



Brexit and family law; the English & French perspective

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Speakers



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Introductions and areas discussed

- 🌍 Briefing Presentation on the position in England and Wales for family law on leaving the EU
- 🌍 To be read in conjunction with the briefing presentation on the perspective from France by Delphine Eskenazi
- 🌍 Acknowledgement to ThoughtsLeaders4 for this conference and discussion
- 🌍 Whilst there may be EU/UK agreements on transitional arrangements and common membership of Hague conventions, there will be a number of matters where the practice and application of the law will be fundamental for cross-border families
- 🌍 For more read '*Family law leaves the EU: A summary guide for practitioners*' by David Hodson, LexisNexis

What was happening?

- 🌍 Original intention of Prime Minister Theresa May and Withdrawal Agreement 2018 was for the EU acquis, the existing EU statute and case law, to become part of English National Law
- 🌍 Parliament would then decide over coming years which laws to reject and replace
- 🌍 Fundamental problem that international laws rely on reciprocity and mutuality
- 🌍 Unless the EU agreed to reciprocate, having within English law would be meaningless and frustrating
- 🌍 Dramatic difference with Withdrawal Agreement 2019. EU laws would continue to apply in all cases instituted in or before 2020

What is happening?

- 🌍 Left EU on 31 January 2020
- 🌍 Implementation/transition until 11 PM 31 December 2020
- 🌍 Present (existing) EU laws continue during that period incl CJEU decisions. No change in law or practice
- 🌍 At 11 PM 31 December 2020 EU family laws cease to be law in the UK (with one exception, domestic violence)
- 🌍 UK has no power to enter into international treaties, laws or accessions during implementation period in 2020
- 🌍 UK has no involvement in any EU law changes in 2020

What is happening?

- 🌍 Withdrawal Act 2020, Articles 67 – 69, provides that EU law, particularly recognition and enforcement around the EU for UK orders and in the UK or EU orders, continues in respect of all matters where proceedings instituted on or before 31 December 2020
- 🌍 This is Brussels II, divorce and children, and Maintenance Regulation, needs-based orders
- 🌍 Any lawyer in the EU wanting to rely on EU laws in a UK/EU member state case should institute proceedings before 11 PM on 31 December 2020. If so, this provides for jurisdiction including forum. Moreover recognition and enforcement will apply to orders subsequently made
- 🌍 There may be some cases where it is beneficial to delay until 2021

What is happening?

- 🌍 Three primary areas: divorce, maintenance/needs (but what is happening about other financial claims) and children
- 🌍 Component features always to be considered:
 - 🌍 Jurisdiction
 - 🌍 Forum
 - 🌍 recognition and enforcement
- 🌍 Whilst England regards jurisdiction and forum separately, EU laws consider together
- 🌍 New national provisions from 1 January 2021

Key dates on UK/EU relationship

1 January 1973	UK joins the EU
1 March 2001	Brussels II
1 March 2005	Brussels II bis
1 January 2010	Lugano 2007
18 June 2011	Maintenance Regulation
10 January 2015	Brussels I bis
11 January 2015	Mutual recognition of protection measures in civil matters Regulation 606/2013
23 June 2016	EU referendum
16 March 2017	EU (Notification of Withdrawal) Act 2017
19 October 2019	Withdrawal Agreement 2019
12 December 2019	General election
23 January 2020	EU (Withdrawal Agreement) Act 2020
31 January 2020	UK leaves the EU at 11 PM
31 December 2020	End of implementation period at 11PM; EU laws cease to have effect
1 January 2021	UK member of 1996 and 2007 Hague Conventions in our own right

Jurisdiction and forum: divorce

- 🌍 Existing position
- 🌍 Divorce jurisdiction in national and international cases found in Art 3 Brussels II plus residual basis: identical in law across the EU although not always applied the same way in practice
- 🌍 Divorce forum in intra-EU case: lis pendens, the first to issue, the race to the divorce court

Jurisdiction and forum: divorce

- 🌍 Transitional provisions
- 🌍 Final divorce orders already made will have priority on forum under Brussels II
- 🌍 If divorce application made in 2020 and identical application made in 2021 in a UK/EU member state case, priority given to the first in time

Jurisdiction and forum: Divorce

- 🌐 Jurisdiction from January 2021 found in national law
 - 🌐 both parties to the marriage are habitually resident in England & Wales;
 - 🌐 both parties to the marriage were last habitually resident in England and Wales and one of them continues to reside there;
 - 🌐 the respondent is habitually resident in England and Wales;
 - 🌐 the applicant is habitually resident in England and Wales and has resided there for at least one year immediately before the application was made;
 - 🌐 the applicant is domiciled and habitually resident in England and Wales and has resided there for at least 6 months immediately before the application was made;
 - 🌐 both parties to the marriage are domiciled in England and Wales; or
 - 🌐 either of the parties to the marriage is domiciled in England and Wales

Jurisdiction and forum: divorce

- 🌍 Sole domicile is now an equal basis
- 🌍 Ministry of Justice resolved conflict in an interpretation of the EU law by taking the more generous approach, making it easier to bring proceedings in England and therefore better for parties with any English connection. This will produce conflicts
- 🌍 All national cases: no change

Jurisdiction and forum: divorce

- 🌐 Forum from January 2021: closest connection, forum non-conveniens
- 🌐 Same as existing law with all non-EU countries
- 🌐 Discretionary and therefore can have risk of higher costs
- 🌐 Perception of fairness
- 🌐 A number of direct problems are likely in practice; when England takes proceedings second in time although closest connection, when France takes proceedings although second in time but first in the EU, the use of anti-suit injunctions

Jurisdiction and forum: maintenance

- 🌍 In EU speak, maintenance means needs based provision. EU law totally separates needs and sharing. The UK is not a party to any EU law on sharing provision. Maintenance means more than just periodic payments
- 🌍 Jurisdiction found in EU Maintenance Regulation: primarily based on habitual residence but also ancillary to divorce and children proceedings. Not allowed if only sole domicile
- 🌍 Forum is again first to issue, *lis pendens*

Jurisdiction and forum: maintenance

- 🌐 Transitional provisions
- 🌐 Final maintenance orders already made will have priority on forum under Brussels II
- 🌐 If maintenance application made in 2020 and identical application made in 2021 in a UK/EU member state case, priority given to the first in time
- 🌐 If maintenance application made in 2020 and application made in 2021 in a UK/EU member state case in respect of a related matter e.g. other financial claims, the court second in time has discretion to stay proceedings to allow the first in time to deal with all matters

Jurisdiction and forum: maintenance

- 🌍 The position from January 2021
- 🌍 Jurisdiction: depends upon the nature of the proceedings
- 🌍 Ancillary to divorce: follows divorce jurisdiction
- 🌍 Part III MFPA 1984, financial order after foreign divorce, reverts to pre-2011 position: domicile or 12 months habitual residence at the time of the divorce or application, or interest in a matrimonial home here
- 🌍 Sch 1 CA: against parents if any of following our habitually resident or domiciled at date of application namely parent, guardian, special guardian, person named in child arrangements order or the child
- 🌍 Other distinctive provisions e.g. s27 MCA

Jurisdiction and forum: maintenance

- 🌍 Jurisdiction will change dramatically if the UK joins the Lugano Convention has the UK has asked and so far the EU has refused
- 🌍 Won't now happen on 1 January 2020
- 🌍 Perception that jurisdiction in Lugano Convention is incredibly complex and complicated

Jurisdiction and forum: maintenance

- 🌍 Forum from January 2021 again depends upon the proceedings
- 🌍 Ancillary to divorce then follows divorce forum; no distinctive provisions for needs-based orders
- 🌍 Part III MFPA 1984 does not apply on forum
- 🌍 Sch 1 CA is likely to follow forum in respect of the child, almost always based on habitual residence
- 🌍 Important to consider provisions of the 2007 Hague Convention if likely to be seeking to recognise or enforce
- 🌍 If UK joins Lugano, the race to issue will arise yet again with extremely distinctive circumstances on maintenance alone: race to divorce will continue to be first on maintenance claims

Jurisdiction and forum: other financial claims

- 🌍 English law characterises financial claims as needs or sharing. Needs is maintenance in EU speak
- 🌍 England has opted out of the EU Marital Property Regulation. There are no cross border EU provisions on sharing type claims.
- 🌍 From January 2021, sharing claims still cannot be brought within 2007 Hague nor, if and when applicable, Lugano Convention
- 🌍 No jurisdiction and forum issues therefore arise under international law with the EU from the UK

Present law: Children ‘headlines’

- 🌍 Significantly fewer changes in children law
- 🌍 Child abduction primarily in 1980 Hague; BII gave an overlap with some additional protections
- 🌍 Recognition and enforcement of children orders across the EU
- 🌍 Jurisdiction found in BIIIR but invariably based on habitual residence of the child, the now global criteria


Children: Jurisdiction/Forum

- 🌍 Section 2(1) FLA 1986:
 - 🌍 *(1) A court in England and Wales shall not make a section 1(1)(a) order with respect to a child unless—*
 - 🌍 *(a) it has jurisdiction under the Council Regulation [or the Hague Convention]*
- 🌍 Private International Law (Implementation of Agreements) Bill [HL] 2019-21:
 - 🌍 *1996 Hague Convention to have the force of law:*
 - 🌍 *Article 5 (1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property*
 - 🌍 *Forum: again unless distinctive circumstances it will be based on the habitual residence of the child*

Children: Changes once BIIR disappears


Children matters

Loss of Article 9:

 *Where a child moves **lawfully** from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, **retain jurisdiction during a three-month period** following the move for the purpose of modifying a judgment on access rights*

 No such replication in 1996 Hague Convention


Loss of Article 11 (4):

 *Court cannot refuse to return a child on the basis of Article 13b...if it is established that **adequate arrangements** have been made to secure the protection of the child*



Children: Changes once BIR disappears

Abduction matters

Article 11 (6-8):

-  *Trumping/‘second bite of the cherry’ provisions – EU state retains jurisdiction: Notwithstanding an Art 13 refusal to return – open to other state to re-examine issue.*

BUT: Art 7(1) HC In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention **keep their jurisdiction** until the child has acquired a habitual residence in another State, and

-  each person, institution or other body having rights of custody has acquiesced in the removal or retention; or
-  the child has resided in that other State for a period of at **least one year** after the person...should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment

Children: Transfer of proceedings

Previously governed by Article 15 BIIR – used primarily within public law proceedings, but also possible in private law matters. Art 8 1996 HC provides vehicle for transfer

Some subtle differences between BIIR and 1996 HC

Art 15 BIIR transfer:	Art 8 1996 HC transfer:
(a) has become the habitual residence of the child after the court referred to in paragraph 1 was <u>seised</u> ; or	a) a State of which the child is a national,
(b) is the former habitual residence of the child; or	b) a State in which property of the child is located,
(c) is the place of the child's nationality; or	c) a State whose authorities are <u>seised</u> of an application for divorce or legal separation of the child's parents, or for annulment of their marriage,
(d) is the habitual residence of a holder of parental responsibility; or	d) a State with which the child has a substantial connection.
(e) is the place where property of the child is <u>located</u> and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property	

Recognition and enforcement: divorce

- 🌐 At present, all orders made by civil courts around the EU are recognised automatically in all EU member states
- 🌐 This will apply to all final divorce orders made on or before 31 December 2020
- 🌐 It will also apply to all final divorce orders made in proceedings instituted on or before 31 December 2020

Recognition and enforcement: divorce

- 🌍 From January 2021, incoming recognition of divorce orders made around the EU unlikely to be an issue as England is a very liberal jurisdiction on recognition of foreign divorces, and in any event will be automatic recognition if from a 1970 Hague signatory
- 🌍 UK divorce orders will be recognised around the EU if the other EU country is a signatory of 1970 Hague Divorce Recognition Convention
- 🌍 Will there be any issues dependent upon the basis of jurisdiction?

Recognition and enforcement: divorce

- 🌍 But only half of EU member states are 1970 signatories
- 🌍 Some substantial countries are not
- 🌍 UK try to encourage the EU to encourage EU member states to sign up to 1970 but seems to have had no impact
- 🌍 Some countries e.g. Ireland are creating own national laws to allow recognition
- 🌍 If recognition of a UK divorce order is needed in a non-1970 Convention country, take local advice as to what other steps may be needed
- 🌍 This may be a good reason to institute proceedings in 2020
- 🌍 Enforcement rarely a problem on divorce

Recognition and enforcement: maintenance

- 🌍 At present automatic recognition around the EU of maintenance orders; system of certificates provided by the court making the order
- 🌍 This automatic recognition will also apply to maintenance orders made in respect of maintenance proceedings instituted on or before 31 December 2020
- 🌍 At present, enforcement of maintenance orders around the EU, as if made in the country of the intended enforcement
- 🌍 Enforcement is automatic without the need of any registration process if the court making the order uses applicable law; as does all EU member states except UK and Denmark
- 🌍 A UK maintenance order needs first to be registered before it can be enforced. This is directly disadvantageous

Recognition and enforcement: maintenance

- 🌍 From January 2021, recognition and enforcement will proceed under 2007 Hague Convention and/or Lugano Convention if the UK joins
- 🌍 The Lugano Convention has jurisdictional provisions which 2007 Hague does not
- 🌍 However once the order has been made, recognition and enforcement can proceed under either 2007 Hague or Lugano

Recognition and enforcement: maintenance

- 🌐 Distinctive issues concerning pension sharing of a UK pension following a foreign pension sharing arrangement e.g. on divorce and financial settlement abroad: jurisdiction will not exist from 2021 onwards unless either party domiciled or habitually resident here. If this is a risk, apply now
- 🌐 Distinctive issue as to whether simply applying under Part III is good enough or whether leave is also needed with the subsequent substantive application also made before the end of 2020
- 🌐 Distinctive aspects concerning choice of court/law agreements entered into already and on or before 31 December 2020; English national provisions only apply in England. How will marital agreements with the choice of court clause of England be treated across the EU?

Recognition and enforcement: financial orders

- 🌍 As there is no international law between the UK and the EU regarding financial orders which are not maintenance, it is entirely subject to local law remedies. This may often mean starting proceedings afresh including opportunities for variation, in effect quasi-appeals
- 🌍 Distinctive issues concerning Orders in respect of real property. Some EU countries will not make orders in respect of foreign real property

Children: Recognition and Enforcement

- 🌍 Article 23 onwards in both treaties:
- 🌍 HC: Non-recognition if:
 - 🌍 '*lack of jurisdiction*' in Art 23(2)(a) 1996 HC, not found in BIIIR;
 - 🌍 Not hearing other party, save in cases of '*urgency*', in Art 23(2)(c) 1996 HC, not found in BIIIR;
 - 🌍 There is no specific provision in the 1996 Convention for a decision given '*in default of appearance*' as in Art 23(c) BIIIR
- 🌍 See also: *Re M (Children)* [2017] EWCA Civ 891 – practical difficulties in enforcing an Estonian order. Taking advice in both states is invaluable

Children: Recognition and Enforcement

- 🌍 *BlIR: A judgment relating to parental responsibility shall not be recognised if...*
- 🌍 *1996 HC: Recognition may however be refused if...*
- 🌍 **Article 28:** Enforcement takes place in accordance with the law of the requested State to the extent provided by such law, taking into consideration the best interests of the child.
 - 🌍 *Does discretion arise? Watch this space...!*
 - 🌍 *See: D (A Child) (International Recognition) [2016] EWCA Civ 12 – Enforcement of Romanian order refused on basis that failure to hear the child constituted a violation of a fundamental principle of procedure; if it were under 1996 HC, possible further ‘defence’ of best interests’*

Children: Recognition and Enforcement

Brussels II Revised	1996 Hague Convention
(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;	a) if <u>the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II</u> ;
(b) if it was given, except in case of urgency, <u>without the child having been given an opportunity to be heard</u> , in violation of fundamental principles of procedure of the Member State in which recognition is sought;	b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, <u>without the child having been provided the opportunity to be heard</u> , in violation of fundamental principles of procedure of the requested State;
(c) where it was given <u>in default of appearance</u> if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;	c) on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, <u>except in a case of urgency</u> , <u>without such person having been given an opportunity to be heard</u> ;
(d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was <u>given without such person having been given an opportunity to be heard</u> ;	d) if such recognition is <u>manifestly contrary to public policy</u> of the requested State, taking into account the best interests of the child;
e) if it is <u>irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought</u> ;	e) if the measure is <u>incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State</u> ;
(f) if it is <u>irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought</u> .	

Children: Wider issues

Relocation proceedings

- 🌍 With the relocation of companies comes the relocation of people; EU citizens returning home.
- 🌍 Immigration law – how will this affect relocation?
- 🌍 Need for expert's reports?

Abduction proceedings

- 🌍 New 1980/1996 HC signatory states can be decided on a case-by-case basis by the UK
- 🌍 Whilst Art 11(4) may not be 'make or break' - could a lack of immigration status be a bar to return?
 - 🌍 See: Re W [2018] EWCA Civ 664 for position with the USA

Domestic violence

- 🌍 EU Civil Protection Regulation provides that civil protection orders made in the EU will be automatically recognised and enforceable around the EU; primarily aimed at land border countries
- 🌍 UK made a commitment at an early stage in the negotiations to continue to recognise EU domestic protection orders in the UK
- 🌍 EU law has been put into national law and England will recognise and enforce orders made in any EU member state
- 🌍 Regrettably EU has not reciprocated, so UK outgoing will not be automatically recognised around EU
 - 🌍 *Problem in practice: what can European practitioners do to help victims of domestic violence who cannot enforce UK orders in the EU although can enforce EU orders in the UK?*

Domestic violence

- 🌍 Transitional provisions
- 🌍 The position is different to divorce, maintenance and children
- 🌍 Domestic violence, civil protection, orders will continue to be recognised around the EU provided the order was made and the appropriate certificate regarding the order was completed on or before 31 December 2020. This will require urgent action by practitioners in late December

Service and taking of evidence

- 🌍 EU laws provide for intergovernmental cooperation on service of court papers and taking of evidence from abroad
- 🌍 To use these laws, the request must be received on or before 31 December 2020 by the appropriate authority in the country where the service or the taking of evidence is to occur
- 🌍 In practice UK practitioners tend to serve direct or through non-governmental means
- 🌍 From 2021, use will be made of the equivalent Hague Service and Taking of Evidence Conventions

Conclusion

- 🌍 Europe is the cradle of civilisations and the foundry from which liberal ideas of justice, fairness and equality have flowed
- 🌍 There is much which the EU can bring to future international family laws and global families, and much which the specialist UK family law profession can contribute to the EU as good supportive friends
- 🌍 The EU must find a way in which the UK, with its huge international family traffic, can still have reciprocal recognition and enforcement
- 🌍 But not laws which encourage racing to court and discourage reconciliation and mediation

Conclusion

- 🌍 Whatever the political aspects of the UK leaving the EU, all concerned must work to the best interests of international families and their children



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Question & Answers

