European and UK family lawyers call on the EU to allow UK accession to Lugano Convention by highlighting implications for families and children

Thousands of separating families and children across Europe risk missing out on maintenance payments or facing confusion, complication, inconsistency, delay and increased costs in establishing, amending or enforcing payments if the UK is not permitted to accede to the Lugano Convention. Top European family lawyers are clear that the Lugano Convention would materially reduce those risks.

The focus of the discussion about the UK re-joining the Lugano Convention post-Brexit has been on trade relationships, but the movement of people that goes with that trade, and their families, must not be forgotten. Family life underpins society and we must make sure there are proper procedures and justice for those who, for understandable reasons, struggle when there is family breakdown. We must respect each other's legal systems and the differences in our substantive laws. When orders are made, they should be recognised and enforced across our international borders and if there is a ready-made solution to improve that for our citizens, surely we should embrace that opportunity. Lugano was previously implemented in the UK and still operates in EU countries vis-à-vis Switzerland, Norway and Iceland. After decades of facilitating ease of movement across borders, we need to work together to support the families created and put politics aside to support the best possible arrangements to protect those families.

The unanimous conclusion of experienced international family lawyers from 22 jurisdictions was that the UK should be permitted to accede to the Lugano Convention once again as an independent convention state.

Those who have prepared this paper, contributed to it, or endorsed its terms come from EU member states, the three Lugano states, as well as from the individual nations within the UK. The key conclusions are the assistance it will give in relation to harmonised rules for jurisdiction and the reduction in the likelihood of competing parallel proceedings.

The contributors expressed real concern about the confusion and complexity of advising in the current circumstances and worry about the increased cost and delay in relation to applications for maintenance (or to enforce them), which by definition are for people in need, for whom delay and additional cost can be disastrous.

This paper summarises the collective thoughts of all contributors. The Appendix has some specific points raised by contributors and a list of others who endorse the conclusions of this paper.

We are hugely grateful to Eleri Jones, barrister (**England and Wales**), for her considerable (pro bono) effort in preparing this paper and to Rachael Kelsey, European Chapter President, for leading this work and collating responses.

We have had significant assistance from many IAFL fellows and other family lawyers from across the EU and the three Lugano states. Particular thanks must be given to Isabelle Rein-Lecastereyres (**France**), Joaquin Bayo-Delgado (**Spain**), Sandra Verburgt (**Netherlands**), Arnaud Gillard (**Belgium**), Anna AD. Demetriou (**Cyprus**), Simona Ambroziūnaitė (**Lithuania**), Else-Marie Merckoll, Hege Moljord and Mathias Thorshaug Rengård (**Norway**), Eniko Fulop (**Romania**), Magda Kulik and Olivier Seidler (**Switzerland**), Joao Perry da Camara (**Portugal**), Nuala E Jackson SC (**Ireland**), Konstantinos Rokas (**Greece**), Francesco Mazzei (**Italy)**, Dögg Pálsdóttir (**Iceland**), Soma Kölcsényi (**Hungary**), Karen O'Leary (**Northern Ireland**), Julia Pasche (**Germany**), Tim Scott QC (**England and Wales**) and Rachael Kelsey (**Scotland**). The conclusions of the paper have also been endorsed by Jørgen U. Grønborg (**Denmark**), Deirdre Du Bois (**Luxembourg**), and Dr Anne Marie Bisazza (**Malta**).

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More than 5.6 million EU nationals living in the UK have applied for settled status in the UK since the end of the Brexit transition period[i], it having previously been estimated that there were only about 3.5 million EU nationals living in the UK [ii]. Over 770,000 British citizens were estimated to be living in the EU in 2018 [iii] and are nearly 1 million children of EU citizen parents (or at least one EU parent) living in the UK[iv] When things go wrong in families, as they sadly do, these international families need as much certainty and clarity as possible to resolve their disputes. They need to know where they can litigate and what happens if there is a clash of countries litigating. If there is non-payment, they need a reliable and swift mechanism of enforcement, otherwise they may not be able to meet basic needs or financial commitments, putting their welfare at risk.

Imagine a family: Ben, from England, Marie, from France and their son Jacques. Ben and Marie marry and live in France but after a few years their relationship unfortunately breaks down. Ben returns to live in England and Jacques remains living in France with his mother, Marie. Both parties want to deal with the divorce and financial arrangements in their home country, what do they do if they both start court cases in different countries? When an order for spousal and child maintenance is made and Ben does not pay, Marie does not have enough money to pay the mortgage and bills and cannot afford new clothes and toys for Jacques. How does she enforce her order? The problem could equally happen the other way around – if they had married and lived in England but on separation, Marie and Jacques moved back to France to benefit from her family support for childcare. How can it be made as straight forward as possible to help Marie and Jacques?

This factual scenario could apply in so many situations – from highly qualified international businesspeople to low skilled workers. Many people reading this will have a family member or friend or knows someone where there is an international couple like this. Sadly, many will find out too late that cross border civil cooperation is crucial in helping people plan, negotiate and resolve problems and right wrongs when they arise.

Why does the Lugano Convention matter? Why are EU family lawyers pressing for it to apply with the UK?

- First there is the issue of jurisdiction: which country should deal with the finances? It helps enormously for people like Ben and Marie if the rules about this are the same in both countries so they don't have to get advice about the law in both France and England about which court can deal with their case.
- Second there is the issue of what happens if both of them start proceedings in their home countries – which set of proceedings prevails? This is hugely important to avoid 'parallel proceedings' running at the same time, which causes significantly higher legal bills and runs the risk of one country making an order that can't or won't be enforced in the other country, or irreconcilable orders.
- Thirdly there is the issue of recognition and enforcement: what a waste of time and money it would be for a court to calculate carefully how much maintenance should be paid if the order won't be enforced in the place where the payer is living. The opportunities to oppose enforcement should be kept to a minimum to top paying parties avoiding their responsibilities.

Since the UK left the EU, following the end of the transition period on 31 December 2020, the EU Regulations about family law matters no longer apply in the UK – the relevant Regulation for spousal and child maintenance is called the 'Maintenance Regulation'[v]. These Regulations can no longer be used to regulate cross-border disputes like Ben and Marie's divorce between EU member states and the UK. The EU family law rules contain common rules for jurisdiction, forum rules for parallel proceedings and contain strict rules regulating recognition and enforcement. For the millions of EU citizens and hundreds of thousands of children of EU citizens in the UK, they can no longer rely on these EU family law rules if their families break up and they need to litigate.

There are some people who point to the international instruments which are left in operation for EU/UK family law disputes post-Brexit – these are the Hague Conventions and, specifically for this purpose, the 2007 Hague Convention. Whilst this is undeniably better than nothing existing between the UK and EU, there is a better solution: the 2007 Lugano Convention. When the UK left the EU, it also lost its membership of the 2007 Lugano Convention, which previously operated successfully in the UK (with the non-EU countries, Switzerland, Norway and Iceland). If the UK is able to join the Lugano Convention in its own right, that will improve the current position for EU citizens in the UK, or anyone making a claim against someone based in the UK.

The UK cannot re-join the Lugano Convention without the consent of the EU. As family lawyers we want our individual legal systems to work together as much as possible – to deliver straightforward, predicable and cost-effective resolutions for people who are often very vulnerable.

Why would the Lugano Convention be better than relying just on the Hague Convention?

1. Jurisdiction

    a. The UK no longer has one unified set of rules for jurisdiction in maintenance cases. There are no 'direct' rules of jurisdiction in the 2007 Hague Convention. It is now a 'mixed bag' of rules in the UK depending on the type of application being made and in some situations e.g. varying an existing order, there are simply no jurisdiction rules set out in UK law. To make matters even more complicated, the rules in England and Wales are different from those in Scotland. This makes it confusing and complicated for lawyers both in the EU and UK to help their clients understand when someone is entitled to bring a claim in the UK. This may mean expensive specialist advice is required and at some point, higher appeal courts will have to decide what the rules are when the law does not set it out. Many may be losing out if they are inadvertently getting the wrong advice or whilst these points are clarified through appeals. There will be delay, and people like Marie and Jacques often cannot wait if they need more money or if they are owed money that is not being paid by Ben whilst there is a dispute in court. If Lugano were in force in the UK, there would again be one unified set of rules in the UK known to EU lawyers.

    b. Post-Brexit the UK has widened its jurisdiction options for international child maintenance cases compared to the EU options. This will encourage split litigation meaning more conflicts.

    c. There are 'indirect' rules of jurisdiction in the 2007 Hague Convention (not the same as the EU rules). They are called 'indirect' rules because the jurisdictional basis used is not checked until the order is being recognised/enforced in another contracting state. It is by then far too late for there to be a dispute about jurisdiction: if Ben tried to oppose the enforcement of an order to try and evade payment, all that time, effort and cost Marie went to will be extended or lost if Ben is able to persuade the receiving court that jurisdiction was not made out.

    d. If Ben and Marie had made an agreement about where to resolve any spousal maintenance disputes in future, that is no longer directly enforceable in the UK at the start of the proceedings – it is merely a factor in the UK court's consideration of whether the UK court is the appropriate court to hear the case. Under Lugano, those maintenance jurisdiction agreements would be enforceable giving rise to much more certainty and avoiding wasting time and money arguing about which is the most appropriate court if Ben or Marie tried to ignore their previous agreement.

2. Forum – competing proceedings

    a. If Ben and Marie both litigate in their home countries, the 2007 Hague Convention has no direct mechanism to determine which country should proceed. There is a scheme for this under the 2007 Lugano Convention: namely the second court to start

proceedings has to stop in favour of the first country. Whilst some say this results in a 'race to court', at least it provides certainty and it is now a concept well known to family (and other civil) lawyers across Europe, having operated for many years (and will continue to operate between EU member states).

b. Conversely the position in the UK is that if there are parallel proceedings, the UK court must decide which is the most 'appropriate' court which can mean lengthy and costly satellite litigation about this issue. It is a discretionary decision by the judge hearing the case. This makes it incredibly hard to predict and advise clients like Ben and Marie with any certainty and, as above, with extra litigation, comes delay and additional cost and stress. In the interim period, Marie and Jacques may lose out if they need financial support and do not get it. Even if the UK court thinks it should proceed, there is no guarantee the French court would agree and may still proceed, meaning duplicate litigation and inconsistent orders. Lawyers worry it will be not just a 'race to court' but a 'race to a decision' which undermines proper justice.

c. In England and Wales, the court can issue a 'Hemain injunction' which is an order against a party personally ordering them to stop litigating elsewhere. No other jurisdiction in the EU has orders of this type. They are generally only effective (i.e. a person punished) when the person is in England/Wales. If Marie started litigation in France and did not obey a 'Hemain injunction' to stop, she might avoid coming to England for fear of punishment. What will that mean for Jacques, potentially unable to see his father if Marie won't bring him to England?

3. Recognition and enforcement

a. The system under EU family law rules and the Lugano Convention for recognising/enforcing orders give a very limited list of reasons by which that recognition and enforcement must be refused (on a mandatory basis). The Hague Convention contains a wider list of reasons and the basis for refusal is discretionary. This again leads to a lack of certainty about whether or not an EU member state would refuse to recognise/enforce a UK order or vice versa.

b. As noted above, due to the 'indirect' jurisdiction rules in the Hague Convention, there is an added step at the recognition/enforcement stage with greater room for argument. The whole point of having a common system of recognition and enforcement is to facilitate a swift and effective method. Therefore we should operate the swiftest and most effective system available, and the Lugano Convention would be better than the Hague Convention.

c. As a result of the above differences, people reliant on maintenance payments like Marie may have to make a decision early on about which country to litigate in, i.e. indirectly forcing them to choose to litigate in the country where the paying party lives, to reduce the prospect of problems with recognition and enforcement (as the order will not have to cross a border to be enforced). However this means she must find a lawyer abroad, potentially litigate in a language with which she is not familiar and understand a child

or spousal support scheme that is not the same one as where she is living, in order to make a decision. Whilst these considerations do not disappear with Lugano, the need for those types of dilemma reduce as the scheme for recognition/enforcement is arguably more reliable under Lugano than Hague.

In summary, having the Lugano Convention will mean:

- Greater legal certainty for considering where litigation may be possible, if it is required;
- Eliminating the prospect of parallel proceedings due to defined rules about priority of litigation;
- Greatly reduced scope for opposing recognition and enforcement of orders across EU/UK borders;
- Notable savings in terms of time, money, stress and potential damage to the welfare of children caught in the cross-fire of their parents' disputes as a result of the above.

There are two points which could usefully be addressed if the UK were permitted to accede to the Lugano Convention which would ensure its best operation:

- Firstly, there must be clarity as to how the Lugano Convention and Hague Convention interact – academics at present do not agree. There must be a decision: the various contracting parties can make a declaration on UK accession about how it works, which will avoid huge uncertainty to all.
- Secondly, there should be some consideration given to some form of reliable record noting how each country defines 'domicile' (which is the basis for when the Lugano Convention applies): it would assist each country significantly if this were known so that there could be understanding by other countries.

Written by Eleri Jones, barrister at 1GC Family Law, London (UK)

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[i] https://www.bbc.co.uk/news/uk-politics-57657520
[ii] Estimate by the Office for National Statistics (ONS): population of EU nationals in the UK, Jun 2019-Jun 2020
[iii] ONS as at 1 Jan 2018
[iv] The Migration Observatory at the University of Oxford, 2018 https://migrationobservatory.ox.ac.uk/resources/reports/unsettled-status-which-eu-citizens-are-at-risk-of-failing-to-secure-their-rights-after-brexit/
[v] Before 2012 the 'Brussels I' Regulation (now Recast) covered family maintenance cases in a similar way.

Appendix

Contributors:

• Belgium	**Arnaud Gillard***, A.G. Avocats - Avocat au barreau de Bruxelles, Brussels *Obviously the fact that the UK no longer has a unified set of jurisdictional rules for maintenance is a huge disadvantage to legal foreseeability.* *Access to court is a fundamental right; the court would not recognize Hemain injunctions.* *I expect thing to be more complicated with a non-unified system of recognition.*
• Cyprus	**Anna AD. Demetriou***, Elias Neocleous & Co LLC, Limmasol *[Without Lugano] there is a big chance for delays and expenses to overtake and the initial claim of Sarah to be a burden instead of a relief … in our opinion the expenses and the delays will be massive … [and there will be] inconsistent enforcement of the law.*
• France	**Isabelle Rein-Lescastereyres***, BWG Associés, Paris *We will have a race to court (because [timing] is still relevant from the French perspective) AND a race to the decision.* *At least with direct rules of jurisdiction such as can be found in Lugano, the matter is resolved at the beginning and does not come back to "haunt" the creditor of maintenance after long and expensive proceedings to get maintenance.* *I find it extremely difficult to "guess" when the UK will consider it is a forum conveniens.*
• Germany	**Julia Pasche***, Witzel Erb Backu & Partner, Munich *I am of course in favor of the "project" to have the UK in the Lugano convention.* *We have to make a clear difference between a political opinion and our professional interest. For our clients, we can only be in favor of the UK entering Lugano.*

• Greece	**Konstantinos Rokas,** Attorney at law, Athens Bar Association, Lecturer Law School University of Nicosia *Clients with a substantial link with the UK will face greater uncertainty as to the courts where their differences could be brought.* *I have serious concerns about the fact that no formal lis pendens rule will exist. My worries are all the most important since the presence of Greek citizens in the UK has increased considerably especially after the financial crisis of 2009 and a big number of Greek-english couples have been created.* *Parallel proceedings could continue, resulting in much greater costs for the family's finances. It may also mean that there are two orders in two different countries covering the same or similar points which are then inconsistent and cannot both be enforced.*
• Hungary	**Soma Kölcsényi***, Kölcsényi & Némethi Law Firm, Budapest *Without a proper and unambiguous lis pendens rule there will definitely be unwanted uncertainties, so I would indeed welcome the 2007 Lugano Convention to be applicable.*
• Iceland	**Dögg Pálsdóttir**, Supreme Court Attorney and Lecturer in Family and Health Law, Faculty of Law, Reykjavík University, Reykjavik *The Lugano Convention operates with Icelandic law to give parties certainty on when there is jurisdiction in matters of child and spousal support*
• Ireland	**Nuala E Jackson SC***, Member of the Inner Bar, Dublin *As the closest of neighbours with language commonality, family law cases with a UK/Ireland aspect are not uncommon… Any legislative provision which increases certainty (and enforceability) in this context is most welcome.* *We have benefitted greatly from EU-based legislation in this context (esp Brussels 2bis and the Maintenance Regulation). Vis a vis the UK, Brexit launches us back into uncertainty. Lugano would assist in this regard and thus is to be welcomed. Competing orders and limping orders must be actively discouraged and inconsistency of result between international instruments does not assist.*
• Italy	**Francesco Mazzei***, Avv. Studio Legale, Avv. Francesco Mazzei, Salerno *There is no doubt that the relevant rules as set forth by the 2007 Hague Convention cannot effectively replace and fill such post Brexit huge lack of legal rules which has created many inconveniences in terms of certainty of Law and increasing of costs.*

Infact, among the Brexit consequences it is necessary to consider also that the UK jurisdiction is now qualified and considered such a "third Country" whose judgments and public documents can no longer circulate and be enforced freely in EU as they did before, with the concrete risk of creating parallel proceedings.

The massive negative effects of the non-application of the EU Regulations in UK, including the so called "Maintenance Regulation", will be partially mitigated by the re-accession of the UK to the Lugano Convention 2007 post Brexit ("Convention"), an international agreement which determines which courts are entitled in civil and commercial cross-border disputes, including also those involving separating EU and UK families and children. In this respect, by UK re-joining to the Convention post Brexit, it would be applied between the UK and the EU, including the other contracting States (Iceland, Norway and Switzerland) which are not EU members also having regard to "maintenance cases" involving cross border EU and UK family and children. Therefore, UK judgments and jurisdiction clauses would continue to be enforced within both the EU and the no EU member States in maintenance cases facilitating law solutions avoinding any conflicts among different jurisdictions in that matter.

- Lithuania

Simona Ambroziūnaitė, family law specialist, Drakšas, Mekionis and partners, Vilnius

We worry that because there are no lis pendens rules, it will instead be a race to the decision instead of a race to issue proceedings.

[With Lugano] we will have lis pendens rules again to avoid parallel proceedings and the huge waste of time and money that arises when parties have to debate jurisdiction.

- Netherlands

Sandra Verburgt*, Advocaat, Delissen Martens, The Hague

The Forum (non) conveniens rule is considered an exorbitant basis of jurisdiction.

We apply the principle that no one can be prevented from submitting his case to the Dutch court, provided that the Dutch court has (international) jurisdiction.

- Northern Ireland

Karen O'Leary*, Partner and Head of Family Law, Caldwell & Robinson, Derry

People born in Northern Ireland under the terms of the Good Friday Agreement, an international Treaty have the right to Irish as well as British citizenship or both. Consequently those who exercise their right to Irish citizenship retain their EU citizenship. The failure to date to allow the UK to accede to the Lugano Convention is preventing EU citizens resident in

	Northern Ireland from continuing to rely on their rights under the convention regarding claims following relationship breakdown. The current rules without the Lugano Convention can result in uncertainty, delay and cost regarding where to litigate, and how court orders will be recognised and enforced. Why are EU citizens rights not being recognised and protected?
• Norway	**Else-Marie Merckoll***, Attorney at law/Partner, **Hege Moljord,** Junior Barrister/Associate and **Mathias Thorshaug Rengård**, Attorney at law, Langseth Law Firm DA, Oslo *The more unified and direct jurisdiction rules for maintenance issues that is subject under 2007 Lugano Convention, would no doubt (again) make the parties more able to assess and foresee the prevailing law. It would also make it easier for lawyers to give clear advices that aren't inflicted by the parties actions during the case etc.*
• Portugal	**João Perry da Câmara***, Rogério Alves & Associados, Lisbon *It will be better always to have a convention like Lugano applying because that will equalize the law solution to the case and facilitate the legal advice.*
• Romania	**Eniko Fulop,** Romanian and International family lawyer, Fulop Lawyers, Bucharest *Lugano convention would certainly give more clarity and more predictability for Court, parties, lawyers. It would be very beneficial for all EU countries [for the UK to join] to avoid parallel proceedings , further debates on jurisdiction, delays, waste of time, money.*
• Scotland	**Rachael Kelsey***, Partner, SKO Family Law Specialists, Edinburgh *There is a mechanism in the Lugano Convention that the UK has already operated for many years and that will improve the current situation markedly.* *Anything that can be done to make the loss of the EU instruments less acute would be welcome, and Lugano ameliorates that loss a little.*
• Spain	**Joaquín Bayo-Delgado***, Barrister, Former Barcelona Appellate Court Judge (Family Division) Barcelona *Articles 2 and 5 of the Lugano Convention give more and clearer bases for UK jurisdiction.* *A 'Hemain' injunction is unthinkable in Spain; it is contrary to the Spanish Constitution.*

	I always study the recognition and enforcement abroad … to avoid Pyrrhic victories.
• Switzerland	**Magda Kulik***, Family Law Specialist and **Olivier Seidler**, Avocat, Kulik Seidler, Geneva *There is no set of rules for jurisdiction in maintenance case. This obviously creates uncertainty for the client that would not exist if there were a set of rules.* *Certain rules of Swiss domestic law … expressly mention the Lugano Convention, which facilitates recognition and enforcement of foreign decisions rendered under Lugano.* *[UK should be permitted to join] for the sake of uniformity between Swiss, EU and UK.*

* *Denotes Fellows of the International Academy of Family Lawyers – www.iafl.com*

Endorsements:

• Denmark	**Jørgen U. Grønborg***, Advokaterne Sankt Knuds Torv P/S, Aarhus
• Luxembourg	**Deirdre Du Bois***, Avocat a la Cour, Luxembourg
• Malta	**Dr Anne Marie Bisazza***, Advocate, Bisazza & Bisazza Advocates, Valletta
• France	**Véronique Chauveau***, Véronique Chauveau & Partners, Paris
• France	**Alain Cornec***, Villard Avocats, Paris
• Switzerland	**Gabriela van Huisseling***, Attorney-at-Law, Zurich
• England	**Tim Scott QC***, Barrister, London
• England	**James Roberts QC***, Barrister, 1 King's Bench Walk, London
• England	**William Massey***, Partner, Farrer & Co, London
• Scotland	**Jennifer Wilkie***, Partner, Brodies LLP, Edinburgh
• England	**Sarah Hoskinson***, Partner, Burges Salmon LLP, Bristol
• England	**Grainne Fahy***, Partner, BLM Law, London
• England	**Alison Hawes**, Consultant, Burges Salmon LLP, Bristol
• England	**Nancy Khawam***, NANCY KHAWAM Family Law and Mediation Limited, London