

International Family Law in light of Brexit: An (Un)solvable Rubik's Cube?

For many lawyers international family law is an opaque and intricate puzzle. It may be compared to a Rubik's Cube that appears unsolvable, with rotations and arrows pointing in all directions. Only insiders and enthusiasts manage to unravel the puzzle by applying well-developed formulas. For the United Kingdom, these formulas were clear for a long time, until Brexit occurred on December 31st of 2020. From that moment onwards, the arrows suddenly pointed in different directions, and different rotations were required in order to solve the puzzle.

This essay describes a case in which the private international law puzzle is unravelled in the light of Brexit.

The case

The case concerns Josh, an Australian national, and Maria, an Argentine national, who married in Argentina in 2015 and have two children: Marcello (10) and Nina (8). Following their marriage, the family settled in the United Kingdom, residing in their owner-occupied home.

During the Covid-19 pandemic, Josh and Maria purchased a second home in the Netherlands, and in 2021 the family relocated there permanently. The London property was retained for Josh's employment, requiring him to travel regularly between the Netherlands and the UK; as a result, he spends nearly half his time in London.

The marriage has irretrievably broken down, and both spouses seek a divorce. Notably, on the same day Josh filed a divorce petition in the United Kingdom, while Maria filed one in the Netherlands. In addition to the divorce itself, arrangements must be made concerning parental responsibility, care and upbringing of the children, child maintenance, spousal maintenance, and the division of matrimonial property.

Although this initially appears to be a standard divorce, its international elements necessitate more than a cursory private international law (PIL) analysis. Two aspects are particularly complex: Josh's partial residence in both the Netherlands and the United Kingdom, and the fact that the spouses filed divorce petitions simultaneously in different jurisdictions.

Following Brexit, the United Kingdom must, from a Dutch perspective, be treated as a "third country" for the purposes of applying the Brussels II ter Regulation. Consequently, it is essential to assess whether Maria can validly bring her divorce petition, including ancillary relief, before the Dutch courts and, if so, which law those courts are required to apply.

Preliminary question

Since the case concerns a marriage concluded abroad, it must first be established whether the marriage entered into in Argentina in 2015 is recognised in the Netherlands. Under Article 9 of the Hague Convention on the Celebration and Recognition of the Validity of Marriages 1978, applicable to this case, the general rule is that a marriage valid under the law of the State where it was celebrated shall be recognised in the other Contracting States.¹

¹ Convention on the Celebration and Recognition of the Validity of Marriages, The Hague, 14 March 1978.

Given this favourable principle, reinforced by Article 13 of the Convention, which allows for broader recognition, a marriage validly concluded under Argentine law will also be recognised in the Netherlands. Recognition will likewise follow provided there are no facts or circumstances indicating incompatibility with public policy, as stipulated in Article 10:31 of the Dutch Civil Code.

If, when filing the divorce petition, Maria's lawyer submits a copy of the marriage certificate authenticated with an apostille, the Dutch court will likely presume that the marriage was validly concluded. The facts of the case give no indication that recognition would conflict with Dutch public policy.

Divorce

Habitual Residence

The jurisdiction of the Dutch courts in relation to the divorce can be established on the basis of Article 3, introductory wording and under (a), of the Brussels II ter Regulation.² This provision offers several grounds leading to Dutch jurisdiction, in particular points (i) and (v). Central to this assessment is the spouses' habitual residence, a concept not defined in the Regulation itself.

According to the case law of the Court of Justice of the European Union, "habitual residence" refers to the place where a person has established the permanent or habitual centre of their interests, with the intention of giving it a stable character.³ This must be assessed on the basis of factual circumstances.⁴

In this case, Josh and Maria have been durably settled in the Netherlands since 2021. Their children attend school there and Maria is employed in the Netherlands, clearly indicating that the centre of their family and social life is located there.

Josh's additional residence in London, where he spends approximately 40% of his time, does not change this conclusion. As long as the focal point of social and family life remains in the Netherlands, that country qualifies as the spouses' habitual residence. Moreover, even if Josh's habitual residence were disputed, Maria's habitual residence is undeniably in the Netherlands, which independently confers jurisdiction on the Dutch courts under Article 3, introductory wording and under (a), sub (v), of the Brussels II ter Regulation.

Lis pendens

A parallel divorce proceeding is pending outside the European Union, as Josh filed a divorce petition before the English courts on the same day. Before Brexit, such a situation would have been governed by Article 20 of the Brussels II ter Regulation, which obliges the court second seised to stay its proceedings. Since the United Kingdom is no longer an EU Member State, this mechanism no longer applies.⁵

² Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, and repealing Regulation (EC) No 1347/2000.

³ Court of Justice of the European Union, 25 November 2021, Case C-289/20 (*IB v FA*).

⁴ Court of Justice of the European Union, 25 November 2021, Case C-289/20 (*IB v FA*).

⁵ On 25 June 2019, the Council of the European Union adopted the recast of Brussels IIbis (hereinafter: *Brussels IIbis (recast)*). The Regulation entered into force on 22 July 2019 and has applied since 1 August 2022. As this date of application falls after 31 December 2020, the new instrument does not apply in the United Kingdom.

The issue must therefore be assessed under national rules of private international law, with the case law of the Dutch Supreme Court (Hoge Raad) as guiding authority.⁶ The starting point is Article 12 of the Dutch Code of Civil Procedure (DCCP), which grants the Dutch court a discretionary power to stay proceedings if the same dispute is pending before a foreign court and the expected foreign judgment is capable of recognition and enforcement in the Netherlands.⁷

Unlike the Brussels II ter Regulation, which imposes a mandatory stay in cases of *lis pendens*, Dutch *communis* private international law provides only a discretionary power to stay proceedings. Article 12 DCCP states that proceedings *may* be stayed, while a declaration that the court lacks jurisdiction *must* follow only at a later stage. In addition, *lis pendens* is not applied *ex officio*, as Dutch courts will generally be unaware of foreign parallel proceedings.

If Josh were to invoke a *lis pendens* defence, the Dutch court would first need to determine whether the English proceedings were instituted earlier, which is established by comparing the registry date stamps. The mere existence of parallel proceedings does not automatically lead to a declaration of lack of jurisdiction; such a declaration follows only once the foreign court has assumed jurisdiction and rendered a decision.⁸

If Josh refrains from raising a *lis pendens* objection, the Dutch court will retain jurisdiction over the divorce and apply Dutch substantive law pursuant to Article 10:56 of the Dutch Civil Code.

Parental responsibility

Preliminary question

In Dutch law, parental responsibility is embodied in the concept of parental authority (*ouderlijk gezag*), as referred to in Article 1:247 of the Dutch Civil Code. In matters concerning parental responsibility, the preliminary question is who exercises parental authority over the children by operation of law. Article 16 of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (hereinafter: the 1996 Hague Child Protection Convention) determines the applicable law for this question.

Due to its universal scope (Article 20), the Convention applies in the present case. Article 16(1) provides that the attribution or extinction of parental responsibility by operation of law, without judicial or administrative intervention, is governed by the law of the State of the child's habitual residence. The relevant point in time is the moment the application is filed.⁹

If the children's habitual residence is found to be in the Netherlands, as discussed below, Dutch law applies. Under Dutch law, Josh and Maria jointly hold parental authority over Marcello and Nina, since the children were born during the marriage. An assessment under British law would lead to the same result, as parents of children born during marriage likewise exercise joint parental responsibility under

⁶ Supreme Court of the Netherlands (Hoge Raad), 29 September 2023 (ECLI:NL:HR:2023:1265 and ECLI:NL:HR:2023:1266).

⁷ Mr F. Ibili, *Weighted Jurisdiction in Private International Law (Gewogen rechtsmacht in het IPR)*, Research & Practice no. 148, 2006, para. 3.8 (*Lis pendens*; Article 12 Dutch Code of Civil Procedure), 28 November 2006.

⁸ See Supreme Court of the Netherlands (Hoge Raad), 29 September 2023, ECLI:NL:HR:2023:1265, *NJ* 2023/349.

⁹ ECLI:NL:RBDHA:2025:18591; Court of Justice of the European Union, 25 November 2021, Case C-289/20 (*IB v FA*); Court of Justice of the European Union, 1 August 2022, Case C-501/20;

UK law. The issue is therefore purely technical, with the same substantive conclusion in either case: both parents hold joint parental authority.

Parental Responsibility and Contact

The jurisdiction of the Dutch courts with regard to matters concerning parental authority and rights of access depends, pursuant to the general rule laid down in Article 7 of the Brussels II-ter Regulation, on the children's habitual residence at the time Maria filed her petition for divorce.¹⁰

Situations as referred to in Articles 8 and 9 of the Regulation do not, on the basis of the facts of the case, (as yet) arise, and there is, in all likelihood, also no choice of court within the meaning of Article 10. This is due to the fact that Josh simultaneously initiated divorce proceedings in the United Kingdom.

Habitual Residence of the Children

Jurisdiction lies with the courts of the State of the children's habitual residence. In the present case, it may be assumed that the children have their habitual residence in the Netherlands, as the family has been durably settled there since 2021, i.e. for five years. At the age of ten, Marcello has now spent half of his life in the Netherlands. Given the school closures during the Covid-19 pandemic in 2020, it is plausible that he effectively started attending school in the Netherlands.

Nina has lived in the Netherlands since the age of three and is therefore unlikely to retain active memories of her time in the United Kingdom. Although the London apartment has been retained for Josh's employment, there is no indication that the family regularly resides in the United Kingdom or that other family members remain there. After five years of residence, it is also reasonable to assume that the children speak Dutch fluently, while presumably using English and Spanish at home with their parents.

Marcello's expressed wish to return to the United Kingdom is understandable in the context of his parents' divorce, but it does not justify the conclusion that his habitual residence has shifted there, particularly as there are no concrete plans for Josh to (re)establish residence in the United Kingdom.¹¹

It may therefore be assumed that the Dutch courts have jurisdiction over matters of parental responsibility under the general rule of Article 7 of the Brussels II ter Regulation. By way of *obiter dictum*, it is noted that even if Marcello were to move to the United Kingdom during the proceedings, the Dutch courts would retain jurisdiction for three months following the relocation. Pursuant to Articles 15 in conjunction with Article 17 of the 1996 Hague Child Protection Convention, Dutch law would then be applicable to decisions on parental authority and access rights.

¹⁰ Asser/Vonken & Ibili, *Private International Law*, Vol. 10-II, 2021, no. 542.

¹¹ For the assessment framework and interpretation of the concept of habitual residence, reference is made to Court of Justice of the European Communities, 2 April 2009, Case C-523/07, *NJ* 2009/457 (the second Finnish case), and Supreme Court of the Netherlands (Hoge Raad), ECLI:NL:HR:2022:440.

Child maintenance and spousal maintenance

For the determination of the jurisdiction of the Dutch courts, reference must be made to the Maintenance Regulation¹², which applies pursuant to Article 1 to maintenance obligations arising from family relationships. Articles 75 and 76 confirm its universal scope and applicability to proceedings instituted after 18 June 2011.

Article 4 of the Maintenance Regulation allows for a choice of court in maintenance matters. However, under paragraph 3 of that provision, such a choice is excluded in cases concerning child maintenance. A forum choice in favour of the Dutch courts is therefore not possible, particularly given that Josh initiated proceedings in the United Kingdom on the same day. Jurisdiction in respect of both child maintenance and spousal maintenance must accordingly be assessed under Article 3 of the Maintenance Regulation. This provision lays down four alternative, non-hierarchical grounds of jurisdiction: the court of the defendant's habitual residence (sub (a)), the court of the maintenance creditor's habitual residence (sub (b)), ancillary jurisdiction in divorce proceedings (sub (c)), and jurisdiction linked to proceedings concerning parental responsibility (sub (d)).

Although the concept of "habitual residence" is not defined in the Regulation, it is interpreted autonomously in line with the Brussels II ter Regulation.¹³ As established above, the family has its habitual residence in the Netherlands, and the maintenance claims are brought as ancillary claims in the divorce proceedings. The Dutch courts therefore have jurisdiction on the basis of Article 3(a) and (c) of the Maintenance Regulation. In adjudicating these claims, the Dutch court will apply Dutch substantive law, as the maintenance creditors, whether Maria or the children, have their habitual residence in the Netherlands.¹⁴

Financial settlement

The Dutch court determines its jurisdiction in respect of the matrimonial property settlement on the basis of the Matrimonial Property Regimes Regulation.¹⁵ This Regulation applies temporally to proceedings instituted on or after 29 January 2019 (Article 69), materially to matrimonial property regimes (Article 1), and, pursuant to Article 20, has universal application. It is noted that the Regulation does not apply in the United Kingdom.

In principle, jurisdiction could be derived from the ancillary jurisdiction provided for in Article 5(1). However, pursuant to Article 5(2), such jurisdiction requires an agreement between the spouses where the application is filed in the Member State of the applicant's habitual residence after at least one year of residence. As no such agreement exists, jurisdiction cannot be based on Article 5 and must instead be assessed under Article 6.

¹² Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, the recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, *OJ* 2009, L 7/1 (entry into force 30 January 2009), as amended by *OJ* 2018, L 314/1 (the *Maintenance Regulation*).

¹³ Court of Justice of the European Communities, 2 April 2009, Case C-523/07, *NJ* 2009/457, annotation by Th.M. de Boer; and: *Green Series Civil Procedure (GS Burgerlijke Rechtsvordering)*, Article 3 European Maintenance Regulation, annotation no. 3.

¹⁴ This follows from Article 15 of the Maintenance Regulation in conjunction with Article 3 of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

¹⁵ Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, *OJ* 2016, L 183/1 (entry into force 28 July 2016) (*Matrimonial Property Regulation*).

Under Article 6(a), jurisdiction lies with the court of the Member State in which both spouses have their habitual residence at the time proceedings are instituted. As this condition is met, the Dutch court has jurisdiction over the matrimonial property dispute, including immovable property located abroad, such as the London apartment.¹⁶

Although a detailed analysis falls outside the scope of this essay, it is relevant that the Dutch court must apply English law to the matrimonial property regime.¹⁷ This follows from the Hague Convention on the Law Applicable to Matrimonial Property Regimes 1978, which has universal effect and is applicable to the United Kingdom. The parties did not choose an applicable law, and pursuant to Article 4 of the Convention, the regime is therefore governed by the law of the State of their first habitual residence after marriage, which in this case was the United Kingdom.

Conclusion

A divorce with international dimensions can readily resemble a Rubik's Cube whose faces no longer display matching colours—particularly in the post-Brexit era. Nevertheless, this case demonstrates that the puzzle is not insoluble. With the correct legal “twists and turns”—through the application of conventions, regulations, and the rules of *commune* private international law—structure and coherence can be restored.

This essay has shown that Maria can successfully bring her divorce petition, together with ancillary claims, before the Dutch courts, and that the Dutch court will apply its own internal law to all of those claims, with the exception of the matrimonial property settlement. Accordingly, despite the United Kingdom's shift to the status of a third country, Dutch international family law continues to offer sufficient guidance to arrive at a coherent and workable solution.

¹⁶ By way of illustration, see Court of Appeal Amsterdam, ECLI:NL:GHAMS:2026:309, in which the Dutch court, in the context of the settlement of the matrimonial property regime, ruled on a property situated in Turkey.

¹⁷ Convention on the Law Applicable to Matrimonial Property Regimes, The Hague, 14 March 1978, *Trb.* 1988, 130 (entry into force 1 September 1992; *Trb.* 1992, 123) (*Hague Matrimonial Property Convention 1978*).