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Divorce Post-Brexit: A New Frontier for Intra-EU/UK Divorces

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Introduction

The United Kingdom left the European Union on 30 January 2020. For almost a year, practitioners could continue to apply EU laws and regulations as between the EU and the UK, as the Withdrawal Agreement provided for an 11-month transition period. It had been hoped by many that the time would be used to negotiate a deal as between the EU and the UK. Unfortunately, that proved not to be the case and the transition period ended at 11pm GMT on 31 December 2020, with no deal in place. The no-deal scenario that many practitioners dreaded is now a reality. Since then, all EU law has ceased to apply to the UK and *vice versa*, although there are still some scenarios where practitioners will find themselves applying EU laws to their cases.

Proceedings Started But Not Finished

For any proceedings that were instituted before the end of the transition period, EU laws and regulations will continue to apply where there is a cross-border element with one of the EU27. For example, if a party started divorce and financial remedy proceedings in England before the end of the transition period, the parties to those proceedings will still be able to make use of existing EU relations in the EU27 for enforcement and recognition in the future, if necessary. This is the case even where judgment or final decision had not been made by the end of the transition period. Provided the proceedings were instituted before 11pm on 31 December 2020, parties to those proceedings will be able to use the EU regulations to have that judgment recognised and enforced in the future even though the judgment will be given after the end of the transition period.

Unhelpfully, a definition of "instituted" for this purpose has not been provided. However, it is generally thought to mean issued by the court rather than just submitted to the court.

Cases Instituted After the Transition Period

For any cases instituted in the UK after the end of the transition period, EU laws and regulations are no longer available to the parties and the applicable rules on jurisdiction, enforcement and recognition will depend on the country in question. The UK now treats the EU27 in the same way it treats non-EU countries.

One of the key benefits of the EU regulations was that there was a harmonised set of rules between the Member States; from a lawyer's perspective, this simplified matters as there was a clear road map as to what should happen and what procedure should be followed where there are competing jurisdictions within the EU. The UK is now dealing with potentially 27 different legal systems, plus any differences between the individual legal states within the UK. Non-UK lawyers also need to remember that, within the UK, there are three different legal jurisdictions: England & Wales; Northern Ireland; and Scotland. These jurisdictions do not have uniformed rules.

Post-Brexit, there are some existing instruments that will plug some of the gaps that are left behind, but these will not necessarily apply across all of the EU27. The recognition of divorces provides a good example of where some gaps, but not all, are filled.

The recognition of divorces between EU Member States is provided for by Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ("Brussels IIa"). The UK now falls outside of Brussels IIa; however, it remains a signatory to the 1970 Hague Convention on the Recognition of Divorces and Legal Separations. The 1970 Hague Convention includes provisions for the recognition of divorces, so will apply between the UK and the signatory states. This is currently applied between the UK and some non-EU countries, so is an instrument with which many family law practitioners are already familiar. Its application is not universal, however, and not all of the EU27 are a signatory to the 1970 Hague Convention. For those countries that are not signatories (for example, France and Spain), the position will depend on their domestic law.

Unlike Brussels IIa, the 1970 Hague Convention does not deal with civil partnerships or nullity. Therefore, even where a second state is a signatory to the 1970 Hague Convention, in those circumstances, it will still be necessary to check the relevant domestic legislation.

The 1970 Hague Convention does not contain provisions regarding jurisdiction; so, where there are competing jurisdictions between the UK and a signatory state, we are solely reliant on the domestic law. The UK approach on jurisdiction is dealt with further below.

The above is just one example of where existing provisions may plug some gaps, but not entirely. Another key point to consider is that signatories to the various Hague Conventions can make reservations or declarations, meaning there may be a slight difference in applicability across the signatories, which must be checked at the outset.

Divorce and Financial Proceedings – A Move to *Forum Non Conveniens*

The jurisdictional grounds to start divorce proceedings in England are similar to those in Brussels IIa, and are set out in section 5(2) of the Domicile and Matrimonial Proceedings Act 1973. The key difference is that the jurisdictional basis for divorce can be met in England on the basis of just one party's domicile. These jurisdictional grounds apply to all cases commenced in England.

It remains entirely possible that a couple could satisfy the jurisdictional requirements for proceedings in multiple countries; this is not a novel concept to family lawyers following Brexit, and is not unique to intra-UK/EU cases.

Prior to Brexit, however, where this happened in two or more EU Member States, there was a clear set of rules to state what should happen, known as *"lis pendens"*. The *lis pendens* rules (colloquially known as "the first past the post") see the state where proceedings were started take first priority. The state second in time is required to stay their proceedings, whilst the first state considers the question of jurisdiction. If that first state concluded they did not have jurisdiction to entertain the proceedings, the proceedings could continue in the second state. Whilst many practitioners lamented the *lis pendens* rule as encouraging a race to court, it did at least provide certainty for practitioners and reduced the risk of parallel proceedings.

In this post-Brexit era, the question of competing jurisdictions from an English perspective is dealt with on the basis of *forum non conveniens* (or *forum conveniens*). The doctrine of *forum non conveniens* conveys discretionary power to courts to decline jurisdiction over a matter on the basis that there is a more suitable and appropriate forum available to the parties elsewhere. This is the approach the courts in England and Wales take when considering jurisdiction disputes with non-EU countries. There is no guarantee that the English courts will stay their proceedings if second in time under the doctrine of *forum non conveniens*. Equally, the approach of the competing state may be entirely different; gone are the days of the uniformed approach provided by Brussels IIa. Obtaining local advice in both jurisdictions is vital.

Obligatory Stays

There are some circumstances where the English courts will be obligated to impose a stay of proceedings here, where there are competing jurisdictions. A stay will be imposed if it appears to the court that proceedings are ongoing in a "related jurisdiction" and both the following apply:

- The parties resided together in the related jurisdiction when proceedings were begun in England or Wales, or, if they did not then reside together, where they last resided together before those proceedings were begun was in that jurisdiction.
- Either party was habitually resident in that jurisdiction throughout the year ending with the date on which they last resided together before the date on which the proceedings in England and Wales were begun.

"Related jurisdictions" for this purpose are Alderney, the Isle of Man, Guernsey, Jersey, Northern Ireland, Sark and Scotland. For jurisdictions further afield, there are no circumstances where the English courts are obliged to stay.

The End of the Race to Court?

Notwithstanding the above, timing can still be of the essence. In disputes before the English courts involving a non-EU state (and following Brexit, involving an EU state), the court has discretion to impose a stay of proceedings if there are proceedings in another country, if it considers it is in the balance of fairness to do so (schedule 1, paragraph 9 of the Domicile and Matrimonial Proceedings Act 1973). It is not necessary for an applicant seeking a stay under the DMPA 1973 to show that the other forum was "clearly" or "distinctly" more appropriate. The applicant only needs to demonstrate to the court that it is more appropriate to some extent (*Butler v Butler* No 2 [1997] 2 FLR 321). The fact another country was first seized is a relevant consideration within this balance when considering an application to stay its proceedings. Timing can still be key, particularly if the domestic law of the competing state will factor in any earlier proceedings started in a competing jurisdiction.

How Does the English Court Determine Jurisdiction Using *Forum Non Conveniens*?

The doctrine of *forum non conveniens* offers little certainty, and each case will turn on its facts. The burden of proof rests on the party applying for the stay (*Mytton v Mytton* (1977) 7 Fam Law 244). The court will consider all relevant factors when seeking to establish which is the most suitable jurisdiction to deal with proceedings. Factors such as the location of the assets, where the parties live and spend their time, the children, the language and the parties' immigration status will all be relevant considerations. The case of *J v U; U v J (No 2) (Domicile)* [2017] EWHC 449 (Fam) offers a good example of the considerations the court will make. In that case, the competing jurisdictions were England and Bosnia. The parties had moved to Sarajevo in Bosnia and this was the place the parties last lived together. The respondent wished for proceedings to proceed there. The English court weighed up a number of factors, including: the fact that the main assets of the marriage were in England; the limited jurisdiction the Bosnian courts had in relation to property located outside of its jurisdiction; that the parties spoke English fluently; the respondent's uncertain immigration status in Bosnia; and the fact that London had been a constant reference point during their marriage. Notwithstanding that the parties last lived together in Bosnia and that the respondent and the children remained living there, the English court considered that the respondent had failed to demonstrate that Bosnia was a more appropriate jurisdiction to hear the case.

The Lugano Convention

It would be remiss not to consider the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The Lugano Convention 2007 is an international treaty between the EU Member States, Iceland, Norway and Switzerland, which sets out provisions to determine which national courts have jurisdiction in cross-border civil and commercial disputes and to ensure that judgments taken in such disputes can be enforced across borders. The UK is no longer a signatory, as it is no longer an EU Member State; however, it applied to accede to the Convention as an independent member. This required the agreement of all signatories. Unfortunately, the European Commission has recommended that the EU Member States decline the UK's request to re-join. The Lugano Convention would see a return of *lis pendens* as between the UK states and the Lugano signatories which, importantly, provides that orders made in one signatory country must be recognised and enforced in another signatory country (with a few exceptions). By contrast, the Hague Convention has many more exceptions, and refusal to recognise or enforce orders made in other Convention states is discretionary. The European Commission's recommendation was disappointing, both to many UK family lawyers and family lawyers across the EU. It is hoped that the benefits to families both in the UK and the EU of the UK being permitted to accede to the Lugano Convention will sway opinion, and the UK will be permitted to re-join by the European Council.

Conclusion

For UK practitioners, we are certain to see an increase in *forum non conveniens*, as this approach will now be used for both EU and non-EU forum disputes. For a period, our knowledge of the application of EU rules and regulations will remain relevant, as those cases instituted before the end of the transition period continue to their conclusion (and possibly later, if there is enforcement sometime after judgment). They will of course remain in place between EU Member States, including our close neighbours Ireland (the Republic of Ireland, not Northern Ireland). Even before Brexit, obtaining local advice in cross-border cases was crucial. This remains the case now. The interests of family law clients often rely on cross-border relationships working well, and the UK's decision to leave the EU has not changed that.

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