

Heavy fog in Channel

Choices, problems and opportunities
after Brexit

Tim Scott QC and Philip Marshall QC

What do we know?

- Article 50 notice expires in March 2019. This will not be extended.
- The 'divorce settlement' will have to be agreed before other negotiations start.
- If the 'divorce settlement' is agreed by October 2017, 18 months will remain. An overall deal cannot be achieved in that time.
- An interim deal is almost as complex as a final deal.

The Great Repeal Bill

- EU law *acquis* to be adopted into UK law from the date of Brexit on a snapshot basis.
- This makes no sense in relation to jurisdictional Regulations such as BIIA and MR which require reciprocity both for first in time and for enforcement.

Recasting BIIA

- BIIA is in process of being recast.
- UK Government opted into the negotiating process in October 2016.
- Recast version will supplant present version when it comes into force – which may not be until after March 2019.
- Will English courts continue to apply present version when it has been repealed in the 27?

UK Government's attitude

UK Government:-

- Is aware of these technical problems.
- Knows that commercial litigation is a major money spinner for the UK economy.
- Also knows that BIIA may affect millions of families.
- Understands the downside of losing the jurisdictional Regulations.

EU attitude

- Probably sympathetic to retaining BIIA and MR as many families in the 27 would benefit.
- Perhaps less sympathetic to retaining BI Recast as other Member States would like to take commercial litigation from London.
- In practice the jurisdictional Regulations are likely to stand or fall together.

Can a legally chaotic Brexit be prevented?

- Bar Council has urged Government to seek 'Denmark option' – a treaty with the EU to retain jurisdictional Regulations.
- Before the election this looked very doubtful. Why should the EU do UK any favours?
- If BIIA and MR are retained, might UK also have to adopt Succession Regulation, Rome III and 2007 Hague Protocol?
- What role for the Court of Justice?

The effect of the election

"In Hollywood nobody knows anything"
William Goldman

Hard Brexit

- The loss of Brussels IIa and the Maintenance Regulation
- filling the gap?
 - *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children* ('the 1996 Hague Convention')
 - *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance* ('the 2007 Convention')
- themes and advantages of BIIa and Maintenance Regulation
- BIIa recast
- scheme of the 1996 Hague Convention and the 2007 Convention
- perceived shortfalls and gaps

Subject matter

BIIa

- divorce, nullity and separation
- parental responsibility, guardianship, child arrangements (public and private law, including transfer of proceedings)
- child abduction
- reciprocal recognition and enforcement

Maintenance Regulation

- financial remedies on divorce
- maintenance in other proceedings (Part III 1984 Act, Schedule 1 CA 1989, CSA 1991)
- reciprocal recognition and enforcement

common themes

BIIa : Divorce

- uniform jurisdictional rules for divorce (Art 3)
- exclusive jurisdiction (Art 6)
- residual jurisdiction (Art 7) – s. 5(1A) DMPA 1973 (*domicile*)
- seising of a court (Art 16)
- Lis pendens (Art 19)
- provisional / protective measures (Art 20)
- recognition (Art 21)

BIIa : children proceedings

- jurisdiction based on habitual residence (Art 8)
- exceptions: Arts 9 (former habitual residence); Art 10 (child abduction); Art 12 (prorogation of jurisdiction to Art 3 court); Art 13 (child's presence)
- incorporates Hague Convention 1980 (Art 11)
- residual jurisdiction (Art 14)
- emergency protection (Art 20)
- transfer to court better placed (Art 15)
- recognition (Art 21)

common themes

Maintenance Regulation

- uniform jurisdictional rules (Art 3)
- choice of court agreements (Art 4)
- other: Art 5 (appearance); Art 6 (subsidiary); Art 7 (*forum necessitatis*)
- limits (modification or new orders): Art 8
- seising a court (Art 9)
- Lis pendens (Art 12)
- related actions (Art 13)
- provisional and protective measures (Art 14)
- recognition and enforcement (Chapter IV, Arts 16-43)

common advantages

- uniformity (certainty as to jurisdiction, first in time, *lis pendens*)
- *reciprocity* (recognition, ease of enforcement in other member states)
- limited exceptions
- designation of Central Authority
- designated roles in cross-border enforcement, exchange of information, judicial co-operation in welfare matters
- protective measures (particularly child welfare)

BIIa recast

- enhancement of children's right: EU's Charter of Fundamental Rights; UN Convention on the Rights of the Child
- obligation to give children the right to be heard (Art 20)
- improvements to return process after international abduction: centralised courts (Art 22); limits on appeals (Art 25(4)); clarification of 6 week rule (Art 23(1))
- other: provisional measures, funding Central Authorities, placement of children in other member states (etc.)

scheme of the 1996 Hague Convention and the 2007 Convention

1996 Hague Convention

- 45 signatories
- ratified by UK (in force 1 November 2012)
- jurisdiction: habitual residence (Art 5)
- other: refugees (Art 6); wrongful removal (Art 7);
- transfer to better placed court (Art 8 + 9)
- protective measures (Art 10 on divorce)
- emergency + protective measures (Art 11 +12)
- applicable law (exceptionally) (Art 15)
- recognition and enforcement (Arts 23-28)
- co-operation between Contracting States, including designation of Central Authority (Arts 29-39)

2007 Convention

- UK currently bound *only* as member of EU (not otherwise)
- in force 23 November 2007 but does not apply within EU as Maintenance Regulation takes precedence
- ‘to establish a comprehensive system of co-operation’
- *no* (uniform) jurisdictional rules or first in time rules
- designation + role of Central Authority (Arts 4-8)
- applications via Central Authority: recognition and enforcement (Art 10)
- effective access to procedures in requested state (Art 14)
- limit on proceedings (Art 18)
- recognition and enforcement: Art 20 (bases); Art 22 (grounds for refusal); Art 23 (procedure); Art 30 (maintenance arrangements); Art 32 (in accordance with internal law)

shortfalls and gaps

- **1996 Hague Convention** generally thought to significantly (but not entirely) fill the gap left by BIIa
- but BIIa recast will improve processes further
- e.g. absence of centralised courts, strict time limits, limited to one appeal (etc.)
- **2007 Hague Convention** is not a suitable replacement for the Maintenance Regulation
- e.g. no jurisdictional rules, no first in time, does not presently apply intra EU
- if UK ratifies Lugano II Convention post-Brexit this might fill the gap

Note: do not apply to **divorce** (so domestic law would apply i.e. DMPA 1973, *forum conveniens*)
