

IAFL EUROPEAN CHAPTER MAINLAND REPORT

Introduction

The present document arises out of the (natural) concern of Mainland fellows that the paper *Brexit and Family Law* (« B&FL »), which was produced in England in November 2017, in conjunction with the English practitioner associations Resolution and the FLBA (and endorsed by the Scottish Advocates Association), but produced also in necessarily great haste (for reasons of political and legislative timetables), went out in the name of the IAFL but without specific consultation with the Mainland fellows. What follows below is therefore intended to provide a supplementary paper - not in opposition nor in competition but by way of complement to the B&FL paper - drawing on the sample views of those Mainland/non-English fellows who responded to the Questionnaire (« the Questionnaire ») sent out in December 2017.

The Questionnaire asked 12 questions to practitioners in 20 different jurisdictions other than England and received responses from representatives of 16 jurisdictions, being Austria, Belgium, Cyprus, France, Germany, Greece, Hungary, Ireland (Northern Ireland and the Republic), Italy, Luxembourg, Netherlands, Poland, Scotland, Spain and Sweden.

The Questionnaire

The questions were as follows :

Paper "Brexit and Family Law" (October 2017)

1. Do you agree with the English Family Law position and the likely future consequences of Brexit, as set out in the paper "Brexit and Family Law", in particular that the pursuit of "option 1" (re-negotiation of the present EU family law regime but with the UK outside the EU, would in theory provide the best result whether or not achievable in reality; and that "option 2" (freezing current EU law and unilaterally importing it into UK law without any reciprocal agreements), which is the current UK government intention and expressly confirmed in the draft Brexit legislation currently before the UK parliament), is the worst of all possible results, precisely because it would not secure any reciprocal recognition or enforcement of UK proceedings/orders abroad and would therefore be entirely one-way (and also quickly out-of-date as European law develops through, for example, the recast of Brussels IIa in 2019).

yes / no

- a. If you do not agree, could you explain the position in this regard from your country perspective?

- b. If you do agree with the position, but have additional comments, we would like to hear these, too.

Brexit and the legal implications in civil and commercial matters (internal market)

2. Has your Bar Association taken a position in relation to the legal implications of Brexit in civil and commercial matters (internal market) already?

yes / no

If yes, is this position published and would you be able to send us a soft copy of it?

3. Has your government taken a position in relation to the legal implications of Brexit in civil and commercial matters (internal market) already?

yes / no

If yes, is this position published and would you be able to send us a soft copy of it?

The UK Law Society's representation in Brussels has said to British Family Law associations that the European member states/the EU 27 will be keen to negotiate a new sub-Europe family law regime.

4. Do you agree with this statement?

yes / no

If you do not agree, could you explain the position in this regard from your country perspective?

Jurisdiction, Lis Pendens, Recognition and Execution in family law proceedings

5. To your knowledge is your own jurisdiction keen to negotiate a judicial convention with the UK in family matters to reproduce the current EU agreement ?

yes / no

Could you explain your response?

6. Post-Brexit, how will English family proceedings be treated if there are other rival proceedings pending in your own jurisdiction ?

a. if the English proceedings are first in time?

b. if they are second in time?

7. Will your jurisdiction take into account an injunction from an English judge ordering one of the parties not to proceed with the non-English proceedings (in accordance with the English case of *Hemain v. Hemain* [1988] 2 FLR 388)? Please see for a short summary and further authoritative and recent jurisprudence about *Hemain* injunctions: <http://swarb.co.uk/hemain-v-hemain-1988/>

yes / no

Could you explain your response?

8. Is it likely that UK proceedings/decisions are treated in the same way as an EU Member State decision in the absence of a new agreement for reciprocity between, on the one hand, the UK and, on the other hand the EU27 or the individual 27 remaining EU Member States ?

yes / no

Could you explain your response?

9. Do you think that submitting to CJEU rulings is necessary to benefit from the same treatment as European Member states?

yes / no

Other advice / Warnings

10. Are there matters of concern that you thought were missing in the paper “Brexit and Family Law”? If yes, please describe them below.
11. Any other comments on the attached document that should be brought to the attention of English politicians as well as the EU27 politicians?

National/ Local Bar representatives

12. Who should we be writing to in your jurisdiction to seek information on the above posed questions for the benefit of all our clients, who are the consumers of European family justice.

(National or Local Bar Representatives and other opinion-formers)?

Analysis of the responses

Paper “Brexit and Family Law” (October 2017)

The overwhelming point of agreement was that the B&FL paper is right to say that the present UK government position of pursuing Option 2 is the worst of all worlds from the perspective of the consumers of family law in Europe, i.e. ordinary people/families/voters (question 1).

Beyond this, the responses showed inevitably a range of individual views, but in every case from experts specialised in the practice of international family law. They included one strongly held view that the whole exercise was an exorbitant and irrelevant attempt by the English fellows to secure political support for a political correction of an unpopular political direction. Whether or not that is an accurate impression generally, and specifically for the implications of Brexit from a purely family law perspective for our clients, a number of the responses reiterated the obviously correct perspective that the entire issue matters less to those outside the UK than to those in the UK.

Brexit and the legal implications in civil and commercial matters (internal market)

There was also a clear and separate “local” concern as regards the border issue in Ireland and the natural and extreme concern which exists in relation to the prospect of the implications of a “hard” border and the degree to which Brexit risks a return to the violence of the past.

Subject to these points, the responses to questions 1, 2, 3, 6, 8 and 9 are unanimous for mainland Europe. Ireland has a genuinely special position because of its geography and history.

It appeared that as far as the respondents were aware their governments and bar associations had in the main not taken an individual negotiation position on Brexit (questions 2 and 3). Therefore it was not possible for us to rely on specific position papers from national bar associations in the EU Member States to provide a more in depth view from individual EU Member States on Brexit. The IAFL European Chapter Brexit Committee do recommend the IAFL to actively seek further information from national bar associations in the next months to get more insight from these bars on Brexit.

With regard to questions 4 and 5 it was apparent that the answers read like the “wish is the father to the thought”, with fellows apparently substituting their own subjective positions about what is obviously *not* the same as the government position. The positive answers also conflicted with the negative answers to questions 2 and 3. Most fellows considered it a good idea to negotiate a new sub-Europe family law regime (question 4), however responded also that as far as they knew their government and bar association had not taken an individual negotiation position on Brexit (questions 2 and 3), and therefore neither on a new sub-Europe family law regime (question 5). The conclusion may be, as one fellow suggested, that the EU27 are not keen to negotiate on bilateral treaties, but have taken the joint position to negotiate as one united group with the UK. This was also confirmed in the very short answer received from a government department of one of the EU Member States.

Jurisdiction, Lis Pendens, Recognition and Execution in family law proceedings

There was unanimity among the respondents that Post-Brexit English family proceedings would be ignored if there are other rival proceedings pending in their own jurisdiction and these proceedings were issued first. However, if the English proceedings were issued first, the opinions were divided. Particularly, the lack of reciprocity caused reserve among the respondents. Some answered that this would be answered case by case. All respondents answered that as a minimum the English court should have international jurisdiction based on internationally accepted standards (question 6 and 7).

In this regard the respondents mentioned that an injunction from an English judge ordering one of the parties not to proceed with the non-English proceedings (in accordance with the English case of *Hemain v. Hemain* [1988] 2 FLR 388) would at least have to meet the requirements for an exequatur in their country, before it could be recognised and enforced in their jurisdiction. If the non-English proceedings were issued first, than most respondents would consider it unlikely that a so called

“*Hemain-order*” would be enforceable in their jurisdiction. One respondent said it would be contrary to public order, since accepting a “*Hemain-order*” would result in preventing a citizen from seeking a judgment from the competent court. Another respondent said that enforcement would only be theoretical (question 7).

Perhaps predictably the greatest single point of unanimity was in relation to the importance of submission to the CJEU (question 9). If there would be no agreement post-Brexit for reciprocity between, on the one hand, the UK and, on the other hand the EU27 or the individual 27 remaining EU Member States, then all respondents agreed that the UK will not be treated the same way as the EU Member States. Exit the internal market, means exit internal market. In other words: no burdens, no benefits; one cannot have the best of both worlds (question 8).

Less predictable was the split of strong opinions as to whether the EU27 would want to negotiate with the UK to replicate the present system for Family Law going forward (questions 4 and 5). As mentioned above the answers read like fellows substituting their own subjective positions about what they would prefer to be done in relation to EU Family Law, rather than what the EU27 has to do in the common interest of the EU27, which interest goes beyond family law only. And perhaps most arresting was the news from Poland that a Polish district court has refused a Hague return to England on the basis that Brexit makes the father’s position too uncertain.

The recent case before the Court of Appeal of England and Wales re L v F [2017] EWCA Civ 2121 shows that apparently also English judges are struggling with this. While the Family Court in Oxford considered:

“(...)The fact that as EU citizens his parents' residence and their status in the UK no longer has the certainty it previously had, and the possibility that relocation to Italy may become a necessity is a factor that should, properly, have been considered by the trial judge.(...)”

The Court of Appeal of England and Wales quashed this decision considering:

“(...)there is no sound basis on which courts can factor in the hypothetical possibility that an EU national's immigration position might at some future date become precarious. The task for trial judges of deciding these cases is difficult enough without adding imponderables of this kind.(...)”

Both the Polish and English decisions cannot emphasize more the importance of clarity with regard to citizen’s rights of EU citizens in Britain and British citizens in the EU27 in relation to Family Law post- Brexit.

Other advice / Warnings

The final point, if not of unanimity, is the strong impression of regret and/or incomprehension at the Brexit decision from the point of view of its (wholly) negative effects in terms of international cooperation which underpins international family law.

Provisional Arrangement 8 December 2017

On 8 December 2017 the EU and UK reached agreement on the progress of the first round of negotiations on Brexit. On 12 December 2017 the European Commission published Q&A's about Brexit¹. The information concerns the consequences of the agreements in the joint report on the rights of EU citizens in the UK and of British citizens in the EU from 8 December 2017.

In the provisional arrangement of 8 December 2017, the negotiators of the United Kingdom and the EU agreed that the current rights and obligations of UK citizens in the EU and EU citizens in the United Kingdom will be continued for eight years after the departure of the United Kingdom from the EU²:

“(...) This Part of the Agreement establishes rights for citizens following on from those established in Union law during the UK’s membership of the European Union; the CJEU is the ultimate arbiter of the interpretation of Union law. In the context of the application or interpretation of those rights, UK courts shall therefore have due regard to relevant decisions of the CJEU after the specified date³. The Agreement should also establish a mechanism enabling UK courts or tribunals to decide, having had due regard to whether relevant case-law exists, to ask the CJEU questions of interpretation of those rights where they consider that a CJEU ruling on the question is necessary for the UK court or tribunal to be able to give judgment in a case before it. This mechanism should be available for UK courts or tribunals for litigation brought within 8 years from the date of application of the citizens’ rights Part.(...)”

¹ Questions and Answers – the rights of EU27 and UK citizens post-Brexit, as outlined in the Joint Report from the Negotiators of the European Union and the United Kingdom Government, via https://ec.europa.eu/commission/publications/questions-and-answers-rights-eu27-and-uk-citizens-post-brexit-outlined-joint-report-negotiators-european-union-and-united-kingdom-government_en

² Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, 8 December 2017, via https://ec.europa.eu/commission/files/joint-report-negotiators-european-union-and-united-kingdom-government-progress-during-phase-1-negotiations-under-article-50-teu-united-kingdoms-orderly-withdrawal-european-union_en

³ Brexit-Day, 29 March 2019

With regard to the continued competence of the CJEU and the expiration of citizen's rights the European Commission answers in their Q&A's of 12 December 2017⁴:

"(...) Your rights have no expiry date (but they may lapse in certain circumstances, for example a long absence from the host state).

While the ability of UK courts to ask the Court of Justice for its interpretation of the Withdrawal Agreement is envisaged to be limited to eight years, it will be long enough to ensure that the Court of Justice can rule on the most significant issues.

Other aspects of the Withdrawal Agreement are not limited in time, such as the direct effect of the Withdrawal Agreement that should prevail over incompatible national legislation or measures and that UK courts have to take into account jurisprudence of the Court of Justice.(...)"

Further the European Commission notes in their Q&A's of 12 December 2017 with regard to an eventual modification of UK law on special status in the future contrary the withdrawal agreement⁵:

"(...)The Withdrawal Agreement will make it very clear that once granted to individual citizens, it will not be possible to withdraw the UK special status from individual EU citizens on grounds other than those expressly allowed in the Withdrawal Agreement. Rights under the Withdrawal Agreement will be binding under international law and EU citizens will be able to directly rely on their rights under the Withdrawal Agreement in the UK. The UK will legislate, so that citizens' rights under the Withdrawal Agreement are incorporated into UK domestic law.

The UK legislation enacting EU citizens' rights provided for in the Withdrawal Agreement will prevail over other UK legislation. This means that UK laws cannot 'accidentally' take away rights protected by the Withdrawal Agreement. If the UK Parliament decides in the future to repeal the legislation giving effect to EU citizens' rights in UK law, this repeal would violate the Withdrawal Agreement, and would trigger consequences of this violation in accordance with the rules of the Withdrawal Agreement itself and international law.(...)"

Although this seems to be a welcome clarification on the future rights and obligations of UK citizens in the EU and EU citizens in the United Kingdom, the devil is in the detail. There is no explanation on what these citizens' rights with regard to EU family law will entail. Does it mean that Brussels II-bis or the EU Maintenance Regulation will remain applicable in the UK, also after 8 years from Brexit? The provisional agreement seems to make a particular reference to immigration law, criminal law and social rights, but not to other areas of law. Or is EU Family Law part of the "Phase 2 negotiations"?

⁴ Questions and Answers – the rights of EU27 and UK citizens post-Brexit, as outlined in the Joint Report from the Negotiators of the European Union and the United Kingdom Government, p. 11.

⁵ Questions and Answers – the rights of EU27 and UK citizens post-Brexit, as outlined in the Joint Report from the Negotiators of the European Union and the United Kingdom Government, p. 15.

Further no rights can be derived from the joint report on which the Q&A's are based. The provisional agreement dated 8 December 2017 sets out that it has been agreed⁶:

"(...) under the caveat that nothing is agreed until everything is agreed, the joint commitments set out in this joint report shall be reflected in the Withdrawal Agreement in full detail. This does not prejudice any adaptations that might be appropriate in case transitional arrangements were to be agreed in the second phase of the negotiations, and is without prejudice to discussions on the framework of the future relationship.(...)"

Last but not least it came to our attention that the court in preliminary relief proceedings of the District Court in Amsterdam has decided in a decision dated 7 February 2018 [ECLI:NL:RBAMS:2018:605] to refer preliminary questions to the CJEU to consider the consequences of the Brexit for the EU citizenship of British nationals.

Conclusion

As long as there is no signed Withdrawal Agreement in which the above has been reflected, vigilance is required. At the same time this also leaves the opportunity for organisations like the IAFL to keep on pressing for improving the UK Withdrawal Bill in relation to Family Law and Children's rights aspects.

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⁶ Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, 8 December 2017, p.1