

Essential training on Brexit expanded

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Suzanne is widely known for her expertise in all aspects of family work, in particular the resolution of complex financial issues for high net worth individuals. Suzanne's cases often have an international element and she has considerable experience

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This article follows on from 'Essential training on Brexit' published in August [2017] Fam Law 804. There I was reporting briefly on the Brexit conference which took place on 26 June 2017. In this article I am going to provide more detail and the key points that were discussed.

Reciprocity

Reciprocity can only be achieved through binding regional and/or international instruments; converting EU laws that deal with or are relevant to private international family law into UK law, as described in the Great Repeal Bill White Paper, will *prima facie* not provide reciprocity. If no deal is reached, there will be no reciprocity between the EU member states and the UK on the basis of these EU instruments. However, a number of default international instruments will apply.

During the conference, it was suggested that we need to look at the main default instruments relevant to private international family law that would apply between the

UK and EU member states after Brexit. There are a number of defaulting instruments as well as some old UK bilateral treaties that will still be applicable between the UK and some member states of the EU. There were differing views about the extent to which the default conventions overlap on the basis that most EU instruments are in fact based on Hague conventions.

However, these instruments will not completely fill the gap left by EU Council Regulations. One of the more significant areas for concern is the lack of reciprocity in relation to divorce, legal separation and marriage annulment. Eleri Jones (1 Garden Court) considered what we could do post-Brexit. She suggested either we 'copy' Brussels IIA (the current regulation covering divorce etc) or we come up with our own grounds of jurisdiction for international divorces. She went on to explain that the former would only be of use if there is continued reciprocity with the other EU member states – the regulations only serve a purpose because all EU member states have agreed to abide by them. If we do not have reciprocity with other member states the *lis pendens* provisions will serve no purpose. The latter will mean that we determine which court has jurisdiction on the basis of connecting factors, and we would have the opportunity to evaluate what we consider to be appropriate connecting factors and embody that into our legislation.

Tim Scott QC (29 Bedford Row) explained that the Bar Council is pressing for the 'Denmark option', namely that the UK would opt into Brussels IIA and the Maintenance Regulation (and also the Brussels I Recast Regulation) on a similar basis to Denmark's present opt-in arrangement. If that does not happen (and Tim thought it unlikely that it will), an alternative approach would be for the UK to join EFTA and the EEA, in which case it would be able to join the Lugano II

Convention; this would provide a substitute for the Maintenance Regulation but not for Brussels IIA.

Hague Conventions

Philippe Lortie from the Hague Conference addressed the question as to whether or not the Hague Conventions can take over from the European instruments. He explained that this would certainly be possible, as most of the applicable EU instruments in this area are based on Hague Conventions; among these, only direct grounds of jurisdiction for international divorce and separation are not covered by Hague Conventions (see above divorce jurisdiction). He provided the really interesting statistic that ‘if you count all EU Regulations, EU-related acts of Parliament, and EU-related statutory instruments, about 62% of laws introduced between 1993 and 2014 that apply in the UK implemented EU obligations’. (BBC)

Philip Marshall QC (1 KBW) spoke about the ways in which the 1996 Hague Convention on the Protection of Children and the 2007 Hague Child Support Convention would provide a fall-back position in relation to the children aspects of Brussels IIA and the Maintenance Regulation respectively. His view was that the 1996 Convention would be an adequate (but not complete – see divorce jurisdiction above) substitute for those aspects of Brussels IIA, but that the 2007 Convention would be a poor substitute for the Maintenance Regulation because the former provides for indirect rules of jurisdiction (namely, where the grounds of jurisdiction under national law upon which the decision was based in the first place is verified at the recognition and enforcement stage) whereas the latter provides for direct rules of jurisdiction (ie, grounds of jurisdiction which have to be adhered to when making a decision).

Others argued that the 2007 Hague Child Support Convention provided a sufficient alternative to the Maintenance Regulation. Grounds of jurisdiction for child support provided for by national laws around the world are generally standardised, the fact

that the 2007 Convention only provides for indirect rules of jurisdiction (contrary to the 2009 Maintenance Regulation, which provides for direct rules of jurisdiction) should have a very limited impact.

Michael Wells-Greco considered whether the 2007 Hague Convention on Maintenance will continue to apply to the UK without any break in its operation after Brexit. As the UK was a member of the Hague Conference at the time of its Twenty-First Session, the UK has the right to sign and ratify the Convention with no possibility of any other state objecting. On that basis, there are no reasons why the 2007 Convention should not continue to apply to the UK after Brexit. This would be done by agreement with the EU and as part of the UK’s withdrawal agreement with the EU. For these reasons, it would be prudent for the UK to commence the necessary diplomatic and legislative processes now to ensure the continued application of the 2007 Hague Maintenance Convention.

Children

There was concern that the mechanisms to deal with child abduction under the Brussels IIA Regulation are more effective than those of the 1980 Hague Child Abduction Convention. However, this was met with reassurance that child abduction matters under the Brussels IIA Regulation are governed by the 1980 Convention. Both use the same Central Authority and courts and, as a result, the speed of procedures are in practice the same under both instruments. As far as the UK is concerned (with the exception of Art 11 (6)–(8) of Brussels IIA), the application of the Regulation and the 1980 Convention is the same.

Even without Brussels IIA, children of an appropriate age and level of maturity will have the right to be heard, as Art 12 of the United Nations Convention on the Rights of the Child imposes this obligation. Furthermore, judges in the UK verify as a matter of course that adequate arrangements are available to secure the protection of the child after his or her return (see Art 11(4) of Brussels IIA).

Northern Ireland

Perhaps one of the most shocking elements of the seminar came from Northern Ireland. There, Karen O’Leary discussed the very real difficulties that exist by virtue of the potential collapse of the Belfast Agreement (1998) (‘the Good Friday Agreement’). She explained at a very personal level how that may impact both Northern and Southern Ireland and what needs to be done to rectify this situation.

Brexit viewed from the outside

The mainland Europeans (France and Spain) provided a really interesting and thought provoking insight into how they view Brexit.

Alberto Cedillo commented that opinion polls and occasional referenda consistently reveal Spaniards as the keenest of Europeans and the readiest to cede more powers to EU jurisdiction. Brexit came as a huge shock to many Spaniards. The UK is the biggest destination for Spanish investment abroad absorbing about 17% of the total. Almost 17m Britons visited Spain in 2016 – one in five of all tourists. Moreover some 300,000 Britons reside in Spain. Another half a million or more spend part of the year there. About 137,000 Spaniards lived in the UK in 2015. These economic and human ties illustrate the need for a sensible Brexit deal. Spaniards still hope for Breversal.

Isabelle Rein-Lescastereyres explained that particularly with the French new extra judicial divorce rules there may be further problems of recognition and this might be the hardest hit for those with smaller maintenance awards who do not have the financial means to execute them abroad. She added a note of caution about pre-nuptial agreements potentially losing predictability and certainty notably with a disappearance of the possibility of an election of jurisdiction for divorce and so generally sounded a note of concern regarding the impact of Brexit.

Jennifer O’Brien of Irish Family Law Chambers made a plea ‘Let’s Call the Whole thing off’. Her solution to all the uncertainty surrounding Brexit, was simple – do not

leave the EU. She said that when Britain realized the true cost involved in terms of making a payment to the EU, the recent payment to the DUP and more importantly the overall damage to the economy, leaving would no longer have popular support. She said that the EU was the Empire that we built together since the Second World War and that we shouldn’t underestimate the peace and prosperity we have enjoyed since then.

There was much discussion about the transitional arrangements and Dr Ian Sumner (Voorts Legal Services) indicated that of all of the matters under discussion this is the most crucial. Since the date of the seminar the European Commission has issued a position paper on transitional issues. This is definitely an area to watch.

The ‘Big Questions’ at the end of the day saw a number of eminent panellists, Tim Amos QC (Queen Elizabeth Building), David Hodson OBE (International Family Law Group LLP), Anne-Marie Hutchinson OBE QC (Dawson Cornwell), Rachael Kelsey (SKO) and William Healing (Alexiou Fisher Philips) answer a whole range of tricky (and practical) questions. The session ended in a fun question being posed by Christopher Lee (Spain) asking ‘Brexit cannot be all doom and gloom: will the panel cheer us up by naming their least favourite EU imposed family law provision (the like of which we hope you won’t see again)’.

Subsequent to the conference: the Repeal Bill

On 13 July 2017 the Government (Department for Exiting the EU) published information about the Repeal Bill which is designed to ‘ensure that the UK exits the EU with maximum certainty, continuity and control’. The documentation can be accessed on: <https://www.gov.uk/government/publications/information-about-the-repeal-bill>.

Interestingly, in relation to the European Court of Justice (CJEU), the Bill sets out how retained EU law is to be read and

interpreted on and after exit day. Decisions of the CJEU made after exit day will not be binding on UK courts and tribunals, and domestic courts and tribunals will no longer be able to refer cases to the CJEU after exit day. Questions on the meaning of retained EU law will be determined by domestic courts in accordance with pre-exit CJEU case law. This case law will have the same binding or precedent status as that of the UK Supreme Court or the High Court of Justiciary.

Thanks for organising the conference must go to Donna Goddard and Ali Massey of the IAFL and Sue Gunn of Resolution: and to the sponsors Resolution, FLBA, 29 Bedford Row and 1 Garden Court and to all of the speakers for making this such an interesting and engaging day. We are determined that we will work together to provide a unified and coherent view to the Government using our family law expertise to ease Brexit for family law.