which has among its members senior civil servants from the Justice, Education, and Foreign and Commonwealth departments of state. Hopefully, there will be a filtering through of the consensus reached amongst the specialists and experts on the committee to the departments. I just hope so. My plea is: do not overlook the importance of European family law.

Lord Judd: Some of us would say that wider wise experience is terribly important. Would you both want it on the record that you believe that not only must these things be tackled and solutions found to the point you are underlining but that it is perfectly feasible to do that within a reasonable period of time?

Sir Richard Aikens: I would want that on the record, because it is my strong belief that it is feasible to do it in a reasonable time.

The Chairman: Thank you, Sir Richard. Lord Judd, do you want to ask anything else?

Lord Judd: No, I have covered the ground.

Baroness Neuberger: I want to pick up on something you both said. You both sung the praises of the European Judicial Network. Assuming a Lugano Convention-type approach, what is the implication for British membership of the European Judicial Network after Brexit? How does the UK then play any useful part in the European Judicial Network, which you obviously both admire? Can we do so?

Sir Richard Aikens: I suppose, logically speaking, that it would be up to the remaining 27 to say that they still want to work with British colleagues. My experience of dealing with European colleagues—from

both EU member states and, more particularly, from Council of Europe states, because I was the British representative on the Consultative Council of European Judges for a number of years—is that they are always keen to get the UK point of view, which they like to call the common-law point of view. I do not see why that would change unless there is the feeling, “Well, you rejected us, so we will reject you”. I hope that would not be so among judges, who are there because they are meant to be rational, sensible people.

For my part, I hope that that kind of co-operation and co-ordination could remain. In the end, comparative law, seeing how other people do it, enriches your own law, which must be to everyone’s advantage. I have written an article about Brexit and jurisdiction which I will give your officials the reference for. I will just say what I said at the end of it, quoting from Lord Goff, one of the greatest jurists on conflicts of law. He was talking about jurists, the academics if you like, but it applies to everyone: “Jurists are pilgrims with us on the endless road to unattainable perfection; and we have it on the excellent authority of Geoffrey Chaucer that conversations among pilgrims can be most rewarding”.

Baroness Neuberger: That is brilliant. Thank you. That is really useful.

The Chairman: It is tempting to end on that, as pilgrims on this journey—all of us.

Sir Mathew Thorpe: I would see a real difficulty in relation to family law, because the EJC operates in this way: it will formulate an agenda for a coming meeting, member states will look at that agenda to see whether it touches them, and if it does they will be there. If there is a family law item on the agenda, it could be in relation to the Maintenance Regulation, but if it is in relation to Brussels, Denmark will not go to the meeting. It would be completely pointless for Denmark to do so, because it does not operate the Regulation. We have to be involved in the black law to participate and benefit from the EJC.

Baroness Neuberger: That is very helpful.

The Chairman: May I thank both of you for an invaluable session? Your wisdom has been really helpful to us. I remind you that if there is anything you want to add, please send it to us in writing. We are really grateful to you for giving your time and thought to these difficult questions. Thank you so much.