

Essential training on Brexit

On Monday 26 June, almost a year after the Brexit vote, the International Academy of Family Lawyers joined forces with the Family Law Bar Association and Resolution to provide essential training for all family lawyers on the family law implications of the Brexit decision. The seminar, organised and co-chaired by Suzanne Kingston from Withers LLP, was attended by over 160 family lawyers from England and Wales, Scotland, Ireland and mainland Europe. We explored the implications of the UK departure from the EU from both domestic and international perspectives and heard from an array of experts, lawyers and academics.

The day started with Lord Justice Moylan setting the scene looking at the historic context of EU legislation and what the future might look like. He was followed by Philippe Lortie (HCCH), who explained the role that the Hague currently takes and could undertake in a post-Brexit era. We then heard from a panel of experts – Nuala Mole (the Aire Centre), Anna Worwood, David Williams QC and Anne-Marie Hutchinson OBE QC who considered a case study which highlighted children aspects of Brexit. Dr Jens Scherpe (fellow of Gonville and Caius College Cambridge) and Dr Ian Sumner considered whether it would be possible for the UK to truly ‘break’ from Europe.

There was then a session on the impact of Brexit and the enforcement of child and maintenance orders delivered by Michael Wells-Greco (Switzerland) and Ruth Innes (Scotland). The Scottish theme continued with Rachael Kelsey providing her own inimitable take on the situation regarding Scotland and then an extremely thought provoking and interesting paper was delivered by Karen O’Leary in respect of the Northern Irish situation. Jennifer O’Brien spoke about some specific issues that would occur from a Southern Irish point of view and in particular reminded us of the importance of the Irish Court of Appeal case of *MH v MH*.

Tim Scott QC and Philip Marshall QC spoke about some practical aspects of Brexit including the extent to which other international instruments will (and will not) fill the gap if the EU case ceases to have Brussels II and the Maintenance Regulation. Alberto Perez Cedillo (Spain) and Isabelle Rein-Lescastereyres (France) addressed the view from mainland Europe and Daniela Kreidler-Pleus (Germany) spoke of the potential impact vis-à-vis pre-nups. Eleri Jones of 1 Garden Court spoke eloquently about the jurisdiction for divorce and how that may change in a post Brexit era. She then provided some insight into the future of family law post Brexit not only in relation to recognition and enforcement of divorces but also the implication for financial claims.

The finale was an hour-long question time expertly chaired by William Longrigg. Wide-ranging questions were put to the panel to include:

- (1) Would you vote for the retention of Brussels II Bis or a forum conveniens approach and why?
- (2) Given that ‘habitual residence’ is a key concept in family law, might the UK take Brexit as an opportunity to define it and if so how?
- (3) What effect will Brexit have on the enforcement of European custody orders?
- (4) Can the panel shed any light on the transitional provisions which are likely to apply in relation to the likely changes in automatic stay provisions on jurisdiction of the divorce?

This question and answer session will be considered in more detail in Part 2 of this article, to be published in a future issue of *Family Law*. In the meantime and to provide a quick heads up, my colleague, Laura Winterbottom, provided the following summary of the key points of the conference as follows:

- (1) There was much discussion on the Hague Conventions that will remain in force after a ‘hard Brexit’ in particular:
 - (i) The 1996 Hague Convention

(Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children);

- (ii) The 2007 Hague Convention (Convention on the International Recovery of Child Support and other forms of Family Maintenance).

The 1996 Hague Convention is generally thought to significantly but not entirely fill the gap that would be left by Brussels II bis but not necessarily the recast of Brussels I which it is anticipated to improve processes further. This was ratified by the UK and so will remain in force after Brexit. It has 45 signatories.

The 2007 Hague Convention was regarded by some (Philip Marshall QC) as not a suitable replacement for the maintenance regulation – it has no jurisdictional rules, it has no first in time, it does not presently apply intra EU. The UK is bound only as member of EU. It does not apply within EU presently as the maintenance regulation takes precedence. Neither deals with divorce – and so the domestic law would apply if replacement legislation not put in place – DMPA 1973 and forum conveniens.

- (2) If the UK ratifies the Lugano II Convention post-Brexit this might fill the gap but in order to do so the UK would need to join EFTA and the European Economic Area ('EEA') which requires the approval of all member states and the members of EFTA, namely Iceland, Norway and Liechtenstein. It was thought that these countries would not be keen for the UK to join EFTA given its size in comparison to their own. Further, Lugano is just a replica of previous Brussels instruments – so if we went down this route we would potentially have the same legislation but a few steps behind the rest of Europe and without the opportunity to negotiate its contents.
- (3) There was some discussion on

transitional provision and whether it was likely that there would be a cut-off date and a deluge of applications prior to that date to secure jurisdiction.

- (4) Reciprocity was raised as a concern. As the UK will no longer be a member state but instead a third state – it would have a different status in the local legislation of other member states. The UK may enact legislation which mirrors Brussels II bis but the member states would not need to act reciprocally towards the UK, which will lead to forum disputes.
- (5) In relation to Northern Ireland, the Belfast Agreement 1998 – the Good Friday Agreement – recognises the right of the people of Northern Ireland to identify themselves and be accepted as Irish or British or both. They are therefore entitled to an Irish or British passport – they could be EU citizens or not at their election. This agreement and the choice it gave people was regarded as key to the peace process. Brexit therefore clashes with the Good Friday Agreement and it is unclear what will happen.
- (6) A big unknown is what will happen to decisions of the CJEU and how will disputes with other EU member states be dealt with without a central authority.

An article to be published in the September issue of *Family Law* will look at a number of the speakers' presentations in more detail and answer as many questions as possible.

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Brexit and children

Children England, Children's Society, NSPCC, Children's Rights Alliance for England, National Children's Bureau, Ecpat UK and Coram Children's Legal Centre joined together in June 2017 to publish *The impact of Brexit on children: Key policy recommendations for the new government* which gives policy recommendations for addressing the impact of Brexit on children and young people. The briefing states that