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Brexit – Does Brexit really mean Brexit for Family Law?
Monday 26th June 2017

CONFERENCE PAPERS

29
BEDFORD ROW
CHAMBERS

1 Garden Court
FAMILY LAW CHAMBERS

Brexit – Does Brexit really mean Brexit for Family Law?

Education Papers: Contents

* Please refer to separate documents via www.iafl.com/brexit-papers

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Monday 26th June 2017

Programme

09:00-09:30	Registration
09:30-09:40	Conference opening - William Longrigg (Charles Russell Speechlys LLP)
09:40-10:00	Keynote Speech - Lord Justice Moylan
10:00-10:30	Philippe Lortie (HCCH) – **A View from The Hague: Can the Hague conventions take over from European instruments? Where does this leave us?**
10:30-10:50	Coffee
10:50-11:30	Nuala Mole (The Aire Centre), Anna Worwood* (Pennington Manches LLP), David Williams QC (4 Paper Buildings) and Anne-Marie Hutchinson OBE QC (Hon) (Dawson Cornwell) - **What does Brexit mean for families and children – relocation and abduction Part One: Case Study Analysis**
11:30-11:50	Dr Jens Scherpe (fellow of Gonville and Caius College Cambridge) and Dr Ian Sumner (Voorts Legal Services) - **Divorced, but still family**
11:50-12:10	Michael Wells-Greco* (Charles Russell Speechlys SA) and Ruth Innes (Westwater Advocates) - **The impact of Brexit on the enforcement of child and family maintenance orders (incoming and outgoing)**

12:10-12:30	Rachael Kelsey (SKO), Jennifer O'Brien (Irish Family Law Chambers) and Karen O'Leary (Caldwell & Robinson Solicitors) - **Territorial Units or Countries**
12:30-13:30	Lunch
13:30-14:00	**What does Brexit mean for families and children – relocation and abduction Part Two: Case Study Q&A**
14:00-14:30	Tim Scott QC (29 Bedford Row Chambers) and Philip Marshall QC (1 King's Bench Walk) - **Heavy fog in Channel: choices, problems and opportunities after Brexit**
14:30-15:00	Alberto Perez Cedillo (Alberto Perez Cedillo Spanish Lawyers and Solicitors), Isabelle Rein-Lescastereyres (BWG Associes) and Dr Daniela Kreidler-Pleus (Dr Kreidler-Pleus und Kollegen) - **The morning after the night before: Europeans Wakeup to Brexit**
15:00-15:15	Tea
15:15-15:30	Eleri Jones (1 Garden Court) - **The sound of Brexit: so long, farewell, auf wiedersehen, adieu**
15:30-16:45	**The Big Question** Chair: William Longrigg (Charles Russell Speechlys LLP) Panel: Tim Amos QC (Queen Elizabeth Building), David Hodson OBE (International Family Law Group LLP), Mark Harper (Hughes Fowler Carruthers), William Healing (Alexiou Fisher Philipps) and Nick Bennett (Farrer & Co)
16:45-17:00	Closing remarks
17:00-19:00	Drinks

* Anna Worwood and Michael Wells-Greco are both members of the Resolution International Committee

29 BEDFORD ROW CHAMBERS

1 Garden Court FAMILY LAW CHAMBERS

SPEAKER BIOGRAPHIES

TIM AMOS QC

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Qualified as Barrister 1987, QC 2008, specialising in international family law, jurisdiction and finance cases at QEB Barristers Chambers; fluent in German (including legal German) and French language. Appeared for the companies in the UK Supreme Court case of *Prest v Petrodel* 2013 (corporate veil in family finance), for the successful wife in the CJEU case of *A v B*, C-184/14 (A.19 Brussels IIA), in the UK Privy Council case of *Bromfield* 2015 on appeal from Jamaica (constructive trust and maintenance), and in the English Court of Appeal in *Magiera* 2016 (real estate interests under Brussels I). Sits part-time in a judicial capacity as a "Family Recorder". Mediator in English, German or French.

NICHOLAS BENNETT

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Described by commentators as a "really good youngster" who "finds solutions without fuss", Nick is a former barrister who was admitted to the partnership at Farrer & Co in 2016. He practises in two connected areas. He is a leading specialist in the drafting and negotiation of pre-nuptial agreements. He acts for business leaders, celebrities, landed families and wealthy international couples in London and overseas. He has lectured on the law and practice of pre-nuptial agreements at Oxford University. The other element of his practice is complex divorce disputes, involving companies, trusts, and jurisdiction issues (including in particular the relationship of the Brussels II and Maintenance Regulations to English law). He is a former winner of the IAFL Annual Award for Young Family Lawyers in Europe.

MARK HARPER

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Mark Harper, Partner, Hughes Fowler Carruthers, London. Divorce specialist, particularly international/involving trusts. President, European Chapter, International Academy of Family Lawyers, 2014 - 2016. Co-author of International Trust and Divorce Litigation – Jordans. Mark acted in the leading Court of Appeal cases of *Charman and Crossley*, on trusts on divorce, and on a new procedure where there is a pre-nup on divorce. He has also given English divorce advice in three reported Jersey trust cases. Mark was ranked in the top 10 divorce lawyers in Spear's Family Law Index 2013 - 2016, stated to be "*without doubt the best technician in London… Mark has the intellectual vigour to outwit every opponent in a jurisdiction case*". Chambers HNW 2016: Mark Harper "*is my favourite solicitor in family law" states a commentator, adding "He's extremely strong on anything with an international element, particularly trusts. He is extremely erudite, diligent and hard working. He has got real flair*".

WILLIAM HEALING

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William is a dual French and English national, he is a bilingual speaker, and many of his cases have a Francophone angle. Most cases involve high net worth assets. He has been practising family law for 20 years. William is a Fellow of the International Academy of Family Lawyers (and European Chapter secretary). He is a widely acknowledged expert on European family law issues according to the law profession directories.

DAVID HODSON OBE

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David Hodson OBE MICArb is a co-founder and partner at The International Family Law Group LLP, London. He is an English solicitor, arbitrator and mediator and also an Australian qualified solicitor, and sits as a part-time family court judge at the Central Family Court. He deals with complex family law cases, often with an international element. He is an Accredited Specialist (with portfolios in Substantial Assets and International Cases), a Member of the English Law Society Family Law Committee, a Fellow of the International Academy of Family Lawyers, a Fellow of the Centre for Social Justice, and a member of the Family Law Section of the Law Council of Australia. He is author of "The International Family Law Practice" (Jordan's 5th edition Dec 2016). He is visiting Prof at the University of Law. He received the OBE for services to international family law.

ANNE-MARIE HUTCHINSON
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Anne-Marie was admitted in 1985 and in 1988 joined Dawson Cornwell, one of the UK's leading family law firms, as Head of the Children Department. She is consistently named as one of the leading family lawyers in London in both Chambers and The Legal 500 and is singled out as a "star individual" in Chambers for cross-border disputes. Anne-Marie specialises in all aspects of domestic and international family law and the international movement of children. She has expertise in divorce and jurisdictional disputes, with particular expertise in international custody disputes, child abduction (Hague and non-Hague), the EU Regulation on jurisdiction in family matters, relocations, children's law private and public, forced marriage and international adoption and surrogacy.

RUTH INNES

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Ruth is an advocate at the Scottish bar. She was initially a solicitor in private practice specialising in family law. She called to the bar in 2005. She has been involved in many reported cases. She is instructed primarily in relation to financial provision on divorce and cases involving cross border or international issues.

ELERI JONES

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Eleri practises in both family finance and private child cases incorporating matrimonial, Schedule 1 and cohabitation cases and complex private child disputes, including internal and international relocation cases. Eleri is often requested to advise upon the international aspects of both children, divorce and financial work including questions of jurisdiction, recognition and enforcement, particularly under the Maintenance Regulation and Brussels IIa. Eleri's work in the international arena also extends to reciprocal enforcement of maintenance. Eleri was ranked as a leading individual in the Legal 500 in 2016 which stated that "Her encyclopaedic knowledge and fierce intelligence means she is at her best in complex cases". In November 2016 Eleri jointly submitted a paper to the Justice Committee with the support of the FLBA on the implications of 'Brexit' and she continues to participate in an EU Law working group of 20 international family law experts including leading and junior counsel, solicitors and judges, considering the possibilities for reform of UK family law as a result of leaving the EU.

RACHAEL KELSEY

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Rachael is a solicitor and one of the eponymous founding directors of SKO Family Law Specialists, the largest niche family practice in Scotland. Rachael works in Edinburgh and London, practising Scots Law. She advises on the full range of family law matters, with a particular interest and expertise on jurisdictional issues in family law cases, with over 90% of her practice now having some kind of jurisdictional element to it. She is one of only three 'leading individuals' in Scotland for family law in the current edition of the Legal 500. She has been in 'Band 1' of matrimonial lawyers in Scotland in Chambers and Partners for many years, where her firm is top ranked, as it is in the Legal 500.

SUZANNE KINGSTON

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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 in dealing with prenuptial agreements and cohabitation issues. She is an Accredited Resolution Mediator and qualified Collaborative Lawyer. Suzanne has spearheaded the Arbitration Training for family lawyers and is herself an Accredited Arbitrator. Suzanne won Family Lawyer of the Year Award at the Spear's Wealth Management Awards 2015. In addition, she won Citywealth's Lawyer of the Year Award 2016.

DR DANIELA KREIDLER-PLEUS

Dr Kreidler-Pleus und Kollegen
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Dr. Daniela Kreidler-Pleus started studying law in Tübingen (Germany) in 1976. For six months she went to Aix-en-Provence to study French law. On completion of the first state examination, she worked as a trainee in the judicial service in Ulm for three years. Then she passed the second State Examination. Between 1985 and 1988 she wrote her doctoral thesis on the topic Entrance of Portugal to the EC. Admitted to the Stuttgart Bar in 1988 and one year later founded her own law firm, specializing in family law. At present there are three lawyers working in the firm. From 1997 to 2001 she presided over the family and estate law commission of the AIJA (International Association of Young Lawyers). Since 2000 certified family law specialist (Fachanwältin für Familienrecht). In 2001, elected as a board member of the Baden-Württemberg lawyers' pension fund. Co-author of Family Law Jurisdictional Comparisons, 1st Ed. (2011) and 2nd Ed. (2013) (published by Thomson Reuters) and of "Family Law – A Global Guide from Practical Law" (2015), also published by Thomson Reuters. Member of the IAFL since 2001 and currently European Chapter President. Member of the Working Group for Family Law as well as Inheritance Law in the German Association of Lawyers.

WILLIAM LONGRIGG

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William specialises in divorce, financial relief (to include pre-nuptial and post-nuptial agreements) and private law children cases. William is the former head of the family sector at Charles Russell Speechlys and specialises in divorce, financial relief (to include pre-nuptial and post-nuptial agreements) and private law children matters. He also lectures on a range of family law issues including trusts and matrimonial breakdown and is a joint author with Sarah Higgins of *Family Breakdown and Trusts* for Butterworths. He has wide experience of cases with an international element and is Immediate Past President of the International Academy of Family Lawyers. William was named 2014 International Family Lawyer of the Year at the prestigious Jordans Family Law Awards and Family Lawyer of the Year 2016 at the *Spears Wealth* awards. William is ranked as a "leading individual" by Chambers & Partners and listed in the Honours List of Leading Lawyers in the Family & Matrimonial category of the Citywealth Leaders List 2013. He was ranked in the top 10 London Family Law solicitors by Spears Wealth Magazine in 2015 and 2017.

PHILIPPE LORTIE

First Secretary
Hague Conference
On Private International Law (HCCH)

Philippe Lortie (1965, Canada), B.A.A. H.E.C. Montreal, LL.L., LL.B. and LL.M. University of Ottawa. He joined HCCH as a First Secretary in 2001 after working for the Department of Justice of Canada for a period of 10 years where he held different positions in connection to international law including Head of delegation for a number of international negotiations of private international law instruments.

Philippe Lortie works primarily in the area of international child protection and family law. He has primary responsibility for the Hague 1980 Child Abduction, 1996 Child Protection, 2000 Protection of Adults and 2007 Child Support Conventions, for which, in the latter case, he played a key role in the development. He also has responsibility for the International Hague Network of Judges and issues concerning Direct Judicial Communications under the Hague 1980 Child Abduction and 1996 Child Protection Conventions. He steers the Hague Conference feasibility studies on the development of a possible future instrument on access to foreign law and on the recognition and enforcement of civil protection orders. Finally, he has the responsibility for a number of Hague Conference IT tools including the iSupport electronic case management and secure communication system under the Hague 2007 Child Support Convention.

PHILIP MARSHALL QC

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Call: 1989 • Queens Counsel: 2012 • Chairman of the Family Law Bar Association: 2016 to date • Vice Chairman of the Advocacy and CPD Committee (Gray's Inn): 2014-2015 • Fellow of the International Academy of Family Lawyers (IAFL) • Associate Member of Resolution

Philip Marshall QC is Joint Head of Chambers at 1 King's Bench Walk, Temple. He has extensive experience of complex "big money" matrimonial disputes at all levels, many with an international or jurisdictional element, and appeared in both White and Miller and McFarlane in the House of Lords. He is named as a Matrimonial Finance Leading Queens Counsel in both Chambers & Partners UK Directory and Legal 500. Philip is the national Chairman of the Family Law Bar Association (FLBA), a Bencher and former vice-chairman of the Advocacy and CPD Committee of Gray's Inn, a Fellow of the International Academy of Family Lawyers (IAFL) and an associate member of Resolution.

NUALA MOLE

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Nuala Mole read law at Oxford and European Law at the College of Europe Bruges and was awarded an honorary doctorate from the University of Essex. She founded the AIRE Centre in 1993 to provide information advice and legal representation before the European courts to individuals concerning their rights under European Law. The AIRE Centre's work has always had a focus on families and children—often with a reference to cross border situations. Ms Mole has been involved in the litigation (as either representative or intervenor) of over 120 cases before the ECtHR, many of which have involved families and children, such as Z v UK , TP and KM v UK, AD and OD v UK , MAK and RAK v UK, RK v UK, PC and S v UK, Ignaccolo Zenide v Romania, X v Latvia, Baio v Denmark, Tarakhel v Switzerland, A v UK and France, R v Slovakia, as well as a number of cases before the CJEU including MA and BT v SSHD, Rahman v SSHD and several landmark cases before the UK Supreme Court, such as Biaia v SSHD, ReJ 2015 UKSC70, Re N UKSC 2016 15, Re B 2016 UKSC 4 and most recently SM (Algeria) heard in June 2017. She has written, spoken and taught extensively across Europe on these matters and other areas of European law. Since 2015 she has been leading a project dedicated to the situation of Separated Children in Judicial Proceedings.

JENNIFER O'BRIEN

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Jennifer O'Brien's areas of practice include family law; judicial separation and divorce (court applications); civil partnership and cohabitation; nullity; jurisdiction matters; collaborative law and mediation (non-court approach); ancillary relief (property transfer orders, maintenance, lump sum orders); life insurance and pension adjustment orders; nonmarital cases (division of assets and other issues arising); child law (guardianship, custody and access matters); adoption; recognition of foreign divorces; international child abduction (Hague Convention and Brussels II); relocation applications.

KAREN O'LEARY

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Karen is the Head of the Caldwell & Robinson Family Law practice. She is try-jurisdictionally qualified, Northern Ireland, Republic of Ireland and England and Wales. She has extensive expertise on all of the issues which may arise on the breakdown of a relationship. She has specialist expertise in cases involving an international dimension, in both public and private law. Karen is a qualified family arbitrator and member of the Chartered Institute of Arbitrators. She is A Fellow of the International Academy of Family Lawyers (IAFL), a qualified mediator, an accredited member of the Northern Ireland Children's, a qualified advance advocate under National institute of Trial Advocates a member of LEPCA(Lawyers in Europe on Parental Child Abduction) and a panel member for the Central Authority of Northern Ireland.

ALBERTO PÉREZ CEDILLO

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As a dually qualified Spanish Abogado and English solicitor he has over 20 years of experience in English, Spanish and international law. He has expertise in multi-jurisdiction litigation, including forum disputes, international enforcement, international treaties and analysis of Spanish law and practice in the context of International Litigation. International consultancy and agency work for UK solicitors and international law firms around the world representing the interests of their clients before the Spanish courts is a significant part of his practice. He has often appeared as an expert in European and Spanish Law before County Courts and the High Court of England and Wales and regularly lectures at the various professional associations of which he is a member. He practices in London, where he opened his own practice in Lincoln's Inn in 2005, and in Spain having opened offices in Madrid and Marbella.

ISABELLE REIN-LESCASTEREYRES

Avocat au Barreau de Paris,
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Majored from HEC in 1995, admitted to the Bar in 1997, partner in BWG since 2005; specialiazing in international family law, both in children and financial matters; collaborative lawyer, Resolution Mediator, French expert for the CCBE, Member of the scientific committee of the "Etats Généraux du Droit de la Famille et du Patrimoine"; co-author of "Droit international privé, Exercices Pratiques", 1st edition (2014) and 2nd edition (2015), Regular author in "Gazette du Palais" Family law edition, contributor to "Points de procedure et illustrations" of the "Dalloz Action Droit de la Famille"; Member of various organizations including IAFL (past counsel), IBA (International Bar Association), UIA (Union internationale des avocats), FBLS (Franco-British Lawyers Society), FABA (French-American Bar Association), IDFP (Institut du droit de la famille et du patrimoine), AFPDC (Association Française des Praticiens du Droit Collaboratif), founding member, Family law commission at the Paris Bar.

DR JENS SCHERPE

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Dr Jens Scherpe is a Reader in Comparative Law at the University of Cambridge, Director of Cambridge Family Law, a Fellow of Gonville and Caius College, Cambridge and Cheng Yu Tung Visiting Professor at the University of Hong Kong. He also is an Academic Door Tenant at Queen Elizabeth Building, London. He specialises in comparative law and particularly comparative family law. Jens has held visiting positions in many institutions, including the University of Sydney, the University of Auckland, Queen Mary University of London, the University of Vienna, the University of Padova and the Catholic University of Leuven. He has acted as consultant in many cases in England, Germany, Hong Kong and Belgium, including *Radmacher v Granatino* [2009] EWCA Civ 649, Z v Z (No 2) [2011] EWHC 2878 (Fam) and SA v SPH [2011] HKCFI 1649 (HCMC 1/2011) and CACV 99/2012. His publications include major comparative studies on cohabitants, same-sex relationships, the legal status of transgender and transsexual persons and marital agreements. In 2016 he edited a four volume book set on European Family Law (http://www.e-elgar.com/shop/european-family-law), including a monograph on 'The Present and Future of European Family Law'.

TIM SCOTT QC

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Tim Scott is a senior QC who also sits as a part-time Judge. Most of his practice has an international element. He is committed to resolving disputes by the most appropriate and least expensive method. He is a mediator, collaborative lawyer and conducts private hearings and arbitrations. He has appeared in numerous reported cases, including in both the House of Lords and the Supreme Court. He is accustomed to and enjoys working alongside foreign lawyers and regularly gives expert evidence on English law in other jurisdictions. Tim has particular expertise in the EU Regulations affecting English family law and has played the leading role in drafting the Bar Council's response to various EU initiatives.

DR IAN SUMNER

Voorts Legal Services

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Ian Sumner graduated with a first class honours degree from Christ's College Cambridge before proceeding to obtain his PhD from Utrecht University in 2005. He has also since obtained his bachelors and masters degrees in Dutch law, and is currently an independent legal adviser and owner of Voorts Legal Services. He provides expert legal advice in international family law cases, as well as training to lawyers, notaries, judges, central authorities and ministeries. Since 2015, he is also a deputy court judge at the District Court Overijssel.

DR MICHAEL WELLS-GRECO

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Dr Michael Wells-Greco TEP, Partner, Charles Russell Speechlys (Geneva and London) and Assistant Professor, Maastricht University. Michael specialises in all aspects of family law and the international movement of children, including adoption, fertility law and co-parenting agreements. Able to approach cross-border planning from a practical perspective, he also advises on international succession and private client matters. Michael is a regular speaker at conferences and contributor to various legal and media publications. He co-authors with Horspool and Humphrey, textbook “EU law” (2016, OUP). His doctorate “The Status of Children arising from Inter-Country Surrogacy Arrangements” (2015) was published by Eleven Publishing. He is recognised as a legal expert in the independently researched in Chambers and Partners and Who's Who Legal. Michael holds a doctorate in law and is an Assistant Professor in private international law and Family law in Europe at Maastricht University. He is a consultant lawyer to the Permanent Bureau of the Hague Conference on Private International Law.

DAVID WILLIAMS QC

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David Williams QC is a barrister and Recorder based in London. He has practised in family law for 27 years concentrating on the international aspects of the movement of children, including child abduction, international relocation and contact, the enforcement of foreign orders and jurisdictional disputes. He also acts in public law cases with an international element in particular involving the placement of children abroad. He has particular experience in the operation of BIIa and other European Regulations, the 1980 Hague Convention and the 1996 Hague Convention. He has appeared in both of the English children cases referred to the CJEU and has appeared in the European Court of Human Rights and filed an amicus brief in the US Supreme Court. In 2013 and 2015 he appeared for Appellants in the UK Supreme Court as a result of which the approach to the habitual residence of children and the role children play in that assessment has been clarified. He was appointed Queens Counsel in 2013 and a Recorder in 2015. He is the editor of a new edition of the leading English family law textbook, Rayden, and is the author and editor of a number of other books and journals including 'International Issues in Family Law', the International Child Law Information Portal, Butterworths Family Law Service and International Family Law journal. He writes a blog on international children issues; ww.internationalfamilylaw-dw.blogspot.com and tweets as @bikingbarrister He lives near London and is a keen motorcyclist.

ANNA WORWOOD

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As well as having a thriving high-value financial practice, Anna is one of a small number of 'go-to' lawyers in private children cases, particularly those involving international relocation. Anna has acted in a number of reported cases, including acting for the father in an internal relocation case of Re C [2015] which provided an opportunity for the Court of Appeal to review fundamentally the approach of the courts in relation to relocation and determined there should be no difference in the approach of the courts to internal and international relocation cases. Anna was President of the Private Client Commission of the International Association of Young lawyers from 2013 – 2016. She is a Fellow of the IAFL, a member of Resolution's International Committee and a collaborative lawyer. Anna co-authored Relocation: A Practical Guide (second edition published in 2016) and is the General Editor of Practical Law's Global Guide to the International Relocation of Children (Thomson Reuters 2016).

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HCCH
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ

A View from The Hague
Can the Hague Conventions Take Over from European Instruments?

Conference on Brexit and Family Law
London - 26 June 2017

Philippe Lortie
First Secretary

What is the HCCH?

- An **intergovernmental organisation** with a ***legislative* function**, origin goes back to ***1893***;
- Works toward *"**progressive unification** of the rules of **private international law**"* (*Art. 1 of the Statute*)
- Develops and adopts ***Hague Conventions and Protocols*** (currently **38** + **1 soft law** instrument), dealing with:
  - ***(1)*** *Int'l Family Law & Child Protection*
  - ***(2)*** *Int'l Civil Procedure & Legal Co-operation*
  - ***(3)*** *Int'l Commercial Law & Finance Law*
- ***Practical outcomes***, with direct benefits for children and adults, commercial operators and investors

83 Members

82 States + 1 Regional Economic Integration Organisation (EU)

Candidate State
Applied for membership (six-month voting period)

Admitted State
Applied for membership, admitted by affirmative vote, must still accept Statute

Member State

Dominican Republic *Colombia* *Lebanon*

NB: Boundaries on this map are based upon those used by the UN Cartographic Section. The number of States reflects the Parties as recorded by the Depositary (NL MFA). Neither should be taken to imply official endorsement or acceptance.

150 States "Connected" with HCCH

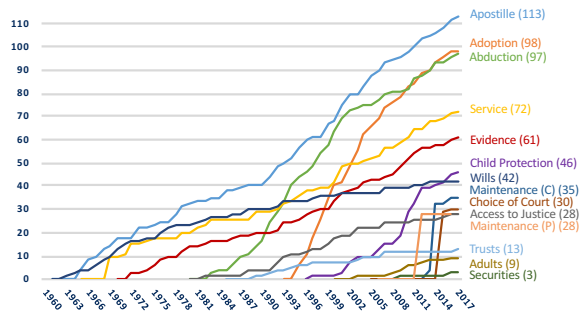
A "Connected" State is either a Member State (incl. candidate and admitted States) or a Contracting State to one or more of the Hague Conventions

■ Member State "Connected" State

■ Non-Member "Connected" State

NB: Boundaries on this map are based upon those used by the UN Cartographic Section. The number of States reflects the Parties as recorded by the Depositary (NL MFA). Neither should be taken to imply official endorsement or acceptance.

Number of States/REIOs bound by the Core Hague Conventions



The Way Forward

29 March 2017 ⟶ **29 March 2019**

Article 50(2), Treaty on the European Union

"The treaties shall ***cease to apply*** [in the UK] from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification…unless the European Council, in agreement with [the UK], unanimously decides to extend this period."

Mind the Gap!

"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)

Global Private Int'l Law Framework

Hague Conventions Already Binding the UK and Facilitating International Family Law Practice

International Civil Procedure and Legal Co-operation

- ✓ 1961 Wills Convention (42)
- ✓ 1961 Apostille Convention (113)
- ✓ 1965 Service Convention (72)
- ✓ 1970 Evidence Convention (61)
- ✓ 1985 Trusts Convention (13)

Global Private Int'l Law Framework

Hague Conventions Already Binding the UK and Facilitating International Family Law Practice

International Family Law and Child Protection

- ✓ 1970 Recognition of Divorces Convention (20)
- ✓ 1973 Maintenance Convention (24)
- ✓ 1980 Child Abduction Convention (97)
- ✓ 1993 Adoption Convention (98)
- ✓ 1996 Child Protection Convention (46)
- ✓ 2000 Adults Protection Convention (9)
- ✓ 2007 Child Support Convention (36)

Global Private Int'l Law Framework

Hague Conventions to Which the EU Is a Party and That Bind the UK

- ✓ 2005 Choice of Court Convention (30)
- ✓ 2007 Child Support Convention (36)

European Council Guidelines for Brexit

"…the European Council ***expects*** the UK to ***honour*** its share of all international commitments contracted in the context of its EU membership…A constructive dialogue with the UK on a possible ***common approach*** towards third country partners, international organisations and conventions concerned should be engaged."

HCCH Added Value

HCCH Post-Convention Services

- ✓ Meetings of States Parties to review the practical operation of HCCH Conventions (+ relevant IOs & NGOs)
- ✓ Explanatory Reports on Conventions
- ✓ Implementation Checklists
- ✓ Guides to Good Practice & Practical Handbooks
- ✓ International Hague Network of Judges & Direct judicial communications in specific cases
- ✓ Databases (INCADAT & INCASTAT)
- ✓ Case management & communication systems (iSupport)

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HCCH
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What does Brexit mean for families and children?

Relocation and abduction?

David Williams QC

Anne-Marie Hutchinson QC OBE

Nuala Mole

Anna Worwood

The Betterfhof-Inne Family

Phil Inne is an English mathematician specialising in Artificial Intelligence. He has set up a company to develop a software programme which will inhabit a lawyer-bot which will be capable of providing legal advice on family law matters. The working title of the programme is 'LongBerg'

Sowmuch Betterhof is an EU MS neuro-psychologist specialising in brain development.

Phil and Sowmuch met whilst they were working on a classified programme in Luxembourg developing an EU super-computer. They married in Belgium in 2002 and have 2 children Enigma (DOB 1.4.2003) and Spectrum (31.12.2015). They both left Luxembourg in 2015 and moved to London to set up and develop the LongBerg project.

They have been experiencing problems in their marriage. Sowmuch alleges that Phil has been drinking too much and has become violent. She thinks he prefers the LongBerg robot to her. She says she has become depressed and anxious and has sought help from a colleague who is a counsellor.

Phil says Sowmuch has become cool and distant because he believes she was having an affair with her fitness instructor in Luxembourg. He says she is trying to alienate the children from him constantly criticising him and accusing him of being an alcoholic and addicted to lamb chops for breakfast.

The children are both doing fine in schools in England although both schools have noted the children to be somewhat more anxious in school recently.

The LongBerg project has attracted immense interest and a Group of Venture Capitalists have recently bought a 49% share in the company from Phil and Sowmuch for £4m. Phil and Sowmuch have bought another house which is nearing completion. They plan to rent out the current home.

On 9th June 2017 after the election results in the UK became clear Sowmuch took Enigma and Spectrum to EUMS to her family home. She has sent Phil an e-mail saying she can no longer tolerate his physical abuse and does not feel she can remain in England given the current anti-European feeling. She says the English court will be biased in favour of Phil and wont recognise the importance of the maternal bond between her and Spectrum.

Phil denies the allegations wants the children returned to England. He makes an application under the 1980 Hague Convention and BIIa for the return of the children.

Sowmuch defends the applications relying on the Art 13b defence and on Enigma's objections. Enigma is seen in EUMS by a judge and she says she wants to move to EUMS. She says Phil has been violent to all of them.

Phil commences proceedings in the UK seeking a child arrangements order for the children to live with him and a specific issue order for the return of the children. He says Sowmuch is preventing him having any contact with the children and cannot be trusted to promote his relationship with the children.

Sowmuch cross-applies under s.13 Children Act 1989 for permission to relocate permanently with the children to Austria.

An FHDRA is listed and the Cafcass Safeguarding checks reveal Enigma has called them to complain of Phil's behaviour. She says he gets drunk and plays 1980's Britpop very loudly which she doesn't like and that sometimes he calls her mum names. Enigma makes clear she has seen the court papers and discussed them with Sowmuch.

The EUMS first instance court refuses the 1980 Hague application and Phil appeals as of right
The EUMS appeal court initiates contact through the EJN and asks questions about protective measures in England.

Phil also applies to the English court for an order under Art 11(6-8) for the return of the children.

You are sitting in your office one day when a remarkably life-like LongBerg lawyer-bot walks in and says it needs advice about what is going to happen in these very complicated proceedings.

It produces a LONG list of questions and wants to know in particular what difference the implementation of BIIa-Recast might make and what will happen if the UK leaves the EU?

1. What effect is Art 11(4) BIIa supposed to make?
   (Does BIIa Recast change that? What will the position be if we leave the EU?)

2. If the EUMS court makes orders
   (i) Governing occupation of the home

(ii) Domestic abuse protection
(iii) Restricting contact

How quickly can protective measures be obtained in the UK?

3. How will Enigma's views be canvassed in England? What weight will they carry? In the Hague process? In England?

4. What is the process for the court using the Art 11(6-8) mechanism?

5. Will the court make a summary return order in England?

6. In the relocation case if the English court makes a shared 'live with' order how can that be enforced in EUMS? Can jurisdiction be retained in England?

7. What difference will it make if there is a 'Deal or No Deal'?

Part I: Speakers to discuss their answers to LongBerg's questions

Part II: Audience participation.

The UK's Continued Participation in Hague Instruments Following BREXIT

1. The decision to trigger the BREXIT process raises many questions regarding the UK's future relationship with the European Union. Some of the most complex involve the extent to which it will continue to participate in various EU instruments, such as Council Regulation (EC) 2201/2003, commonly known as Brussels II Bis (BiiB), the recast of which is soon to be finalised. The October 2014 Opinion 1/13 from the Court of Justice of the European Union (CJEU) adds a further layer of complexity to the UK's future participation in other international instruments. In that opinion, the CJEU ruled that the matters covered by the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the 1980 Hague Convention) fell within the exclusive competence of the European Union (EU) rather than being a shared competence between the EU and the Member States (MS). To understand why the decision is significant, and in particular, why it further complicates a post-Brexit UK, one needs to understand the meaning of *exclusive versus shared competence* in EU law and the historical practice of the MS regarding accession to the 1980 Hague Convention.

2. Understanding exclusive and shared competence begins with the reforms to the EU clarifying the categories of exclusive and shared competence, among others. Article 2 of the Treaty on the Functioning of the European Union (TFEU) lays out the basic differences between the two. Article 2(1) TFEU says that exclusive competence is when only the EU may create legislation and adopt legally binding acts. When something falls under the exclusive competence of the EU, MS may only act with the permission of the EU or when they are implementing EU acts. Under Article 2(2) TFEU, both the EU and the MS can legislate and adopt legally binding acts in an area of shared competence. Even when something falls within shared competence, however, the doctrine of pre-emption says that MS actions are limited by 1) the extent to which the EU exercises its competence, and 2) the means by which the EU chooses to do so.

3. There are many areas which the TFEU has granted the EU exclusive competence, but the most important for understanding Opinion 1/13 comes from TFEU Article 3(2)—the "conditional exclusivity" article. Under 3(2), the EU has exclusive competence concerning the conclusion of an international agreement when the conclusion may affect common rules or alter their scope. TFEU Article 216 similarly states that the EU has the competence to conclude an international agreement with one or more non-EU States when the conclusion is likely to affect common rules or alter their scope. Taken together, they mean that when the conclusion of an international agreement is likely to affect common rules or alter their scope, not only does the EU have the competence to conclude the international agreement, it has the ***exclusive*** competence to do so. CJEU judgments subsequent to the enactment of the TFEU have further specified that an international agreement only has to fall within the *scope* of common rules, or within an area of law already largely covered by them, to trigger the EU's exclusive competence. In such cases, the EU will have exclusive competence regardless of whether there is an actual contradiction between the international commitments and the internal rules. Finally, the CJEU's Opinion 1/03 stated it

will generally assume that the EU has exclusive competence when doing so is necessary to protect the effectiveness of EU law and the proper functioning of systems established by it.

4. All the MS of the EU are parties to the 1980 Hague Convention, which now (2017) has some 97 parties worldwide. Since the adoption of BiiB, a number of new States have acceded to the 1980 Convention. As a result, the CJEU was asked whether the acceptance of accession by third countries to the Convention fell within the field of cross-border family law in which the EU had external competence so that acceptance of such accessions was also a matter of EU exclusive competence. It considered the EU had exercised its competence through BiiB. The Advocate General's View (AG's View) for Opinion 1/13 explained that BiiB did so by incorporating almost the whole of the 1980 Hague Convention and establishing equivalent provisions to the substance of the Convention. The AG's View indicated that BiiB is limited to relations between the authorities of the MS of the EU and is not intended to apply where a process of co-operation between a MS and a third State is necessary to bring about the return of an abducted child. However, he also noted that there were situations in which proceedings falling prima facie within the scope of the Regulation might involve a child whose habitual residence was in a third State. Therefore, the CJEU felt that the subject of the 1980 Hague Convention was largely covered by EU law. The CJEU in its Opinion decided that the overlap and close connection between the two meant the scope and effectiveness of the common rules created by BiiB were likely to be affected by the MS practices and, thus, within the exclusive competence of the EU.

5. The CJEU's decision to place the 1980 Hague Convention within the EU's exclusive competence was significant because of the MS's practices for bringing in new parties to the convention prior to Opinion 1/13. Before Opinion 1/13, MS treated the 1980 Hague Convention as an area of shared competence because only they were actual parties to the treaty as the Convention does not permit the accession of international organisations. Article 38 of the 1980 Convention also specified that third-party (non-EU) States could accede to the Convention provided that their declarations of accession were accepted by the States already party to the Convention. Because the 1980 Hague Convention was meant to be "an instrument of bilateral cooperation between the Contracting States," the accession of these third-party States would only have effect between the acceding States and the States that declared their acceptance of the accessions.

6. For these reasons, the MS did not believe the EU had any legal obligation to approve the accessions, nor did they believe that they needed such approval to bring in third parties into the Convention. However, the CJEU disagreed, and Opinion 1/13 essentially decided that MS must secure the approval of the EU in order to accept the accession of a third-party State. In other words, if the EU—through the offices of the European Commission ("EC")—cannot agree to a third-party State joining the 1980 Hague Convention, that third-party will not become party to the Convention (vis-a-vis any MS) and thus not be bound by it bilaterally.

7. This new reality raises complicated questions in light of Brexit. Currently, the UK is both a party to the 1980 Hague Convention and is bound by BiiB through its membership of the EU. Should the UK eventually leave the EU and, thus, no longer be bound by BiiB, what, in light of Opinion 1/13, will its position be vis-a-vis other EU MS under the 1980 Hague Convention? Will the

application of the Convention between the UK (which will by then be a "third country") and the remaining MS (except Denmark) have to be approved in full by the EC? What will happen if it fails to receive such approval? Like many things concerning Brexit, there are no clear answers to these questions, so a "wait-and-see" attitude is currently all that can really be adopted. In the light of the approach taken by Opinion 1/13, there seems to be a strong possibility that part of the deal eventually concluded between the EU and the UK may have to include EU approval for the application of the 1980 Hague Convention between the UK and the remaining 27 MS.

8. Similar but slightly different circumstances apply to the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Hague Convention). The Convention was adopted in the UK as though it had been an EU instrument following Council Decision 5 June of 2008 (2008/431/EC) (Council Decision). It authorised certain MS to accede to the 1996 Hague Convention and other MS to make a declaration of the application of relevant internal rules of Community law. In that Council Decision, only 19 of the then 27 MS were authorised to accede to the 1996 Hague Convention. Though the Council Decision does not specify why only certain States were given leave to accede, the corresponding Proposal(s) for a Council Decision (COM (2001) 680 final and COM (2003) 380 final) from the EC suggest some possible motives.

9. In both proposals, the EC emphasised the EU's primacy concerning the 1996 Hague Convention due to "shared competence" between the EU and the MS and the degree to which the subject matter of the 1996 Hague convention was already covered by EU regulations or likely to be covered by EU regulations in the future.[1]

> "[I]n accordance with the AETR case law of the Court of Justice on external competence, Member States are no longer free to approve on their own the Convention, as its provisions on jurisdiction and enforcement affect the common rules of Regulation 1347/2000. Therefore, competence is shared between the Community and the Member States."[2]
>
> "In accordance with the AETR case law of the Court of Justice on external competence, Member States are no longer free to conclude on their own the Convention, since its provisions on jurisdiction, recognition and enforcement affect Community rules, as currently laid down in Council Regulation No. 1347/2000. Moreover, the Convention deals with matters covered by the future Regulation on

[1] Proposal for a COUNCIL DECISION authorising the Member States to sign in the interest of the European Community the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Hague Convention), COM(2001) 680 final, 20 November 2001, ¶¶ 2, 5, 9-11.
Proposal for a COUNCIL DECISION authorising the Member States to ratify, or accede to, in the interest of the European Community the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Hague Convention), COM(2003) 348 final 2003/0127 (CNS), 17 June 2003, ¶¶ 3-5.
[2] COM(2001) 680 final, 20 November 2001, ¶ 9.

matters of parental responsibility. It follows that competence to conclude the Convention is shared between the Community and the Member States."[3]

10. Therefore, the EC suggested the European Council invite and/or authorise MS to accede to the 1996 Hague Convention in the interests of the Community under certain conditions in order "to safeguard the application of Community rules."[4] The EC suggested the European Council require the MS to ratify or accede to the 1996 Hague Convention "at the appropriate time, and at the latest within six months from the adoption of the decision authorising signature" upon making a required declaration of accession[5] and "all necessary preparations for ratification."[6] COM(2001) 680 final, 20 November 2001 also contained language suggesting that the Council require MS to enter into negotiations to allow the EU to accede to the 1996 Hague Convention, since it did not allow for the accession of international organisations, before giving the MS authorisation to accede to the treaty themselves. Such language is missing from the 2003 proposal and from the 2008 Council Decision.

Conclusion

11. The whole Article 50 withdrawal process from the EU is shrouded in a fog of the unknown. However, it does not seem beyond possibility that the EU (or at least the CJEU) will take the same approach to the UK's ongoing participation in the two key Hague Conventions discussed above as it did to other "third countries" in Opinion 1/13.

[3] COM(2003) 348 final, 17 June 2003, ¶ 5.
[4] COM(2001) 680 final, 20 November 2001, ¶ 23.
[5] COM(2003) 348 final, 17 June 2003, ¶¶ 6-7.
[6] COM(2001) 680 final, 20 November 2001, ¶ 23.

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juridische diensten

Does Brexit mean Brexit?

Divorced, but still family

Dr. Ian Sumner
26 June 2017, IAFL

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Affected instruments - EU

- Family Law
  - Brussels II-bis Regulation
  - Maintenance Regulation
- Civil law
  - Brussels I-bis Regulation
  - Insolvency Regulation
  - Rome I Regulation
  - Rome II Regulation
- Procedural Law
  - Service Regulation
  - Enforcement Order Regulation
  - Evidence Regulation
- Other instruments
  - *Matrimonial Property Reg.*
  - *RP Property Regulation*
  - *Inheritance Regulation*
  - *Rome III Regulation*

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Affected instruments – int'l

- Hague Conference
  - Hague Maintenance Convention 2007
  - Hague Choice of Forum Convention 2005
- European Economic Area
  - Lugano Convention 1988 and 2007
- European Communities
  - Brussels Convention 1968
- United Nations
  - UN Disabled Persons Convention 2006

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Issues

- Ratification of International Instruments
  - Instruments ratified by the EU?
  - Lugano Conventions?
- Transitional provisions
  - Which date is definitive – commencement or hearing?
- Interpretation
  - Competency of ECJ / lack of uniformity / future

Issues (continued)

- *Lis pendens*
  - Major distinction: mandatory/discretion
- Referrals
  - E.g. Article 15 Brussels II-bis
- Reciprocity
  - UK will be a third state, thus different status for recognition

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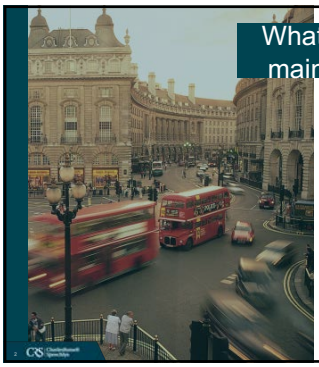
The impact of Brexit on the enforcement of child and family maintenance orders (income and outgoing)

Michael Wells-Greco
Charles Russell Speechlys (Geneva and London)
Assistant Professor, Maastricht University
Monday 26th June 2017



What would Brexit mean for maintenance applications?

Repeal of the European Communities Act 1972 means the UK would cease to be bound by:

- European Maintenance Regulation 2008 (as a Member State)
- 2007 Hague on the International Recovery of Child Support and Other Forms of Family Maintenance (Hague Maintenance Convention)

unless the UK does something…

So what could (should) the UK do?

- Do something. The UK had a choice to participate in these instruments and has chosen to do as it felt that there were problem areas that needed addressing. The UK has only opted into those measures which the government of the day has considered to be in the national interest; on everything else the UK opted out. Any loss of capability in this area post-Brexit will likely result in confusion and slower and less effective justice for families
- Rely on Hague Maintenance Convention?
- 2007 Lugano Convention?
- Bilateral cooperation with the EU (on all family law relevant matters or 'cherry picking')?

- Future: Relevant for UK resident families and those resident across the EU with connections with the UK

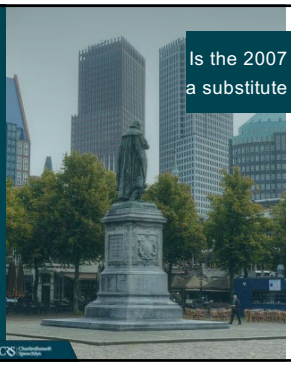
2007 Hague Maintenance Convention

- 36 States bound (EU Member States + Albania, Bosnia and Herzegovina, Kazakhstan, Montenegro, Norway, Turkey, Ukraine, USA (+ Canada, soon))
- UK should do what is necessary under public international law to remain a Contracting Party without any break in its operation
- But the UK is bound by the 2007 Hague Maintenance Convention as a Member State of the EU? UK is a Contracting State as a member of a REIO (Art 59(3))
  - See Art 58(1) and (2) – UK was one of the Members of the HCCH at its Twenty-First Session
  - To avoid a break, the UK will have to exercise its external competence (but when can the UK do that? This is best done by agreement with the EU). *Resolution letter to HCCH and to UK Government*

Maintenance Regulation

- Umbrella PIL regulation – first in the family law field
- EU Regulation (**no reservations permitted**)
- Applies not only to court ordered maintenance, but also to decisions of administrative bodies (the Child Support Agency, UK); provides for legal aid in proceedings relating to maintenance obligations in respect of those aged under 21 initiated through the Central Authorities
- Uniform rules of jurisdiction
- Orders made in other Member States are automatically recognised and enforceable in the UK and Denmark but not vice versa
- There can be no review as to substance on an application for enforcement

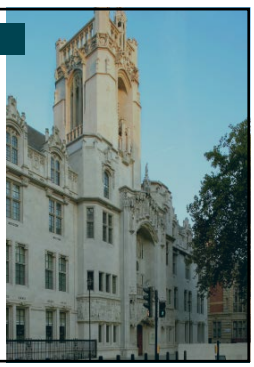
Is the 2007 Hague Maintenance Convention a substitute for the Maintenance Regulation?



- Similar but there are differences
- Material scope is potentially more restricted (NB Reservations e.g. child maintenance until 21 or 25? Ukraine?; Declarations). State by State analysis needed. True extent of complications will only become apparent with more State ratifications
- Does not contain any direct rules on jurisdiction
- No equivalent subsidiary jurisdiction and forum necessitatis
- No supranational court/arbitration system
- Recognition and enforcement regime global based on compromise and therefore not an "EU considered framework"

Post-Brexit (Jurisdiction)

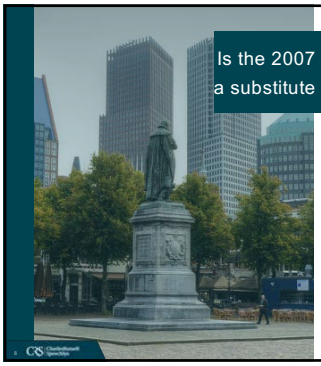
- Unless a deal is reached with the EU, post-Brexit the UK's legal systems free to determine the rules of jurisdiction that apply to maintenance cases
  - One exception is that limitations must be placed on the ability of the maintenance debtor to seek to modify a decision given by the courts of the habitual residence of the creditor in any State other than the State where that decision was given, unless the conditions in Article 18 of Hague 2007 are satisfied
  - This condition will be satisfied if the jurisdiction rules in the EU Maintenance Regulation are retained as part of the Great Repeal Bill
- Unilateral application of the jurisdiction rules as per EU Maintenance Regulation
- Opportunity to abandon a strict *lis pendens* system?
- *Forum non conveniens*
- Opportunity for UK to consider rules on jurisdiction (intra and extra UK matters)



Post-Brexit: Recognition and Enforcement

- Unless a deal is reached in the Brexit negotiations for a transitional or permanent bilateral agreement between the UK and EU, the framework will be Hague Maintenance Convention

Pros	Cons
• Maintenance creditor will still be able to sue for maintenance in the UK and have that maintenance decision recognised and enforced in EU Member States without difficulty (but in practice…) • One recognition and enforcement regime (MR highly technical) • Technical areas of uncertainty in MR fall away (e.g. Hague Maintenance Convention, Article 37(1) (establishment and variation of maintenance decisions), and Articles 9(5) and 37(2) (recognition and enforcement)) • No supranational court	• Review of jurisdiction possible • Incoming Orders made in other Member States no longer automatically enforceable in the UK (e.g. good news for UK resident adult children?) • Outgoing Orders: EU Member States would apply 2007 Hague Convention in relation to maintenance decisions from the UK • Two more grounds for refusal of recognition and enforcement (fraud in procedure and Article 18 jurisdiction) • No supranational court • No EU solidarity (EU Charter application)



Is the 2007 Hague Maintenance Convention a substitute for the Maintenance Regulation?

- Conclusions:
  - the Hague Maintenance Convention would fill a gap so no cliff-edge
  - however it does not contain
    - jurisdictional rules or t
    - he same approach to recognition and enforcement as the Maintenance Regulation
    - (and practitioners in the UK will need to beef up their knowledge on the differences and procedural aspects)

2007 Lugano Convention

- If the UK were to join the EFTA then it would be possible for the UK to accede to and ratify the 2007 Lugano Convention. Such a step would require unanimity among the remaining Member States and the Lugano Contracting States, in the second
- Would 1988 Lugano Convention revive? Probably not
- Uniform rules on jurisdiction
- Requires exequatur
- Overlap with 2007 Hague Maintenance Convention?
  - Norway is a Contracting Party to the 2007 Hague Maintenance Convention whereas Iceland and Switzerland are not

Adieu to the EU Maintenance Regulation?

- Hopefully not
- Without denying that there are some alternative international instruments, there are advantages in proceeding with a **reciprocal basis with the EU**
- **Bilateral Treaty as a Third Sate**: With respect to jurisdiction and judgment recognition and enforcement, the UK should strive to ensure the on-going effectiveness of the current EU system by seeking to negotiate an agreement with the EU parallel, along the model of the EU-Denmark Agreement entered into for the purposes of the Brussels I Recast Regulation
- The desirability of adjudicative review and the CJEU?
- Second Protocol to the 2007 Lugano Convention provides a valuable template (e.g. Switzerland)

10

Recommendations

- **Be clear** on the post-Brexit status on EU PIL family law instruments and applicability in the UK (including as between/among the legal systems of the UK). Role for Resolution and IAFL and academics
- Keep the process as **simple** as possible (dangers of 'cherry picking' and of delay and confusion). Realities of dealing with these applications in practice
- Negotiate a **Bilateral Arrangement with the EU**: Seek to secure continued reciprocal application to those EU family law instruments for **current instruments** e.g. European Enforcement Order Regulation and **future ones** e.g Brussels IIa Recast, Public Documents Regulation
- Give **pre-Brexit CJEU decisions** the same **binding precedent** status as UK Supreme Court decisions and confirm status of post-Brexit CJEU decisions
- UK to start the necessary and diplomatic and legislative process to ensure continued application of **2007 Hague Maintenance** and possible ratification of 2007 Lugano Convention
- Benefit in a continuing and complimentary relationship between the EU (and its tes) and the Hague Conference on Private International Law

11

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The implications of Brexit on the allocation of maintenance jurisdiction within the UK

Ruth M Innes

Westwater Advocates

The current position

Westwater Advocates

- The provisions of the Maintenance Regulation in relation to jurisdiction have been given intra-UK effect by Schedule 6 of the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011
- Certain modifications are contained within the Schedule to ensure that the provisions operate within the UK - for example, in Article 3(c) "nationality" is to be read as "domicile"
- The *lis pendens* rule in Article 12 is applied intra-UK

Practical impact of importing Article 12

Westwater Advocates

- Increased number of cases in which there is competing litigation in Scotland and other parts of the UK, primarily England
- Cases being raised at an earlier stage without any preceding negotiation
- Use of fault grounds of divorce to seise jurisdiction
- Increased acrimony, expense and uncertainty for litigants

Example: *Re V [2017] 1 FLR 1083*

- The wife issued divorce proceedings in England.
- The husband raised an action of divorce in Scotland.
- The wife conceded that the divorce proceedings in Scotland would take precedence as the parties last resided together in Scotland (Domicile and Matrimonial Proceedings Act 1973, Sch. 1 para 8)
- However, immediately prior to doing so, she issued proceedings in England for maintenance, including interim relief in terms of sec 27 of the Matrimonial Causes Act 1973
- Although the action of divorce was live in Scotland, it contained no application for maintenance and as a result, the English court was first seised in relation to that issue and an award of interim maintenance was made

What will happen post-Brexit?

According to the Great Repeal Bill White Paper:

- Directly effective EU law will be converted into UK law
- Implementing legislation under sec 2(2) of the ECA 1972 will be preserved (includes 2011 regs)
- This will remain in place until UK legislators decide otherwise

What if it is adieu to the Maintenance Regulation?

- If the 2011 Regulations are repealed, the default would be a return to the pre-existing intra-UK rules.
- The provisions of the 2007 Hague Maintenance Convention do not include jurisdictional rules and are unlikely in any event to be applied intra-UK
- The 2007 Lugano Convention may lead to provisions similar to those found in the 2011 Regulations being implemented if it is thought that a similar approach to the current position is justified

An opportunity?

- To consider what rules should be applied intra-UK both in relation to maintenance but also to divorce jurisdiction
  - Should the system of mandatory and discretionary stays/sists in the Domicile and Matrimonial Proceedings Act 1973 remain or be amended to some extent?
  - Should the approach to conflicts of maintenance jurisdiction be based on *forum non conveniens* or *lis pendens?*

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Territorial units or countries

Rachael Kelsey
SKO Family, Edinburgh

Indyref2

Matthew 9:24

'He said unto them, Give place: for the maid is not dead, but sleepeth. And they laughed him to scorn.'

Indyref2

- EU
- Hague
- Lugano....

Meantime…practicalities I

- Strategy
- Contested proceedings- Articles 12 and 13

Article 12

Article 12

Lis pendens

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States **or different parts of the United Kingdom**, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
2. 2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court

Article 13 I

Article 13

Related actions

1. Where related actions are pending in the courts of different Member States **or different parts of the United Kingdom**, any court other than the court first seised may stay its proceedings. L 7/8 EN Official Journal of the European Union 10.1.2009
2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

Article 13 II

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

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Article 14

Article 14
Provisional, including protective, measures

Application may be made to the courts of **a part of the United Kingdom** [Member State] for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State **or another part of the United Kingdom** have jurisdiction as to the substance of the matter

SHEEHAN KELSEY OSWALD FAMILY LAW SPECIALISTS

Meantime…practicalities II

- Procedure and timing
- Funding

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Caldwell & Robinson

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The Belfast Agreement (1988) recognises:

- The right of the people of Northern Ireland to identify themselves and be accepted as Irish or British or both;
- Their right to hold either British or Irish citizenship, or both;
- Their right to leave the United Kingdom and join the Republic of Ireland;
- The right of Northern Irish people who choose to be Irish to reside freely in Northern Ireland.

Caldwell & Robinson

The Belfast Agreement (1988) states that:

- The power … shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just treatment for the identity, ethos and aspirations of both communities.

Caldwell & Robinson

EU Council of Ministers:

- "The European Council acknowledges that the Good Friday Agreement expressly provides for an agreed mechanism whereby a united Ireland may be brought about through peaceful and democratic means. In this regard, the European Council acknowledges that, in accordance with international law, *the entire territory of such a united Ireland would thus be part of the European Union*."

Caldwell & Robinson

The border reality:

Caldwell & Robinson

Donald Tusk:

- "Avoiding a hard border .... is crucial to the peace process in Northern Ireland."
- "We will seek flexible and creative solutions aiming at avoiding a hard border between Northern Ireland and Ireland."

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15 June 2017

Brexit – *Let's call the whole thing off!*

Final Call Brexit Conference 26th June 2017

IAFL - Resolution - FLBA

Jennifer O Brien Solicitors

Impact of EU Law on both British & Irish family law:

•EU Regulations are key to determining the jurisdiction for family law cases – venue matters

•Underlying national laws can differ greatly

•If British Courts decide not to observe *lis pendens* rules

•Parallel actions could become more commonplace

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➢Forum shopping undesirable – BII creates a race for the line

➢MH v MH – Irish Court of Appeal decision delivered Jan 17 following reference to CJEU

➢Agreeing with the Rules without signing up to the whole EU/CJEU package?

➢The Great Repeal Act – what are the consequences in the event of a dispute as to the precise meaning of the Regulation?

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- Are we entering a parallel Universe? – see Owusu v Jackson C281/02; [2005]ECR I-1383
- MH v MH same facts post-Brexit….
- *Forum non conveniens* – how will it work?
- The obligations which remain in place for neighbouring EU jurisdictions – reciprocity, recognition & enforcement of orders.
- Will Hague help us out or can we just ….

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- call the whole thing off!
- Any Questions?

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Let's call the whole thing off

In a follow-up to 'Separation anxiety' by Keith Walsh in the May issue, **Jennifer O'Brien** assesses the impact of Brexit on international family law cases

JENNIFER O'BRIEN IS A SOLICITOR SPECIALISING IN INTERNATIONAL AND IRISH FAMILY LAW MATTERS AND IS PRINCIPAL OF IRISH FAMILY LAW CHAMBERS

Britain's imminent withdrawal from the EU creates uncertainty in international law, particularly in the field of international family law. First, the current impact of EU law on both British and Irish family law must be considered. EU regulations principally determine the jurisdiction in which a family law case is to be heard. The regulations ostensibly have no bearing on the result, albeit every good family lawyer knows that venue matters.

Council Regulation 2201/2003, known as *Brussels II bis*, sets out the basis for jurisdiction in matters relating to divorce, legal separation, or marriage annulment, such that jurisdiction lies with the courts of the member state in whose territory the spouses are habitually resident, or of the nationality of both spouses or, in the case of Britain and Ireland, of the domicile of both spouses.

Of course, a common jurisdictional scheme assumes that the underlying national laws are broadly similar. This is not the case – there are vast differences in approach in the application of family law across the EU in terms of division of property, financial matters, and issues pertaining to parental responsibility and children.

Consider the default property regime, for instance, applicable in France and Spain and, indeed, the prevalence of enforceable premarital agreements in Germany and elsewhere. Such concepts are not generally considered capable of enforcement in this jurisdiction. As we have a requirement of four years' separation (albeit sometimes under the same roof) prior to the granting of a decree of divorce, our jurisdictional races tend to involve Irish judicial

AT A GLANCE

- EU regulations are key to determining the jurisdiction for family law cases – the regulations ostensibly have no bearing on the result, but the venue matters
- Underlying national laws can differ greatly, especially with regard to the division of property, financial matters, parental responsibility, and children
- If British courts decide not to observe *lis pendens* rules, parallel actions could become more commonplace

PIC: SHUTTERSTOCK

> ONE CANNOT DETERMINE EU LAW WITHOUT CONSIDERING THE NATURE OF THE EU LEGAL SYSTEM WITHIN WHICH IT OPERATES, AS WELL AS THE MYRIAD OBLIGATIONS CREATED BETWEEN MEMBER STATES, AS THINGS CURRENTLY STAND

separation proceedings competing for time with divorce proceedings in the other EU member state. Similar, yet different relief – and that's before you even consider the question of available ancillary financial relief.

Forum shopping

While 'forum shopping' is undesirable, especially in the area of family law, it is submitted that *Brussels II bis* has created a race for the line, as choice of jurisdiction is key to the outcome in most cases.

Consider the recent case *MH v MH*, a Court of Appeal decision delivered by Finlay Geoghegan J on 24 January 2017. The applicant/appellant husband married the respondent wife in 1982. The marriage had irretrievably broken down. For the purpose of the appeal, it was assumed that both parties were domiciled in Ireland and were, prior to September 2015, habitually resident in England. The Irish judicial separation proceedings were commenced on behalf of the husband by the issue of a special summons out of the Central Office of the High Court shortly after 2.30pm on 7 September 2015. It was served on the wife on 9 September 2015.

On behalf of the wife, an English divorce petition was issued by the Family Court Office in England on 11 September 2015. It was served on the husband on 15 September 2015. The evidence before the High Court was that the wife's divorce petition in its envelope was delivered by DX to the family court office in England at 7.53am on 7 September 2015.

There were two motions before the High Court:

> WHILE 'FORUM SHOPPING' IS UNDESIRABLE, ESPECIALLY IN THE AREA OF FAMILY LAW, IT IS SUBMITTED THAT *BRUSSELS II BIS* HAS CREATED A RACE FOR THE LINE, AS CHOICE OF JURISDICTION IS KEY TO THE OUTCOME IN MOST CASES

- The husband's motion seeking a declaration that the Irish High Court had full and exclusive jurisdiction to deal with the proceedings and consequential orders restraining the wife from taking any steps in the English divorce proceedings,
- The wife's motion sought a stay of the judicial separation proceedings until such time as the jurisdiction of the court first seised was determined and, thereafter, declining jurisdiction in favour of that court pursuant to article 19 of the regulation.

The High Court found as a fact that the English divorce petition was opened and stamped prior to 10.30am on 7 September 2015. The High Court also found that, on the facts, the Irish High Court was not the court first seised within the meaning of articles 16 and 19 of regulation 2201/2003.

Accordingly, an order was made in the High Court staying the judicial separation proceedings until such time as the jurisdiction of the court first seised was determined, pursuant to article 19 of the regulation.

Following a hearing of the appeal to the Court of Appeal, that court identified two issues arising:

- Was the trial judge entitled to find as a fact, on the evidence before him, that the divorce petition was opened and date-stamped prior to 10.30am on 7 September 2015, and
- The proper interpretation of article 16.1(a) of the regulation.

The Court of Appeal upheld that finding of fact, but found that the overall question required a reference to the CJEU in the following terms: is "the time when the document instituting the proceedings … are lodged with the court" in article 16.1(a) of regulation 2201/2003 to be interpreted as meaning:

1) The time at which the document instituting the proceedings is received by the court, even if such receipt does not result in the immediate commencement of proceedings or proceedings being considered as pending under national law, or
2) The time at which, following receipt of the document instituting the proceedings by the court, the proceedings are commenced or are considered pending under national law.

Hunting lodge

The CJEU, by a reasoned order of the court (6th Chamber) on 22 June 2016, made the following ruling: "Article 16(1)(a) of Council Regulation (EC) no 2201/2003 … must be interpreted to the effect that the 'time when the document instituting the proceedings or an equivalent document is lodged with the court', within the meaning of that provision, *is the time when that document is lodged with the court concerned* [author's emphasis], even if, under the national law, lodging that document does not, of itself, immediately initiate proceedings."

Accordingly, the Court of Appeal concluded that the English court was first seised within the meaning of article 16(1)(a) at latest by 10.30am on 7 September 2015. The Irish High Court was not seised until, at earliest, 2.30pm that day – hence the appeal was dismissed. The wife went on to obtain generous financial provision in the context of her English divorce proceedings.

Certainly, this case highlights in some detail the provisions of the regulation

FOCAL POINT

YOU MUST COMPLY

What if the English courts and the British Parliament promise that they will continue to comply with Council Regulation 2201/2003 – agreeing with the rules – without signing up to the whole EU/CJEU package? How then would differences of opinion be resolved, as occurred in *MH v MH*, as to the precise meaning of the words in the regulation? Will the English courts await a reference to the CJEU or will they just happily proceed with litigation in their own courts based on their interpretation of the regulation?

It is submitted that the regulation cannot be interpreted in a vacuum – that one cannot determine EU law without considering the nature of the EU legal system within which it operates, as well as the myriad obligations created between member states as things currently stand.

***Brussels II bis* also governs jurisdiction in relation to matters of parental responsibility, including custody, access, and child-abduction matters. The connecting factor is the child's habitual residence. As such, these cases tend, for the most part, to be determined by the courts of the children's home country. This approach has worked well, and is consistent with the provisions of the *Hague Convention on Child Abduction* and, as such, it is submitted that there is unlikely to be much change in this area of practice. One wonders, however, about the future status of Irish care orders that place minors in facilities in Britain.**

applicable to jurisdiction and the current mechanism available when a dispute arises as to 'which court' between the courts of Ireland and the courts of England and Wales.

Imagine, if you will, precisely the same facts – *MH v MH* – in a post-Brexit scenario. Would the Irish court remain obliged to consider the provisions of the regulation when considering jurisdictional matters pertaining to a non-EU jurisdiction? Or would we simply fall back on the principles of private international law?

Under the doctrine of *forum non conveniens*, it is a fairer approach, perhaps, to consider the suitability of the forum – especially in family law – rather than rewarding the first spouse to get to court. In such a scenario, the Irish court would no doubt consider the domicile of both parties, the fact that they had an Irish holiday home, and the ability of the Irish court to resolve matters between them in an effective manner.

Certainly, the fact of actual residence elsewhere would be of some weight in terms of arguing convenient forum; however, one imagines lawyers enjoying (and perhaps clients enduring) initial motions of wonderful complexity, all of which the regulation was designed to prevent.

Parallel universe

Perhaps we will take renewed interest in the case of *Andrew Owusu v NB Jackson*, where the Grand Chamber decided not to apply the doctrine of *forum non conveniens*, notwithstanding the fact that the personal injury took place in Jamaica and the action was in part against a defendant domiciled in England.

Essentially, the court found that the application of *forum non conveniens* was likely to affect the uniform application of the rules on jurisdiction contained in the convention. It didn't matter that the other state was a non-contracting state and, as such, it seems that the same reasoning would apply to *MH v MH* in a post-Brexit scenario. Our courts would still carry out an assessment as to which court was seised under the regulation, so being first would no longer matter.

Of course, the real question is what would happen in the English High Court? Should Britain decide to no longer be bound by the regulation, the court would no longer be obliged to observe the *lis pendens* rules with regard to the stay of its proceedings, pending the determination by the Irish High Court as to which court is seised. The court could proceed with the English divorce proceedings, hear and determine same, while all the time competing proceedings were being processed in an EU member state.

Parallel actions – every client's worst nightmare – could become more commonplace between here and London, and between London and every other EU jurisdiction. This would appear to be a retrograde step between close neighbours in a formerly civilised world.

Mirror, mirror

The EU also governs jurisdiction on maintenance claims in the context of the *Maintenance Regulation*. To make matters worse, the jurisdictional basis for these claims differs from that for divorce or separation. In addition, the *Maintenance Regulation* allows parties to choose the jurisdiction, whereas this possibility is not available in relation to divorce or the division of property.

Certainly, Brexit will complicate the recognition and enforcement of maintenance orders between these islands. It may be preferable, in particular cases, to seek mirror orders in Ireland and Britain to ensure enforceability.

Currently, the status of EU law in Britain after Brexit is unclear. It is considered likely that the British Parliament will legislate for all EU law to remain valid on leaving the EU – with repeals and amendments being considered on an individual basis thereafter.

In family law, jurisdiction for divorce may revert to the original English law, being grounded in either the domicile of either party or his/her habitual residence for one year prior to the proceedings. Undoubtedly, this will widen the possibility for divorce in England – albeit the question remains for Irish lawyers how 'which court' will be determined in these cases, and indeed, will such English divorces be recognised here?

Perhaps, we will revert to the principles of private international law, which remain in place in terms of non-EU jurisdictions, considering matters such as *forum non conveniens* at the inception of proceedings – but these arguments are also limited when one considers the EU case law, in particular, the decision in *Owusu*.

The provisions of the *Domicile and Recognition of Foreign Divorces Act 1986* would be of assistance when considering whether a post-Brexit English divorce is capable of recognition in this jurisdiction. However, the Irish courts may have a difficulty recognising same, where there are valid subsisting proceedings in Ireland or another EU member state, and particularly where the relevant EU jurisdiction court has been seised for the purpose of the regulation.

Perhaps we could ratify and enforce the *Hague Convention on Choice of Court* and, indeed, explore new and interesting ways in which The Hague might be persuaded to launch new conventions with a view to plugging the gaps!

Such complexity in family law between these islands is difficult to comprehend, especially where Brexit has the potential to bring unity to the island of Ireland – and division to Britain. Perhaps there is still time to call the whole thing off!

LOOK IT UP

CASES:

- *Andrew Owusu v NB Jackson* (Case C-281/02; [2005] ECR I-1383)
- *MH v MH* [2015] IEHC 771
- *MH v MH* [2017] IECA 18
- *MH v MH* (Case C173/16), order of the court (Sixth Chamber) (22 June 2016)

LEGISLATION:

- *Choice of Court (Hague Convention) Act 2015*
- Council Regulation No 2201/2003 (*Brussels II bis*)
- Council Regulation (EC) No 4/2009 (18 December 2008) on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations
- *Hague Convention on the Civil Aspects of International Child Abduction* (25 October 1980)
- *Hague Convention on Choice of Court Agreements* (30 June 2005)

The morning after the night before : Europeans wake up to Brexit

Isabelle REIN-LESCASTEREYRES

Mainland perception :

- ✓ A political decision to prevent free circulation in Europe ?
- ✓ UK had a very good deal : negotiate and therefore influence, while being able to opt out.
- ✓ Follow up from the UK **not opting in** the latest instruments.

I. Business as usual ?

- Just a little more "different speed Europe"
- The UK was already a third member state regarding the latest EU regulations.
- Universal scope of the EU regulations :
  - ✓ Jurisdiction
  - ✓ Applicable law

BUT

Even if the UK had opted out of the most recent regulations, it was a Member State of :

- Brussels II bis (Regulation n° 2201/2003)
- Maintenance regulation (Regulation n° 4/2009)

Which involve a big number of cases !

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II. Brexit – the day after the hungover

Brexit will have important negative consequences

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- Litispendance/ the "lis alibi pendens" rule
  - ✓ Different solutions if France seized first or second.
  - ✓ NOT the end of forum shopping/race to the decision ON TOP OF race to courts.
  - ✓ Higher costs plus uncertainty. Great for the lawyers ?
  - ✓ How to deal with UK injunction not to proceed ?

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- Recognition
  - ✓ **Divorce** : automatic recognition in France. How about recognition in the UK plus concerns about new divorce consent without a judge.
  - ✓ **Maintenance** : Simplified exequatur easier than exequatur. Problem for small maintenance awards.
  - ✓ **Parental responsibility** : End of EU certificates. Hague 1980 less demanding than Brussels II bis (too bad whilst the UK was the best pupil in the classroom).

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- **Previsibility/prenups**
  - ✓ No more choice of jurisdiction possibility for maintenance.
  - ✓ Retroactivity ?

  Cf. Daniela's presentation.

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III. SURVIVAL KIT FOR THE DAY AFTER
ONE MORE BLOODY MARY ?

- **First option** : **back to English international law. But which one ?**
  - ✓ Some copy paste of the current EU regulation ? Poetic justice of having some sort of English international code ?
    - o But then why Brexit ?
    - o In time growing further apart
    - o With no more CJEU interpretation
  - ✓ Or back to pre 2003 ? How about reciprocity ? England needs reciprocity as much as we do.

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- **Second option : moving from EU regulations to the Hague international conventions and/or Lugano**.

  = Further changes:

  - ✓ Parental responsibility : different conditions for prorogation (that one parent has his habitual residence in the MS of the divorce). Exp : if the child is in the UK, the Hague 1996 will apply.
  - ✓ Lugano : applies only if the defendant has his habitual residence in a Member state/Choice of jurisdiction unlimited contrary to the maintenance regulation.

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CHEERS !

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Or should I say…« Make Europe great again »,

Just come back !

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The Morning after the Night Before: Spaniards wake up to Brexit

Some Background: The View from the Balcon de Europa

- Spaniards are Europeans before they are Spaniards.
- Opinion polls and occasional referenda consistently reveal Spaniards as the keenest of Europeans and the most ready to cede more powers to Brussels, in part because of a general mistrust of Madrid, especially in the autonomous regions.

Cupboard Love?

- One reason for this may be that Spain has proven particularly efficient at winning money from Europe for infrastructure projects.
- The years of Spain as the main beneficiary of Euro-millions are passed. Nevertheless a positive glow lingers from the decades of largesse.

Europe Forever

- Spaniards generally assume that everyone must love the EU as much as they do.
- As a result there is little sense of the anxiety claimed by politicians in Germany and Brussels about the survival of the European project.

Euro-Fans

- Almost alone among large EU states there is no euro-sceptic let alone anti-EU voice in Spanish politics.
- The euro- prefix is gaily placed before the names of buildings and hotels as a sign of class: Eurobuilding, Eurostars, while as a suffix 'de Europa' lends continental glamour to medium-sized mountain-ranges and moderately spectacular cliffs: Picos de Europa, Balcon de Europa.

Jilted Juan

- But precisely because of this overwhelmingly positive and uncritical attitude towards the European project, Brexit came as a huge shock to many Spaniards.
- The most common response was simply disbelief.
- 'Have the English lost their marbles? They had it all and now they are rolling in the deep.'
- And after the disbelief, sadness and then a desire for revenge, not to make an example of the UK to discourage other states from leaving, but as if having suffered a very personal kind of rejection.

But in the Cold Light of Dawn:

- More than 320,000 UK 'ex-patriates' [NB never-to-called 'immigrants']
- Spanish investment in UK among the highest in Europe: Banco Santander, Ferrovial [Heathrow], Telefónica [O2], Iberdrola [Scottish Power], IAG [British Airways/Iberia/Vueling], Aena [Luton Airport], FCC [Urban Waste]

…Tourism

- 'one in five tourists who come to Spain are British, and close to 17 million Britons visited Spain last year', Spanish Prime Minister Mariano Rajoy warning of the dangers of Brexit in January 2017.
- And then… holiday romances contribute to the large number of Anglo-Hispanic marriages

Left at the altar?

- But were the Brits ever really committed to the relationship?
- No Euro
- No Schengen
- Disdainful of foreign legal systems
- Numerous opt-outs
- For the Spanish, Britannia is like a runaway bride

Business as Usual?

- *Erga omnes*- jurisdiction and applicable law (few exceptions on prorogation)
- UK is already a third state – Spain will welcome some clarity in particular because of enormous problems in the past in connection with the succession regulation.

ALBERTO PEREZ CEDILLO

Brexit: the Hangover Litispendance

- Wealthy British spouses will look back in anger at the end of the EU law of "first to issue" weary of the spreading tentacles of the English jurisdiction.
- Lose the *lis pendis* provisions and return to a complete *forum conveniens* system – double race?... A Spanish court running?
- Spanish judges have often proven quite happy to allow UK nationals to litigate in the UK as otherwise they have to apply English law.
- Spanish judges are as nervous of applying UK law as of driving on the wrong side of the road, the wrong way round a roundabout.

ALBERTO PEREZ CEDILLO

Brexit the Hangover II

- Divorce: automatic recognition of UK divorce in Spain no more. Concern about recognition of the new procedure of mutual consent divorce through notary publics.
- Cohabitation rights – taken for granted in Spain!
- Maintenance: Central authorities have been over-burdened and claim poor reciprocity, which is bad news for child maintenance enforcement.
- *Adios* to the easy-peasy exequatur.
- Parental responsibility – what will be required to travel?

ALBERTO PEREZ CEDILLO

Previsibility and Prenups

- Spanish marriage contracts were never really recognised by English courts due to lack of disclosure and a perceived lack of independent advice.
- Spaniards fear that the trend initiated by Radmacher will be slowed down.

ALBERTO PEREZ CEDILLO

Legal services market

- Maintaining the greatest possible extent of cross-border rights for UK lawyers post -Brexit and *vice versa*

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Out of the British Labyrinth

- The Great Repeal Bill
- CGEU continuing a nonbinding corporation
- Breversal!
- Definitely not talking about Gibraltar

ALBERTO PEREZ CEDILLO

Brexit and Germany

The vote on the resignation of the UK from the EU has not only caught politics on the wrong foot. The parties involved are also concerned about the uncertain consequences.

Article 50 (1) of the Treaty on European Union (EUV) stipulates that any EU Member State may withdraw from the Union in accordance with its constitutional requirements. The declaration of withdrawal shall set a negotiation period of two years in motion which only can be extended by the approval of all Member States and the one who wants to leave. During these exit negotiations, the UK and the Union have to find an exit agreement which needs to be ratified by the EU and UK. If such an agreement does not occur within the two-year period, all legal acts will cease to have effect. An exit agreement is not a necessary condition for the exit itself. Even though it is unlikely that in the two-year deadline an agreement on all aspects can be reached, it seems as well unlikely that all legal acts will be terminated.

Expecting the scenario that no transitional provisions are created, all European legal instruments in relation to the UK expire at the end of the transitional period. The UK would then afterwards be qualified as a third country.

If no prior bilateral agreements are applicable, the national autonomous law of Germany (sec. 98, 108 ff. of the Law Concerning the Proceedings in Family Law Cases and Cases of Non-contentious Matters (FamFG)) applies.

In any case, the Brussels II bis Regulation would be omitted. In this regard, the Hague Convention of June 1, 1970 on the recognition of divorces and legal separation could be re-activated, but this would not be of any use in relation to Germany as Germany has not signed this convention.

So Germany will then apply the autonomous law of sections 98 et seq. of the Law Concerning the Proceedings in Family Law Cases and Cases of Non-contentious Matters (FamFG) in respect of the regulatory content covered by the Brussels II bis Regulation. The bilateral convention of 1960, which also included family and statutory matters, could be revived, but only includes decisions of "upper courts". This leads to

a need of action for German legislation, since decisions of the lower family courts would be not included.

The effect of Art. 16 and 19 Brussels II bis would disappear. The replacement of lis pendens by the pending proceedings, with the result that the court later seized shall suspend its procedure until the jurisdiction of the court first seized is no longer applicable in relation to the UK.

With regard to transitional provisions, it is important to note that the Brussels II bis Regulation is still applicable to divorces issued before the date of the withdrawal from the EU. In contrast to enforcement, recognition does not initiate a separate procedure and has thus already a European effect. There is an advancement/linkage to the time of the divorce. Under Article 16 of the rules of the Brussels II bis Regulation, proceedings pending before the deadline will also be concluded by the Brussels II bis Regulation.

In addition, the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children and the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction will continue to exist. Thus, in parent and custody cases, there is no direct gap, since the United Kingdom has ratified these conventions itself. The UK is also a member of the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children. This Convention does not provide rules for jurisdiction or applicable law, but only recognition and enforcement. Nevertheless, with Brussels II bis being suspended the accelerated return procedure will produce deficits in such cases.

The Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations will also create problems without transitional provisions, since the UK will then be considered as a third country, and the applicants' forum of the Council Regulation will be applicable. Nevertheless, the respective maintenance decisions will be recognized

under the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations of 1973.

The UK will hopefully ratify the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance of 23 November 2007 to ensure official cooperation in this area. On the other hand, after leaving the EU, the UK will no longer be a member of the Lugano Convention on jurisdiction and the recognition and enforcement of judgment in civil and commercial matters of 2007 on enhanced cooperation.

Furthermore, the Treaties and Regulations which the EU has signed will lose their effect for the UK. With the conclusion of the withdrawal, the UK will regain its power of ratification and signing treaties itself.

We have to consider right now what the consequences of Brexit will be. In particular, marriage contracts and prenuptial agreements should contain rules for Brexit as the legal effectiveness of these clauses or of individual clauses will not be regarded by the law at the time of the conclusion of the contract but rather by the law applicable at the time when court proceedings have started.

So be careful when drafting prenups!

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Brexit – Does Brexit Really Mean Brexit for Family Law?

The sound of Brexit: so long, farewell, auf wiedersehen, adieu

26 June 2017

Eleri Jones

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DIVORCE JURISDICTION AFTER BREXIT

This paper is based on an article written by David Hodson OBE, Eleri Jones and Lisette Dupré earlier this year, which was itself drawn from the discussions of an EU Law working group of practitioners.

Introduction

1. The law relating to the jurisdiction for divorce proceedings will affect all family law practitioners, not just those undertaking cases with an international element.

2. Currently our jurisdiction for divorce is based on EU law, namely Brussels IIa. We need to consider what the law will / should be once we leave the EU.

3. This paper will look at:

   - The various scenarios for the future legal position
   - Proposed grounds for divorce jurisdiction
   - Other considerations
   - What will this mean for family law

The various scenarios

4. The three scenarios for consideration are as follows:

   a. Retain full reciprocity with the EU and incorporate the provisions of Brussels IIa into national law

   b. Incorporate the provisions of Brussels IIa into national law but with no reciprocity with the EU

   c. Create our own jurisdiction for divorce

5. By way of reminder, the divorce grounds for jurisdiction in Brussels IIa are found in Article 3:

> *Article 3*
> General jurisdiction
>
> 1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State
>
> (a) in whose territory:
>
> – the spouses are habitually resident, or
> – the spouses were last habitually resident, insofar as one of them still resides there, or
> – the respondent is habitually resident, or
> – in the event of a joint application, either of the spouses is habitually resident or
> – the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
> – the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her 'domicile' there;
>
> (b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the 'domicile' of both spouses.

6. Scenarios (a) and (b) above both involve retaining the above bases of jurisdiction under Brussels IIa. The key distinction is whether there is full **reciprocity** with the other EU member states. If this is an option, then under **scenario (a)**:

a. The decisions of the CJEU would remain binding on us

b. The *lis pendens* provisions (the 'race to issue') would remain but there position would be uniform as between the EU member states and the UK

c. The situation would effectively be the same as it is now

7. The question is whether there is political appetite for achieving full reciprocity, and particular consideration would need to be given to the role of the CJEU.

8. If we are unable to retain full reciprocity, then **scenario (b)** would have the following consequences:

a. CJEU judgments would not be binding on us – would we choose to follow them? If so, would we be permitted to make representations in that court?

b. There is a risk that changes to EU law would not automatically occur in the UK and we might end up applying older / different provisions of Brussels IIa

c. We would apply the *lis pendens* if we use Brussels IIa but none of the other EU member states would be obliged to apply those provisions reciprocally, giving rise to forum arguments, defeating the point

9. In the circumstances, scenario (b) would seem unattractive. It would be easy, but the benefits of the reciprocal system would be lost, yet we would remain constrained by the 'race to issue' provisions, with no possibility of considering which forum is the most suitable.

10. Therefore the third option is **scenario (c)** whereby we create our own grounds of jurisdiction for divorce. What should those provisions be?

Proposed grounds

11. The group considered the grounds in Article 3 of Brussels IIa and some of the advantages and disadvantages of the options and how they work in practice. Ultimately the group considered the following as proposed grounds to found divorce jurisdiction:

a. joint habitual residence

b. habitual residence of the respondent

c. habitual residence of the petitioner for six months before and as at the date of the petition

d. sole domicile of either party

e. sole nationality of either party and a greater connection with England and Wales than any other country within the UK

12. These would operate under a *forum conveniens* system without there being any *lis pendens* provisions.

13. The proposed grounds are drawn upon the grounds in Brussels IIa but with some modification. Each is expanded upon further below:

a. *Joint habitual residence* is the default position for the vast majority of divorces at present. It should continue. It would be habitual residence as at the date of the petition. As a matter of law, a person can have only one habitual residence at any one time.

b. *Habitual residence of the respondent* is also the present law. It is found in other laws such as the EU Maintenance Regulation. It is the country in which the respondent has his or her habitual residence and therefore indicates a strong connecting factor.

c. *Habitual residence of the petitioner for six months before and at the date of the petition*. The group felt that there should be a higher burden of connection on the petitioner than the respondent. It would discourage clear forum shopping and would be consistent with the present provisions in Brussels IIa which require the petitioner to demonstrate a higher burden of connection than is required of the respondent. The group felt that it should be habitual residence over the entire six months rather than habitual residence on the day of issuing and simple residence for a period of time (there is a dispute as to the current law in this regard – see *Marinos* and *Munro* etc). Longer than six months could cause conflicts with other laws and might be considered unreasonable. There are other common law countries which follow this pattern.

d. *Sole domicile* is the present law if no other EU member state has jurisdiction and it was the law before Brussels IIa. The group felt it should always be an option, rather than an option only available if the other options do not apply.

e. *Sole nationality and a greater connection with England and Wales than any other UK country*. The group looked at divorce jurisdiction across many common law countries. A good number have either only nationality or nationality and domicile as connecting factors. There will be some people who are only nationals of a country and not domiciled there. Nationality is undoubtedly a connecting factor. It is also much easier to prove than domicile. As nationality here is 'UK' rather than 'England and Wales', it would have to be with a closer connection to England and Wales than any other country within the UK.

Other considerations

14. There are other considerations to be borne in mind when settling a new law for divorce jurisdiction:

    a. Should there be an ability to agree the divorce jurisdiction in advance?

    b. Should there be a hierarchy of jurisdiction?

    c. Should we have transfer provisions?

15. There is also divergence in views amongst practitioners as to the 'race to issue' provisions of Brussels IIa – the provisions provide legal certainty, a central tenet of the EU provisions, yet favours the more legally astute (economically stronger spouse), and can mean no opportunity to mediate before issuing proceedings.

16. There remains also for consideration the little known **1970 Hague Convention on the Recognition of Divorces and Legal Separations**. There are only 20 Contracting States to this Convention (Albania, Australia, China - Hong Kong, Cyprus, the Czech Republic, Denmark, Egypt, Estonia, Finland, Italy, Luxembourg, Moldova, the Netherlands, Norway, Poland, Portugal, Slovakia, Sweden, Switzerland and the UK). There are therefore only 13 EU Member States which are Contracting States (including the UK). Brussels IIa currently takes precedence over the 1970 Convention but once we leave the EU it will again take effect.

17. It is a relatively straight-forward Convention. It would undoubtedly help if the EU were to enter into it on behalf of all EU Member States. Aside from its current limited applicability, it might be said that this Convention will not be sufficient as a replacement for Brussels IIa because:

    a. It does not provide rules for jurisdiction, however it does require connecting factors with the State of the divorce for the divorce to be recognised

    b. There are no rules for mandatory stays of proceedings where there are parallel proceedings in another Contracting State (only optional)

    c. It does not apply to "findings of fault or to ancillary orders pronounced on the making of a decree of divorce or legal separation; in particular, it does not apply to orders relating to pecuniary obligations or to the custody of children"

Future of family law

18. Ultimately if we do not retain full reciprocity with the other EU member states, then Brexit really *will* mean Brexit for family law, as far as divorce is concerned. We will no longer have automatic recognition and enforcement of divorces and we will likely go back to the 'old days' of forum arguments.

19. Will this be a disaster? Will this clog up our courts with arguments as to the most appropriate forum? There is most likely to be a period of difficulty when considering the transition between the current system and any new system. There will then be the uncertainty arising from the new law and the inevitable cases that must test the new provisions.

20. As to how we get there, is the proposed Repeal Bill the best way forward? The effect of the proposed Bill will be to adopt into domestic law the whole of Brussels IIa, but as mentioned above, once we leave the EU, there will be no more reciprocity. Without agreement(s) with the EU or its individual member states, it will be a one-way system – we will recognise the orders of EU member states, but they will not necessarily recognise ours. What then for our clients?

    a. How will they know whether they can get remarried in another EU country after a divorce here?

    b. What of the implication for financial claims – how will the uncertainty as to recognition of divorces impact the commencement of financial claims where there is a potential jurisdiction race?

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