

CRS
CharlesRussell
Speechlys

W
Westwater Advocates

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

Ruth M Innes
Westwater Advocates

The current position within the UK

W
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

CRS Charles Russell Speechlys

What will happen post-Brexit?

W
Westwater Advocates

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

Department for Exiting the European Union
Legislating for the United Kingdom's withdrawal from the European Union

CRS Charles Russell Speechlys




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)




Practical impact of importing Article 12




- 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 seize 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



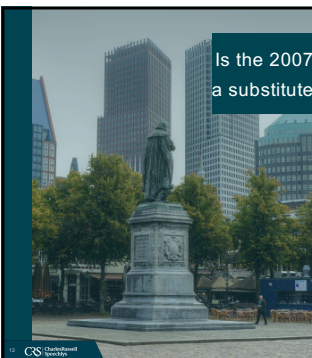
Post-Brexit: Recognition and Enforcement

- 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
<ul style="list-style-type: none"> • 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 	<ul style="list-style-type: none"> • 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) • Reservations possible




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
 - the same approach to recognition and enforcement as the Maintenance Regulation
- And
 - reservations possible
 - no supranational court review
 - practitioners will need to beef up their knowledge on the differences and procedural aspects



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



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 State:** 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)




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





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*?

CS Chartered Solicitors


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 states) and the Hague Conference on Private International Law

CS Chartered Solicitors

CONTACTS



Clerk
 Sheila Westwater
sheila.westwater@westwateradvocates.com
 0131 260 5700

Deputy Clerks
 Christina Ballantyne
christina.ballantyne@westwateradvocates.com
 0131 260 5641

Jane Morrison
jane.morrison@westwateradvocates.com
 0131 260 5828

www.westwateradvocates.com

CS Chartered Solicitors

CRS
Charles Russell
Speechlys

Michael Wells-Greco
michael.wells-greco@crsblaw.com

charlesrussellspeechlys.com
