IAFL Brexit Webinar
Supporting Documents

BREXIT AND INTERNATIONAL FAMILY LAW
Speaker: Eleri Jones

BREXIT AND MARRIAGE BREAKDOWN
Chair: Anna Worwood (England)
Panel: Daniel Eames (England), Delphine Eskenazi (France),
Rachael Kelsey (Scotland), Magda Kulik (Switzerland), Sandra Verburgt (Netherlands)
and Maryla Rytter Wróblewski (Denmark)

BREXIT AND CHILDREN
Chair: Arnaud Gillard (Belgium)
Panel: Nina Hansen (England) Karen O'Leary (Ireland), Julia Pasche (Germany),
Isabelle Rein-Lescastereyres (France),
Professor Esther Margarita Susin Carrasco, (Spain) and Magali van Maanen (Netherlands)

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- Brexit and International Family Law -

Introduction

1. The implications for relations between the United Kingdom ('UK') and the rest of the European Member States ('the EU27') in family matters as a result of Brexit is a topic fraught with uncertainty. About the only thing we can advise our clients with any certainty at the moment is that the future is uncertain.

2. Following the recent UK general election, the plan is for the UK to cease to be a member of the EU from 11pm on 31 January 2020. A 'transition period' is intended until December 2020 during which a 'deal' for future relations can be agreed, and the current rules will remain in force throughout this period. There is scope (but little political appetite in the UK) for extending that deadline. There is a lot to be achieved in a short space of time and there is still a possibility of a 'no deal' situation at the end of the transition period.

3. There is a great deal that can be said about this topic that would touch on the nature of future relations between the UK and EU27 but time (wordcount) does not permit a very detailed exploration. A lot has been published in the UK (and, no doubt, within the EU27) on the topic of Brexit and family law, but the writer's main resources and experiences are in England.

4. The writer has been fortunate to be involved in discussions on the UK side between professional bodies and with the UK's Ministry of Justice as part of the 'no deal' planning in case of that eventuality. She has presented papers to lawyers in England about the implications of a 'no deal' outcome and spoke at the IAFL conference in Stuttgart in 2018 on this issue, also hearing the views of EU colleagues. It has been possible to explore from such opportunities the various questions, thoughts, reactions (including fears) of different lawyers, albeit generally only in an anecdotal way. The writer hopes to continue her involvement in this work; accordingly, this paper is written from a neutral, rather than personal perspective.

5. The future of relations between the UK and EU in the family law world will no doubt be impacted as a result of Brexit. An analysis of our journey to the current EU family law regime, of its advantages and disadvantages, and the legal and practical implications of

Brexit, may help in considering whether the impact will be positive or negative. Whilst family law is unlikely to be close to the top of the political agenda, it is plain that families will continue to be created, and separate, across borders, and that we will have to work hard for our clients to achieve the best outcome we can for them in uncertain times.

Development of EU Family Law

6. The UK acceded to what was previously the European Economic Community in 1973 and ever since there has been an increased effect of EU rules on life in the UK, as well as for the other EU countries, as integration into the European 'club' has progressed. The range of international instruments has evolved over time, from the Brussels Convention (brought into English law in 1982) to Brussels I (2002), to Brussels II – later superseded by Brussels IIa (2005) and then on to the Maintenance Regulation (2011) as well as others which play a part but are not mentioned here. The writer's entire legal career at the Bar of England and Wales has taken place under the operation of Brussels IIa and she has seen the entry into force of the Maintenance Regulation from early on in her practice.

7. The aforementioned intra-EU instruments have existed alongside the various Hague Conventions, most particularly: the 1970 Hague Convention regarding recognition of divorce, the long-established and well-known 1980 Hague Convention concerning child abduction, the so-called 'child protection' 1996 Hague Convention and the 2007 Hague Convention concerning maintenance obligations. Each has had a different path when it comes to ratification/accession by the various EU Member States – either individually or together *en bloc* as part of EU membership. Of those mentioned, only the 1970 Convention does not apply to all EU Member States. In relation to the others, the Brussels IIa Regulation and Maintenance Regulation take precedence over the 1996 and 2007 Hague Conventions and 1980 Hague is supplemented by Brussels IIa.

8. All of this has meant considerable adaptation for the older generation of lawyers as time has gone on and a fascinating web of inter-linked provisions for the newer lawyers to learn as they progress.

9. Some family practitioners in England have struggled to adopt the more civil-minded concepts with the advent of the EU Regulations, but so too may the civil minds of European practitioners have considered it odd to merge with our discretionary-based approach. It is evident from various adaptations made for the UK e.g. continuing use of 'domicile' rather than 'habitual residence' as a connecting factor or the opt-outs e.g. from applicable law

provisions, that efforts have been made to respect the different legal traditions. However, such points also apply to some of the Hague Conventions as well, which must accommodate an even greater number of legal systems. Relations have developed across the board.

Advantages and Disadvantages

10. Stepping back to consider what this long period of development internationally has done to affect relations, there is no doubt mixed opinion as to what is 'best' or 'right', but there has now been a settled period during which lawyers in both the UK and EU27 have become more accustomed to this system and the understanding and jurisprudence has developed accordingly.

11. Perhaps a larger shift in approach of UK lawyers was required when applying the EU Regulations than for our European counterparts, but there are certainly advantages of the EU family law system: there is a cohesive system of rules aimed at providing legal certainty, predictability and mutual trust, with inter-country cooperation to achieve swift recognition and enforcement of orders across borders. However, disadvantages include the 'race to issue,' which can be seen as arbitrary, unfair and undermines prospects of reconciliation/mediation, with varying application of the Regulations between Member States and scope for parties still to argue e.g. about habitually residence.

12. Both 'sides' would accept that neither system is perfect. Those less keen on the EU system say that there is a perfectly good system using the Hague Conventions. On the one hand, the EU Regulations do sometimes provide odd results e.g. the case of *Liberato v Grigorescu* (16.1.19) [1] in which the CJEU held that the recognition of a judgment of a court second seised, which had continued in breach of the *lis pendens* provisions, could not be refused on the basis that to do so would be manifestly contrary to public policy. This is not the place for a detailed consideration of the reasons, but many may be confused by the outcome in a system which is supposed to avoid parallel litigation and inconsistent decisions. On the other hand, an understandable criticism is made of the discretionary '*forum conveniens'* approach of the common law system: whilst the aim is laudable in seeking the most appropriate forum, to have the opportunity in each of the many intra-EU family cases to argue about which country should hear it, when there may be genuine connections on each side, and with different tests applied in each country to that question, also generates increased litigation, cost, delay and stress to our clients. So there are already tensions which exist in our cross-border relationship.

Reactions to Brexit

13. The implications of the UK government's initial 'Withdrawal Bill' were notable for family law: it intended to bring the EU *acquis* into English law without any guarantee of reciprocity, which would make many of the provisions ineffective. The IAFL, together with the English barristers' and solicitors' associations, commissioned a paper in late 2017, composed by the writer of this paper, explaining the effect of the UK government's approach and exploring other possible approaches [2].

14. The aforementioned paper had not had the opportunity (due to time) to set out the perspective of mainland EU family lawyers and a second paper was prepared shortly thereafter in early 2018 summarising the responses to 12 questions of practitioners in 16 jurisdictions in the EU (other than England) [3]. In summary, the responses demonstrated overwhelming support for the general conclusion that the (then) proposed approach of the UK government was the worst of all possible outcomes. The writer is aware of a letter prepared by the *Societat Catalana d'Advocats de Familia* [4] setting out its support for the main paper and some additional ideas. Whatever the feelings about whether the vote for Brexit was right or wrong – or what the relationship should look like in future – it was encouraging that a number of family law practitioners both in the UK and EU Member States wished to make a contribution with regard to the future relationship between the UK and EU in family law.

15. It is interesting to note some examples of judicial attitudes and responses to Brexit. In a Polish case (12.4.17) [5] a father sought the return of his daughter from Poland after she had been wrongfully removed there from England. The mother sought to argue a grave risk of harm if the child were returned due to separation from her. The court appears to have accepted that argument, and part of the reasoning was that there were uncertainties for the mother as a Pole, post-Brexit.

16. Conversely in the English case of *L v F* (2017) [6] a relocation case (proposed from the UK to Italy) the first appeal judge felt that the trial judge should have considered Brexit and the uncertainties ahead as to residence status in the UK (which had not been considered at all). At the second appeal stage, the English Court of Appeal was clear that such an approach would have been unhelpful and due to the uncertainty, "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."

17. There have evidently been tensions arising out of the uncertainties ahead. Will the difficulties encountered so far contribute to a hardening of attitudes in considering what the future relationship will be?

Implications of Brexit for Family Law

18. The UK, once it leaves the EU, will be regarded by the EU as a 'third state.' Other international instruments will apply if there is no other 'deal' to be agreed, and there are mixed views as to whether they would be sufficient. Will there be enough appetite to work out a new, special, arrangement going forwards and if so, will that even be achievable given the status of family law on the political agenda?

19. It is therefore worth considering what the implications of a 'no deal' scenario would be – do we need to fight it out as to what any such new 'deal' would be or are the Hague Conventions adequate for family law purposes? A small selection of the implications of 'no deal' are noted below. The effect on relations going forward will depend on the degree of change and strength of feeling in relation to each aspect.

    a. **Divorce**: with 'no deal', we will lose the *lis pendens* rules between the UK and EU27 and the UK will return to the *forum conveniens* considerations vis-à-vis the EU27. The anecdotal evidence available, also highlighted by all respondents in the IAFL Mainland EU response paper, is that post-Brexit, "English family proceedings would be ignored [by the EU27] 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". Some answered that it would be considered case by case. All respondents said that the English should have jurisdiction based on internationally accepted standards.

    So what does this mean for our international relations? Without rules governing which country should proceed, will the English seek to use 'Hemain' injunctions ordering a party not to proceed in the other country and how will such injunctions be received in that other country? Most respondents felt they would not be enforceable. Surely comity will suffer if countries start ignoring orders from other competent countries.

    Does it mean that being the first to issue will in fact still be very important, thus perpetuating the problem of the race to court?

b. **Maintenance**: at present, maintenance jurisdiction based on a sole domicile [nationality] divorce petition is prohibited under the Maintenance Regulation but that limitation will be lifted in the UK in the event of 'no deal'. However, if UK citizens seek recognition and enforcement in the EU27 of English decisions based on such jurisdiction, then how will they be received? Article 20(f) of the 2007 Hague Convention provides that a maintenance decision shall be recognised and enforced if "the decision was made by an authority exercising jurisdiction on a matter of personal status or parental responsibility, unless that jurisdiction was based solely on the *nationality* of one of the parties" – it does not refer to domicile. Might there be divergent interpretations in future, considering that 'sole nationality' should include 'sole domicile' (as it does in both Brussels IIa and the Maintenance Regulation)? Might the EU adopt a reservation in relation to Article 20(f)? This may lead to tensions unless catered for in some form of bespoke arrangement.

c. **Children:** whilst many say that the 1996 Hague Convention is a good substitute for Brussels IIa, a curiosity is how the UK and EU will contend with the loss of *perpetuatio fori* which applies under Brussels IIa, but which does not under the 1996 Hague Convention. Under Art 5(2) of the 1996 Convention, a state loses jurisdiction over a child once the child's habitual residence changes. Under Brussels IIa, proceedings continue. Who will decide if/when the child's habitual residence changes? Will we see tactical behaviour before/during proceedings and what about the possibility of increased cost and delay in resolving proceedings if they must be started afresh in a new country? The 1996 Convention (Art 10) does not permit prorogation of jurisdiction unless there are linked divorce proceedings: without such a link, there cannot even be the prospect of agreeing to continued jurisdiction (as under Art 12(3) of Brussels IIa). This may well cause difficulties for continued smooth relations absent an agreement to combat this in some way.

20. One significant feature posing a major threat to future relations is the political 'red line' of the UK that it wishes to be free of the CJEU. Currently, the CJEU achieves consistent application of the rules that apply in the Member States when it is asked to determine problems of interpretation. A notable example is the *A v B* case (16.7.15) [7] where the CJEU held that in relation to Art 3(c) and (d) of the Maintenance Regulation, a case concerning child maintenance is 'ancillary' only to parental responsibility proceedings (ongoing in one country) and not to the divorce proceedings (ongoing in the other country). This leads to a bifurcation of maintenance proceedings. The UK Supreme Court may well have decided this point differently, but the interpretation of the CJEU must be applied

across all EU Member States. It is unclear what the model will be for resolution of disputes in relation to the provisions of any instruments created as a result of a 'deal'. There may well then be divergent interpretations and approaches in the UK vs the EU27 which would again be likely to put strains on the UK/EU family law relationship.

21. In practice, the writer observes the time it has taken to educate practitioners about the EU Regulations as each came into force. There will be significant education and training in relation to whatever the future arrangements will be – deal or no deal – and great potential for uncertainty and mistakes. Will practitioners take advantage of oversights in new legislation, will appeals of the new law be the playground of the rich, even if it makes bad law? Who will help those who do not have funds for specialist international lawyers to help them untangle the knotty legal web that we face?

Conclusion

22. Change is always difficult: it can be exciting but it can also bring about fear and suspicion. Uncertainty about what the changes will be is unhelpful, particularly for lawyers when it comes to advising our clients. We have seen the pitfalls of our current system, our more experienced colleagues can help us consider the difficulties that existed in the 'old' system, and we can explore the ramifications of a 'no deal' scenario. We should learn from this as we contribute on each side to the future negotiations (insofar as we are permitted) and to help us reflect on what the various options would mean for our future relationship.

23. Family lawyers see their clients going through some of the most challenging times of their lives and we all know how costly and difficult – emotionally and financially – prolonged litigation can be. It is very much hoped that there will be a desire across the board to contribute proactively to the discussions on both sides to ensure that the future relationship between the UK and EU in matters of family law is as positive as possible, whilst respecting the nature of the break that is to be achieved. Whatever one's view about Brexit, there is clearly a lot of hard work to be done to pave as smooth a path going forwards as possible. It is very positive that organisations such as the IAFL exist, given how well positioned it is to help to continue uniting the lawyers across borders as friends and colleagues in the hope that it helps as we try to navigate the inevitably tricky waters ahead.

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13 January 2020

References (*excluded from word count*)

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[1] *Liberato v Grigorescu* (Case C-386/17, CJEU, 16.1.19)

[2] *Brexit and Family Law*, Eleri Jones (October 2017), commissioned by the Family Law Bar Association, International Academy of Family Lawyers and Resolution.

[3] IAFL European Chapter Mainland Response, IAFL European Chapter Brexit Committee (S Verburgt, I Rein-Lescastereyres, K Niethammer-Jürgens and T Amos QC) (12.2.18)

[4] Letter from Societet Catalana d'Advocats de Familia, Barcelona, to Mr Daniel Eames (20.3.18)

[5] District Court in Suwałki, 12.4.17

[6] *L v F* [2017] EWCA Civ 2121

[7] *A v B* (Case C-184/14, CJEU, 16.7.15)

Joint Resolution and Law Society Note to family lawyers in England and Wales ahead of the end of the Brexit transition period

November 2020

This note replaces our previous joint notes published in January 2019 and March 2019.

It largely covers the position in respect of divorce and finance matters and does not cover private and public children proceedings. Please see the note published by Resolution and the Association of Lawyers for Children.

This note is not legal advice, opinion or guidance, nor represents policy. Practitioners should consider the relevant international laws and national statutory instruments and, where applicable, take local advice in other relevant jurisdictions. Practitioners should also refer to the Government's published advice on Brexit and family law, and guidance produced by the EU.

Introduction

The UK left the EU on 31 January 2020. But the EU Regulations and CJEU decisions continued to apply for all purposes of law, including family law, throughout the so-called transition period and comes to an end at **11pm on 31 December 2020**. From that point the EU Regulations will immediately cease to apply to all new cases starting thereafter. Instead, reliance will be placed on other existing international instruments, most particularly the various Hague Conventions, and national law where they do not apply. In relation to divorce and maintenance cases, there are notable changes to the position regarding jurisdiction and finance and some points to be aware of regarding recognition and enforcement.

This note focusses on divorce and finance, but it touches on other family law areas too and concerns the position in England and Wales only. Whilst Northern Ireland is similar, there are some differences and Scotland has made distinctively separate arrangements. It is directed to practitioners and therefore intended to be for practice rather than a full exposition which can be found in other places. It sets out the transitional arrangements for cases ongoing as at 31 December 2020 and the position from 1 January 2021. Practitioners must be aware of the position from 1 January 2021 now in order to decide whether to take action to bring their cases within the transitional arrangements.

The central and most urgent issue for all family law practitioners is whether commencement of proceedings should take place in any particular case before 11pm on 31 December 2020 to ensure that Brussels IIa and the Maintenance Regulation apply to ongoing proceedings and orders subsequently made arising out of those proceedings.

The transitional arrangements are set out in the Withdrawal Agreement reached between the UK and EU in October 2019 and enshrined in the European Union (Withdrawal Agreement) Act 2020. Those provisions will apply regardless of whether any trade deal is reached. In summary, provided proceedings in respect of divorce, children and maintenance (needs-based provision) are instituted before 11pm on 31 December 2020, Brussels IIa and the Maintenance Regulation will continue to apply to the orders subsequently made in those proceedings whenever needed for the purpose of recognition or enforcement, perhaps years or even decades later. This joint note therefore emphasises again to practitioners how fundamentally important it is to review all cases now and decide whether to institute proceedings now, this year. Orders already made will be capable of recognition and enforcement around the EU (although not Denmark in certain cases) under the aforementioned EU Regulations. This note is directed to the importance of instituting proceedings where orders are not yet made.

This might arise in the following situations, although there are many more:

a) A client wants to know that their final divorce will be recognised in an EU member state in years to come if, for example, they wish to remarry there. Brussels IIa provides automatic divorce recognition and as long as the proceedings are instituted before the end of the transition period, it will benefit from that automatic recognition, whenever the final decree is pronounced.

b) A client wants a spousal maintenance provision which they think they may need to enforce against the paying party in years to come if they were to be in an EU member state. The Maintenance Regulation provides jurisdiction and *lis pendens* rules to regulate the proceedings and will apply to recognition and enforcement of maintenance orders as long as the proceedings are instituted before the end of the transition period.

Some of these provisions may not need to rely on the current EU Regulations because the Hague Convention alternatives may be considered adequate. But it will be for the practitioner to decide in each particular case whether the EU provisions are far better and more satisfactory and, if so, to ensure proceedings are instituted now so that the order will come within EU laws.

The transitional provisions are found in Articles 67 – 69 of the Withdrawal Agreement, having the force of law from 1 February 2020. Article 67 covers Brussels IIa, divorce and children, and the Maintenance Regulation, maintenance, needs-based provision. It separates jurisdiction, which for these purposes includes forum, and recognition and enforcement. Article 68 covers EU laws on service and taking of evidence. Article 69 covers legal aid. The Withdrawal Agreement deals both with UK proceedings and EU proceedings involving the UK courts.

It is still not known whether the EU will agree to the request by the UK to join the 2007 Lugano Convention. The UK is presently a member but this ends on 31 December 2020. The UK will not be a member on 1 January 2021 but might be in subsequent months. If so, this complex international law, which not only covers recognition and enforcement of maintenance orders, will have distinctive provisions as to jurisdiction and forum. Account

should be taken of the likelihood of the UK joining the Lugano Convention but is not covered in this note due to the uncertainty.

As always in any case with a cross-border element, advice should be taken from specialist lawyers in the other country/ies concerned. In particular it is believed that there may be different expectations of practice and interpretation in some EU member states. There will inevitably be some cases from January 2021 where conflicts will arise between the UK and EU member states in circumstances where previously EU law would prevail. For practitioners without existing EU contacts, an association of specialist international family lawyers is IAFL.

Instituting proceedings and practical points

Reference is made in the Withdrawal Agreement to the instituting of proceedings. Unhelpfully this is not defined in either the Withdrawal Agreement or EU family laws which instead refer to lodging or seizing. It might mean a step before the issue of proceedings but practitioners will almost certainly cautiously require proceedings to be issued, and to be notified that they have been issued, before 11pm on 31 December 2020 to be confident that they have ensured that the proceedings have been instituted and brought within the Withdrawal Agreement to avoid the possibility of any competing proceedings.

However, a number of issues then directly arise.

First and foremost, commencing proceedings should not be left until mid or late December. The courts are very busy. There are many Christmas contact applications. The courts are short-staffed. There is in any event a significant amount of work arising from the impact of the pandemic on family courts. Practitioners should not presume that all attempted applications made in mid-December onwards will be issued. It is essential to take action now.

In some instances, it may be wise to issue a precautionary Form A in order to ensure proceedings are instituted in time, but in circumstances where the parties don't seek to invoke the automatic court timetable and requirements. It should be made clear that this step is taken not in an aggressive or hostile form but simply to ensure compliance with the Withdrawal Agreement, probably with a general adjournment of the automatic court timetable.

Attendance at a MIAM is not required in an urgent international case as will almost certainly be the position in any matter where proceedings have to be instituted before the end of December.

In respect of online filing on 31 December 2020, FPR PD5B states that filing after 4:30pm is deemed to be the next working day. We are informed by HMCTS that the Practice Directions supporting both Divorce and Financial Remedy digital cases are to be amended to remove the cut off of 4.30pm so that any case received up to 11pm on 31st December 2020 will be classed as being received (check for all updates to the FPR and accompanying PDs here).

In respect of an online application for a financial consent order, there is technically no Form A issued. It is an application for the consent order. If it is crucial to come within the Withdrawal Agreement, a precautionary Form A might be necessary.

Where it is essential for the proceedings to be issued by a court office, naturally every possible step should be taken to ensure the application form, such as the divorce petition, is technically correct. Court offices undertake a vigorous gatekeeping exercise with strict checklists and application forms will be returned if not compliant. So a practitioner seeking to ensure issuing by a particular date should take steps to ensure there are no technical failures resulting in the return of the documents by the court, for example, after 1 January 2021.

The courts are very busy and therefore applications for expedited issuing or indeed expedited hearings to come within the Withdrawal Agreement will be treated very cautiously by HMCTS. There should be no unnecessary litigation and every attempt to work collaboratively with the court office and court service.

Practitioners and regional groups should find out arrangements in local court offices or divorce centres for particular provisions for any need for issuing of applications in mid and late December.

HMCTS have though created a specific email address for urgent Brexit related divorce petitions and financial applications filed digitally to flag up the urgency. This is onlineDFRjurisdiction@justice.gov.uk (but practitioners are asked not to misuse this email address for other non-Brexit related applications, however urgent they may perceive their application).

Divorce jurisdiction

The existing position continues, based on Brussels IIa, until the end of the year. The existing jurisdiction provisions for divorce continue in respect of divorce proceedings instituted on or before 11pm on 31 December 2020 in line with the terms of the Withdrawal Agreement.

From 1 January 2021, the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019 amend the DMPA 1973, Section 5 to provide jurisdiction grounds for divorce in our national law as follows:

(a) *both parties to the marriage are habitually resident in England and Wales;*

(b) both parties to the marriage were last habitually resident in England and Wales and one of them continues to reside there;

(c) the respondent is habitually resident in England and Wales;

(d) the applicant is habitually resident in England and Wales and has resided there for at least one year immediately before the application was made;

(e) the applicant is domiciled and habitually resident in England and Wales and has resided there for at least 6 months immediately before the application was made;

(f) both parties to the marriage are domiciled in England and Wales; or

(g) either of the parties to the marriage is domiciled in England and Wales.

It should be noted that sole domicile is now a primary basis of jurisdiction. Nevertheless, practitioners should take care in relying on this basis if it is anticipated that there may be the need for enforcement abroad of any maintenance orders for example via the 2007 Hague Maintenance Convention or 2007 Lugano Convention (if it were to apply), and local advice should be taken.

The Government's intention is that this new law follows the previous Brussels IIa law. However, it hasn't done so completely, particularly in relation to clauses (d) and (e) in that they require habitual residence on the day of issuing the proceedings together with a period of previous simple residence beforehand. The wording is different to that in Brussels IIa, The interpretation of Article 3 in relation to which there has been a long-standing debate as to whether the period of residence set out should be 'habitual residence' or simple 'residence' (Marinos vs Munro) has not yet been settled by the CJEU.

Divorce forum

At present the forum test and criteria in divorce matters occurring in two EU member states is *lis pendens*, namely the first party to lodge proceedings secures the proceedings in that country. This continues in respect of proceedings instituted on or before 11pm on 31 December 2020. So if a petition is presented in England on 31 December and another in France on 5 January 2021, the English petition has priority and forum will be England – the French petition cannot continue because the Brussels IIa *lis pendens* regime will apply as there are existing proceedings instituted in England (see the Withdrawal Agreement Article 67(1)).

From 1 January 2021, forum from a UK perspective will be decided on closest connection, *forum non conveniens*, as presently prevails between the UK and all non-EU countries (and Denmark).

Practitioners should therefore consider with clients whether it is more beneficial to institute proceedings before the end of the transition period, relying on the *lis pendens* provisions, or wait until 1 January 2021 and rely on the closest connection test.

However, how the courts of each EU member states will respond from 1 January 2021 where a divorce is lodged first (or otherwise) in England will depend on their national law. Advice from the other country should be taken and may differ between member states and it is noted that they may still give priority to the court first seised.

Divorce recognition

At present under Brussels IIa, UK divorce orders, decree absolute of divorce, will be recognised automatically around the EU (with the exception of Denmark), just as the UK recognises divorce orders made by civil courts in the EU. This will continue for UK divorce orders made in respect of proceedings instituted on or before 11pm on 31 December 2020.

For divorce proceedings instituted from 1 January 2021, two different regimes prevail as to both UK divorce orders being recognised around the EU and EU divorce orders being recognised in the UK. Ease and confidence of recognition may be relevant for purposes of remarriage or evidence of status/tax/inheritance etc.

First, the 1970 Hague Divorce Recognition Convention provides for recognition of divorces between signatory states. So a UK divorce order will be recognised in an EU member state which is a 1970 Hague Convention signatory (subject to the requirements of the 1970 Hague Convention being met), just as the UK will recognise divorces from EU member states which are 1970 Hague Convention signatories. This Convention has not been used significantly and practice across the EU may vary and it is therefore wise to check with a lawyer in the other country where recognition is sought. In particular it may be important to check the

requirements of the 1970 Hague Convention, especially that the jurisdictional basis for the divorce will not cause difficulties in the recognition process in the other country pursuant to the 1970 Hague Convention.

Secondly, for recognition of a UK divorce in EU member states which are not 1970 Hague Convention signatories, and 15 EU member states including several substantial north-west European countries are not members, recognition will depend entirely on their national law. Local advice should be taken in advance. Similarly for the UK, recognising a divorce from an EU non-1970 signatory depends upon UK national laws. In this regard English law is very liberal in its recognition of foreign divorces and it is highly likely that a divorce regularly granted by a civil court in an EU member state will be recognised.

Given that there might be some difficulties in recognition in non-1970 signatory EU member states, this may be a good reason to institute proceedings before the end of the year, to make sure that there can be reliance on the automatic EU wide recognition. This might be for example in a case in which one of the parties is an EU national of a non-1970 signatory state and might therefore have difficulties in having their English divorce recognised in that state.

There may also be distinctive issues with a few EU member states in respect of recognition of same-sex divorces and, again, advice should be taken locally.

Maintenance and financial claims: general

In its laws, the EU distinguishes between maintenance and other financial claims. In this respect maintenance is defined as needs based provision rather than just that of a periodic nature. So maintenance may include pension sharing, lump-sum and provision of accommodation as well as the traditional spousal maintenance and child support. In contrast there are also financial claims which are invariably sharing assets arising during the marriage, the marital property, which are dealt with separately to the provision of maintenance with different criteria and different procedures in many EU countries. Although certainly not a straight delineation, it is akin to the differential between needs and sharing.

The Maintenance Regulation provides rules for jurisdiction and forum in maintenance claims and for recognition and enforcement of maintenance between EU member states and, until the end of the transition period, currently applies in the UK. There is a separate EU Regulation in relation to marital property of which the UK is not a member.

A key aspect of the Maintenance Regulation is the recognition and enforcement of maintenance orders amongst EU member states. Following the end of the transition period, the Maintenance Regulation will not apply and reliance will instead be placed on the 2007 Hague Maintenance Convention or, if the UK joins, the 2007 Lugano Convention. Whilst each have similarities with the EU law, there are some distinct differences and there may be a benefit in being able to rely on the Maintenance Regulation. This may be relevant for many years to come. There might be a child maintenance order for a very young child made now with up to 18 years still to run in which enforcement abroad may be relevant. There may be a joint lives or long-term spousal maintenance order which may have to be enforced in many years hence. There might be an order against a property in the EU for which enforcement may not be appropriate for a few years. To benefit from the provisions of the Maintenance Regulation, proceedings must be instituted this year. Practitioners must consider this carefully with all clients for whom there may be any EU connection and whether the EU laws

would be significantly more beneficial than 2007 Hague Maintenance Convention or, if applicable later, Lugano.

Maintenance: jurisdiction

The Maintenance Regulation sets out specific grounds for jurisdiction for any maintenance claim. Unless this jurisdiction exists, a family court in the EU has no power to make a maintenance order, even if no other EU member state is involved. Jurisdiction is based on the habitual residence of the claimant or defendant (respondent), if separate. There is jurisdiction based on maintenance ancillary to divorce or children proceedings unless those proceedings were based on sole domicile for jurisdiction. There are additional grounds if a party takes part in proceedings, so-called entering an appearance, if there is an agreement (for spousal maintenance only), or if it is a forum of necessity.

The Maintenance Regulation jurisdiction provisions will apply to all existing proceedings instituted before 11pm on 31 December 2020 and the recognition and enforcement provisions will apply to all maintenance orders arising out of proceedings instituted before 11pm on 31 December 2020. So an application for financial provision made on 1 December 2020 with a final financial order made on 1 June 2021 will have the benefit of the Maintenance Regulation provisions as to recognition and enforcement pursuant to the terms of the Withdrawal Agreement.

For maintenance claims commenced from 1 January 2021 in England, jurisdiction depends upon the basis on which the maintenance claim is brought. If ancillary to divorce, it will follow the divorce jurisdiction. There are distinctive jurisdictional provisions for Schedule 1 Children Act 1989 (paragraph 14 of which is amended by SI 2019/836) and for MCA 1973 Section 27 (failure to maintain) and Section 35 (alternation of maintenance agreement) cases, but unfortunately not for Section 31 (variation) cases. There is also provision in Section 15 of the MFPA 1984 ('Part III' cases).

This lacuna in relation to Section 31 variation cases is notable and will give rise to uncertainty after the end of the transition period. Practitioners with variation cases where there is jurisdiction at present under the Maintenance Regulation will need to consider whether to issue prior to the end of the transition period to avoid any such uncertainty. Conversely, where there is no jurisdiction at present under the Maintenance Regulation but the original order was made in England, practitioners should be aware that it is possible that the English court may consider that it retains an inherent power to vary is own orders. The Government has been invited to consider legislating for this lacuna, as it has done with Schedule 1 claims but it has stated that it does not intend to do so.

The only exception to the above in relation to jurisdiction for maintenance cases of which practitioners should be aware is the application of Article 18 of the 2007 Hague Maintenance Convention, which will apply instead of the Maintenance Regulation at the end of the transition period (of which see more below). There are no direct rules of jurisdiction in the 2007 Hague Maintenance Convention save for Article 18, which provides for a limitation on bringing variation proceedings: if the creditor remains habitually resident in the state where the decision was made, modification proceedings cannot be brought elsewhere unless certain criteria apply. The Government has drafted a 'fixing SI' to amend the relevant legislation to 'signpost' the fact that this Article 18 limitation will apply across the board in relation to the

modification of *any* maintenance proceedings. This is the same as the current situation under Article 8 of the Maintenance Regulation but is noted as an important point for practitioners to consider in relation to jurisdiction in future in light of the suggestions made in this document.

As a result of the overriding Maintenance Regulation provisions falling away and the slight narrowing of jurisdiction provisions for the aforementioned types of cases (where there are any such jurisdiction provisions at all), there may be benefit in instituting certain maintenance proceedings in 2020 in order to come within the jurisdictional provisions of the Maintenance Regulation. For example, jurisdiction under Part III MFPA 1984 will from 1 January 2021 be limited to domicile or one year of habitual residence of either party (at the time of the foreign divorce or the time of the application for leave) or where either has an interest in property that was used as a matrimonial home here. This is narrower than the position at present which can include the habitual residence of the creditor without limit of time (for needs-based claims). So if a client would not qualify under the Part III jurisdiction from January onwards for a long time, proceedings should be instituted, and quite possibly proceedings for the substantive claims with leave granted, before 11pm on 31 December 2020.

Moreover, in relation to Part III, this can be used for the making of pension sharing orders after a foreign divorce in respect of a UK based pension (as an English order is required to share an English pension). In many of these instances, the parties have no ongoing connection with the UK apart from the existence of the pension. Hitherto, reliance has been placed on one of the jurisdictional grounds in the EU law, Article 7 Maintenance Regulation, the forum of necessity. This basis will no longer be available from 1 January 2021 once the Maintenance Regulation no longer applies and it would be thereafter impossible to obtain a pension sharing order of a UK pension unless there is domicile or habitual residence in accordance with the MFPA 1984, Section 15. If a practitioner seeks to obtain a pension sharing order under Part III after a foreign divorce and there are no other connections with the UK, it will be vital for the substantive application to be made before 11pm on 31 December 2020.

At present it is not possible to bring a maintenance based claim if the only connection is sole domicile (i.e. where neither party is resident in England and Wales and only one party is domiciled here). This prohibition ends at the end of the year. If a practitioner seeks to bring a maintenance claim and the only connection is sole domicile, it may be wise to wait until 2021 to institute the proceedings. However considerable caution is needed. There might be a risk of the other party commencing proceedings elsewhere in the EU and therefore establishing prior or competing forum. If the only basis available is sole domicile, there may be some difficulties in enforcing maintenance orders under the 2007 Hague Maintenance Convention (which does not recognise orders based on sole nationality) and particularly the 2007 Lugano Convention and further enquiries should be made urgently as to how the order would be received in the other country concerned before embarking on potentially lengthy and/or expensive proceedings here.

Maintenance: forum

At present, forum for maintenance claims is, like divorce, decided on the basis of *lis pendens rules*, namely the first to lodge proceedings (Article 12 of the Maintenance Regulation). This continues in respect of all proceedings instituted before 11pm on 31 December 2020.

Moreover, if maintenance proceedings are commenced in England on 30 December 2020 and maintenance proceedings are commenced in for example France on 5 January 2021, the first in time secures jurisdiction even though the latter application is brought after the end of the transition period i.e. when EU law no longer applies in the UK. This is because of the terms of the Withdrawal Agreement (specifically Article 67(1)) which regulates the position regarding ongoing cases. Furthermore, under the Maintenance Regulation, if there are maintenance proceedings in one country and so-called related action proceedings in another country, the courts of the second country retain a discretion to stay or bring an end to their proceedings so that they can all together go ahead in the country where the first set of maintenance proceedings are happening (Article 13 of the Maintenance Regulation). These related action proceedings might be financial claims other than needs-based maintenance claims. So if there were maintenance proceedings instituted in France on 30 December 2020 and proceedings instituted in England for sharing claims on 5 January 2021, the English court would have a discretion, following case law, to stay the sharing claims so that they all went ahead in France. Practitioners should therefore consider carefully when and where proceedings should be commenced both for maintenance and for other financial claims.

Under English law, the divorce petition includes prayers for financial claims. It has never been fully established whether these prayers are sufficient to institute proceedings and therefore claim priority. To avoid any risk, many family lawyers have already been in the practice of making an application in Form A to gain priority. This may be particularly important in light of the EU transitional arrangements. So even if a divorce petition is instituted this year, with prayers, it would also be advisable to issue a Form A in order to remove any arguments about the priority of forum. See notes above on the issue of 'instituting' proceedings and associated practical considerations.

If a practitioner considers that a client may not succeed in the English courts under the closest connection forum criteria with an EU member state then it will be essential to issue proceedings in 2020 first in time to secure forum. Whilst Brussels IIa applies, the country with the closest connection is irrelevant on forum and all that matters is being first to lodge proceedings (as long as there is also jurisdiction to do so).

Maintenance: recognition and enforcement

At present under the Maintenance Regulation, maintenance orders made by courts of an EU member state are recognised around the EU. Enforcement is two-tier depending on whether a country has signed the 2007 Hague Protocol on applicable law. Where enforcement is required of an order from a country which has signed the 2007 Protocol, as do all EU countries apart from the UK and Denmark, enforcement is a streamlined process with no intervening stages of registration. So the UK will automatically enforce a French maintenance order as if it were a UK order. However, where the enforcement is required of an order from a country which did not sign the 2007 Hague Protocol, which for these purposes is only the UK and Denmark, there is a two-stage process. First the order has to be registered in the other country and then it can be enforced. This system of recognition and enforcement will continue in respect of all orders made in or before 2020 and to orders made in respect of proceedings for maintenance instituted on or before 11pm on 31 December 2020 under the terms of Article 67(2) of the Withdrawal Agreement.

For new cases from 1 January 2021, recognition and enforcement of maintenance orders will be pursuant to the 2007 Hague Maintenance Convention, to which all EU member states are signatories as is the UK. This has many similarities with the Maintenance Regulation and indeed some benefits such as the intergovernmental administrative coordination of maintenance claims. But it has some differences and potential disadvantages. It has the two-stage process of registration before enforcement for all countries. Practitioners should consider carefully if they will want to rely on the recognition and enforcement provisions in the Maintenance Regulation, and if so, it will be essential for proceedings to be instituted this year.

Maintenance: choice of court agreements

Choice of court agreements are not covered by the Withdrawal Agreement and there is no provision which will formally recognise choice of court agreements made before the end of the transition period for proceedings brought from 1 January 2021 onwards. Therefore, if practitioners wish to have certainty of being able to rely on a choice of court agreement made in accordance with Article 4 of the Maintenance Regulation, it may well be advisable to issue proceedings before 11pm on 31 December 2020.

The UK has decided – unilaterally – that it will respect choice of court agreements in proceedings brought after the end of the transition period, (so there may still be value in entering into these agreements as if the election is not for England and is instead for an EU member state) this will still fix jurisdiction. The main Brexit SI provides in its transitional provisions (updated in a 'fixing SI' not yet made but expected to come into force) that the English courts will consider that agreement binding. This will mean that the court will not take jurisdiction if the parties elected in favour of an EU member state court. It should be emphasised that the UK has committed to respecting them as above, as a unilateral choice and there is no guarantee that the EU member states will respect such jurisdiction clauses after the end of the transition period. This will be most relevant where such clauses were/are in favour of the UK but the approach that the EU member states will take to jurisdiction clauses in future will be a matter for their own private international law and advice should be taken in the countries concerned.

Practitioners should note that this UK decision does not protect (from a domestic law perspective) choice of court clauses made in favour of non-EU Lugano Convention countries (made whilst the UK has been a member of the 2007 Lugano Convention by virtue of its EU membership).

Domestic violence

A different situation prevails in two separate respects namely existing proceedings and the law from 2021 onwards.

Under EU law, the EU Protection Measures Regulation provides that domestic protection orders made in any EU member state are automatically recognised and directly enforceable around the EU. This will end on 31 December 2020 and moreover is not covered by the Withdrawal Agreement, Article 67, except where the enforcement certificate is already issued (Article 67(3)). Therefore, to ensure recognition around the EU, it is not a matter of instituting proceedings but the actual domestic protection order and, crucially, the appropriate EU recognition certificate should be completed on or before 11pm 31 December 2020.

From 1 January 2021, the UK has decided, again unilaterally, to put the EU Protection Measures Regulation into national law with modifications (see SI 2019/493) and will recognise and directly enforce any protection order made in EU member states from 1 January 2021 onwards to give protection to the victims of domestic violence seeking help in the UK. So for incoming orders the position will remain the same. However, the EU has not reciprocated, so a practitioner seeking recognition and enforcement of a UK protection order will need to consult lawyers in the other country about what steps have to be taken, which might mean initiation of fresh proceedings and a consequent gap in protection in that country.

Service and taking of evidence

Other EU Regulations currently provide for cross border intergovernmental cooperation on the service of court papers and taking of evidence from another country.

These Regulations will no longer apply after 11pm on 31 December 2020. But as set out in the Withdrawal Agreement, there is continued access to the intergovernmental cooperation on service and taking of evidence if the applicable request is received by the other country on or before 11pm on 31 December 2020. It will therefore be necessary to make sure the request has been fully completed in this country, and is received by the intergovernmental agency in this country in time.

The UK and the EU are members of equivalent Conventions in respect of service and taking of evidence from the Hague. From 2021 onwards reference will be made instead to the 1965 Hague Convention on Service Abroad and the 1970 Convention on Taking Evidence Abroad.

Same-sex marriages and civil partnerships

In the main Brexit SI, the Government has elevated sole domicile to a primary ground of jurisdiction but it seems that in making the relevant changes to our domestic legislation via the main Brexit SI, sole domicile remains a *residual* rather than primary ground of jurisdiction for same sex divorce and civil partnership dissolution. This has been raised with the Government but they maintain that this will make no practical difference in same sex divorce and civil partnership dissolution.

Intra-UK

Currently the Maintenance Regulation jurisdiction and forum provisions apply intra-UK and this was, of course, central to the recent Supreme Court case of *Villiers*. In that case, there were divorce proceedings in Scotland (but no financial proceedings) and failure to maintain proceedings were brought under s27 MCA in England. From 1 January 2021, the Maintenance Regulation will no longer apply at all, let alone intra-UK, which has two main consequences.

First, *forum conveniens* principles will apply to any competing maintenance intra-UK applications (although mandatory stays will continue to apply to competing divorce proceedings between England (and Wales) and Scotland).

Second, practitioners will have to wrestle with the 1950 Maintenance Orders Act which, it is suggested, is not fit for purpose in relation to variation, recognition and enforcement. The problems with this Act are too manifold to set out in this note but by way of example, if an English joint lives spousal maintenance order is registered in the Scottish Sheriff court for the

purpose of enforcement, the debtor can ask the Scottish court to vary this, even though long term maintenance orders are very rare in Scotland. However Scottish law applies very differently and there is no guidance as to how to deal with any such action. Furthermore, a Scottish court has no power to capitalise or terminate maintenance, only vary it to nil.

Conclusion

There have over the past three years been significant discussions by representatives of the UK family law professions with the Government and with judicial initiatives. Guidance to practitioners will continue to be updated, for example, depending on developments relating to the Lugano Convention. It is also repeated that this is not legal advice or opinion and practitioners must consider each of their cases individually including with advice from lawyers abroad where applicable. Nevertheless, it is the hope and intention of this note from our respective organisations to help and assist practitioners at this time.

This note has been prepared by David Hodson OBE (dh@davidhodson.com) for The Law Society, and Daniel Eames (daniel.eames@michelmores.com) and Eleri Jones (ejones@1gc.com) for Resolution.

LIBRA
AVOCATS

CHART OF RULES APPLICABLE *POST-BREXIT* BEFORE THE FRENCH COURTS FOR FAMILY LAW ISSUES[1]

The purpose of this presentation is to describe the rules applicable before the French courts whenever there is a foreign element with the United Kingdom. It is important to recall that according to Art. 66-68 of the withdrawal agreement, the European Regulations will continue to apply during the transition period. Therefore, such Regulations will apply for all decisions rendered in legal proceedings initiated ***before 31st Dec. 2020****. Conversely, any proceedings initiated* ***after that date*** *will be subject to the rules set out below.*

DIVORCE AND PARENTAL RESPONSIBILITY

A. *APPLICABLE RULES FOR JURIDICTION, APPLICABLE LAW, RECOGNITION AND ENFORCEMENT*

MATTER	JURIDICTION	APPLICABLE LAW	RECOGNITION AND ENFORCEMENT
DIVORCE	Once the French court is seized of divorce proceedings, it will continue to determine its jurisdiction pursuant to Articles 3, 6 and 7 of the Regulation n° 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (called *'Brussels IIbis ' Regulation*). **Additional ground of jurisdiction with the United Kingdom as 1st Jan. 2021 - Application of French international private rules in accordance with Art. 6 and 7 of the Brussels IIbis Regulation.**	The French judge will continue to apply Regulation n° 1259/2010 of 20 Dec. 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (called '*Rome III' Regulation*).	Regarding the recognition and enforcement of English divorce judgments, in the absence of applicability of the rules of the *Brussels IIbis Regulation*, the ordinary French rules on recognition and enforcement of judgments will apply. As a result, English decisions will no longer be eligible for the European certificate for the circulation of decisions provided for in the *Brussels IIbis Regulation*. More specifically, French law provides for *de plano* recognition of judgments[2] rendered in matters of status and capacity of persons. The principle of divorce will be *de plano* recognized. From an

[1] This chart has been prepared by Delphine Eskenazi, Lawyer admitted to the Paris and New York Bars (Libra Avocats).
[2] The *de plano* effect means that it will not be necessary for the foreign judgment to be covered by *exequatur* in order to produce some legal effects in France.

	If the defendant spouse is not a national of a Member State and no ground of jurisdiction under Art. 3 of the *'Brussels IIbis ' Regulation* exists, the French courts may, in a subsidiary manner, accept jurisdiction on the basis of (i) the habitual residence of one of the spouses even if this residence has been for less than 6 months (French spouses) or 12 months (foreign spouses) (*Article 1070 of the Civil Procedure Code* if the residence is with the children, otherwise *Article 14 of the Civil Code* if a foreign resident in France) or (ii) the French nationality of one of the spouses (*Article 14 of the Civil Code*).		administrative point of view, it will still be necessary to go through the procedure of the *"control of opposability"* for the registration of the divorce on the French marriage certificate by referring the matter to the public prosecutor if there is a marriage certificate in France. **<u>Warning</u>:** France, unlike the United Kingdom, is not a Party to the *Hague Convention of 1st June 1970 on the Recognition of Divorces and Legal Separations*.
MATRIMONIAL PROPERTY REGIME	In matters of matrimonial property regimes, the French judge will apply the rules of jurisdiction of Articles 4 to 11 of the Regulation n° 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 (*'Matrimonial Property Regime' Regulation*). **Remarks**: The French divorce judge (who is seized under Art. 7 of the 'Brussels IIbis Regulation' in case of residual jurisdiction) will have jurisdiction to rule on the liquidation in case of agreement of the spouses on the basis of Art. 5 of the *"Matrimonial*	To determine the law applicable to matrimonial property regimes, the French judge will continue to apply the conflict of law rules below: (i) For spouses married before 1st Sept. 1992, ordinary rules of private international law; (ii) For spouses married between 1st Sept. 1992 and 29 Jan. 2019, *the 1978 Hague Convention on the Law Applicable to Matrimonial Property Regimes*;	In the absence of a convention applicable between France and the United Kingdom, English decisions on matrimonial property regimes will be subject to the ordinary French process of *exequatur*, to be enforced in France. French ordinary rules on *exequatur*, although liberal, requires that for a foreign decision to be recognized and to produce its effects in France, it must meet the following conditions: (i) Close connections with the matter; (ii) Absence of fraud; (iii) Absence of violation of the international public order.

	Property Regimes" Regulation, or Art. 7 in case of choice of court, or Art. 6 if the defendant resides in France at the time of the seizure, or Art. 8 if the defendant appears in court, or Art. 10 if real property in France, or Art. 11 to avoid a denial of justice.	(ii) For spouses married after 1st Sept. 1992, ss. 22 and 26 of the *'Matrimonial Regime' Regulation.*	
MAINTENANCE OBLIGATIONS BETWEEN SPOUSES	In matters relating to maintenance obligations between spouses, the French court will apply the rules of jurisdiction set out in Art. 3 et seq. of the Regulation n° 4/2009 of 18 Dec. 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (*'Maintenance Obligations' Regulation*)[3]. **Remarks**: the French court seized with jurisdiction for divorce may also have jurisdiction to rule on maintenance obligations between spouses pursuant to Art. 3, c) of the *'Maintenance Obligations' Regulation* (unless such jurisdiction is based solely on the nationality of one of the parties).	As regards the law applicable to maintenance obligations, the French judge will continue to apply the rules of the *Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations.* By default, the law applicable will be the law of the place of habitual residence of the maintenance creditor (Art. 3). However, if another law has closer connection to the marriage, such law may be applicable (Art. 5). French courts may for this reason apply English law to any issue of maintenance obligations between spouses upon divorce. **Warning**: the UK has never ratified this protocol and therefore it remains inapplicable in the UK. Consequently, if the judge having	The United Kingdom deposited on 28 Sept. 2020 its instrument of accession to the *Hague Convention of 23 Nov. 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance. This Convention will therefore be applicable between France and the United Kingdom.* This Convention establishes cooperation between the authorities of the Contracting States as regards the international recovery of maintenance obligations. *The 2007 Hague Convention* provides for a simplified *exequatur* system (Art. 23). However, the French text allowing such a simplified *exequatur* to be filed directly by the maintenance creditor (rather than through the Central Authority) has still not been adopted. Therefore, for the maintenance creditor wishing to act directly, it will be necessary

[3] An accession of the United Kingdom to the Lugano Convention would change the rules of jurisdiction in respect of maintenance obligations.

		jurisdiction is the English judge, he or she will not apply the Protocol, unlike the French judge.	to follow the ordinary *exequatur* process (as described above).
PARENTAL RESPONSIBILITY	In matters of parental responsibility, in the absence of applicability of *the 'Brussels IIbis ' Regulation* between France and the United Kingdom, the French courts will apply the *Hague Convention of 19 Oct. 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*. Article 5 of the latter provides for the principle of the jurisdiction of the courts of the State of the child's habitual residence. Unlike Art. 8 of the *Brussels IIbis Regulation*, in the event of a change of the child's habitual residence from France to the United Kingdom in the course of proceedings, the English courts will immediately acquire jurisdiction. In addition, if the children are habitually resident in the United Kingdom, the French courts, seized of the divorce proceedings, could benefit from a prorogation of jurisdiction (*Art. 10*) under the following conditions: '*(a) at the time of commencement of the proceedings,*	In matters of applicable law, the French courts will also apply the *1996 Hague Convention.* Art. 15 of the latter provides for the application of the law of the *forum.*	The *1996 Hague Convention* states in Art. 23 that '*The measures taken by the authorities of a Contracting State shall be recognized by operation of law in all other Contracting States'.* In the event of difficulties of enforcement, decisions rendered by the English courts based on this instrument will be subject to the conditions of *Art. 23, 2 of the Hague Convention.*

	one of his or her parents habitually resides in that State and one of them has parental responsibility in relation to the child, and b) the jurisdiction of these authorities to take such measures has been accepted by the parents, as well as by any other person who has parental responsibility in relation to the child, and is in the best interests of the child'. **Warning:** the French court may, however, decline jurisdiction if it considers that the courts of another Contracting State are better placed to hear the case in the best interests of the child (*1996 Hague Conv., Art. 8*).		
MAINTENANCE OBLIGATIONS FOR CHILDREN	In matters relating to maintenance obligations for the children, the French court will apply the rules of jurisdiction set out in Art. 4 et seq. of the *Maintenance Obligations' Regulation.* **Remarks**: Since the French judge has jurisdiction to hear divorce but also parental responsibility, he has jurisdiction on the question of the financial support and education of the child (*'Maintenance Obligations' Regulation Art. 3 d*).	As mentioned above, the French judge will apply the *Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations* and its principle of applying the law of the habitual residence of the maintenance creditor (Art. 3).	As in the case of maintenance obligations between spouses, at present, if the system of central authorities provided for by the *2007 Hague Convention* is not used by the maintenance creditor, *exequatur* proceedings will have to be introduced for the enforcement of English decisions on maintenance obligations for children.

B. *LIS PENDENS* EXCEPTION

CONDITIONS FOR LIS PENDENS EXCEPTION UNDER FRENCH LAW

Art. 19 of the *'Brussels IIbis' Regulation* (for divorce and parental responsibility) and Art. 12 of the *'Maintenance Obligations' Regulation* (for maintenance obligations between spouses and for children) will no longer apply between France and the United Kingdom.

Consequently, if the English Courts are seized before the French courts, an exception of *lis pendens* will have to be raised in France according to French rules of international private law. The *lis pendens* exception requires the demonstration that the future foreign decision will be recognized in France, which will be the case if these three conditions are met (same as *exequatur*) : 1) close proximity between the foreign court and the matter 2) absence of fraud 3) absence of violation of international public order (procedural and substantive public order).

If this exception is upheld by the French courts, they will have to stay the proceedings and then to subsequently decline jurisdiction in favor of the English courts (if the English courts accept jurisdiction).

DATE OF THE SEISING OF THE FRENCH COURTS (IMPORTANT CHANGE OF FRENCH DOMESTIC RULES AFTER 1 JANUARY 2021)

As regards the starting date of the divorce case in France for the *lis pendens* issue, there is an important change of French domestic rules after 1st January 2021: **the starting date of a French divorce case will be the date of service:** this stems from the combined application of the new Article 1108 of the French Procedural Code and Article 16 (b) of the *Brussels IIbis Regulation*:

- Article 1108 will state after 1st January 2021 that *"the Family Affairs Judge will be seized once the divorce summons is lodged with the Court"* (it used to be the filing of a divorce petition)

- **In France, a divorce summons ('assignation") (unlike a divorce petition "requête") has to be served to the defendant before it can be lodged with the Court** (French procedural rules, applicable in all civil matters);

- As a consequence, under the *Brussels IIbis Regulation* (and also under the *Maintenance Regulation* and the *Matrimonial Property Regime Regulation*), to determine the date of seising of the French courts, it is no longer possible to refer to Article 16 (a) (*article 9 (a) under the Maintenance Regulation, and 14 (a) under the Matrimonial Property Regime Regulation*) and one must refer to Article 16 (b) (*Article 9 (b) and 14 (b) under the other Regulations*) :

- *"A court shall be deemed to be seised (b) if the document has to be served before being lodged withthe court,* ***at the time when it is received by the authority responsible for service,*** *provided that the applicant has not subsequently failed to take the steps he was required totake to have the document lodged with the court"*

- The difficulty is that there is an uncertainty as to the *"authority responsible for service"*: Will it be the French bailiff in France sending the documents to the Central Authority? The Central Authority in the UK? The solicitor in the UK if the claimant proceeds with direct service under Article 10 (c) of the *Hague Service Convention*? There is no clear answer on this for the moment, practitioners have asked for clarification from the French government in an international context but it is doubtful that there will be an answer before 1st January 2021….

GROUNDS OF NON-RECOGNITION IN FRANCE IN THE EVENT THE UK PROCEEDINGS, EVEN THOUGH SECOND IN TIME, ARE CONTINUED

If the French courts are seized before the English courts, it is possible that the English court will nevertheless accept jurisdiction under the English rules of *"forum conveniens*". In this case, it will be possible to challenge enforcement in France of the English decisions in matters of maintenance obligations and parental responsibility on the following grounds:

Maintenance Obligations (*2007 Hague Convention, Art. 22*)

a) recognition and enforcement of the decision is ***manifestly incompatible with the public policy ("ordre public") of the State addressed;***
b) the decision was obtained by fraud in connection with a matter of procedure;
c) proceedings between the same parties and having the same purpose are pending before an authority of the State addressed and those proceedings were the first to be instituted;

Parental responsibility (*1996 Hague Convention, Art. 23*)

(a) if the measure was taken by an authority ***whose jurisdiction was not based on one of the grounds provided for in Chapter II****;*

2. INTERNATIONAL CHILD ABDUCTION

In matters of child abduction, the *'Brussels IIbis' Regulation* will no longer apply in relations between the United Kingdom and France. The *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* will then apply. The procedure provided for in Art. 11 of the '*Brussels IIbis' Regulation* will no longer apply.

3. PROCEDURAL MATTERS

In the absence of the applicability of European Regulations on procedural matters, general internal conventions dealing with procedural issues will have to be applied in relations between the United Kingdom and France from 1st Jan. 2021.

SERVICE OF DOCUMENTS	The United Kingdom is a Party to the *Hague Convention of 15 Nov. 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.* France is also a Party. It should be noted that the United Kingdom has not made a reservation to Art. 10 of the Convention. Such article allows the possibility of direct service (subject to the English domestic rules for service). This is a major change since this possibility did not exist under the European Regulations on service. On this issue of service, there is another important practical difference after Brexit – the UK has made a reservation under *the 1965 Hague Service Convention*: all documents sent to the Central Authority must be translated into English (such obligation did not exist under the previously applicable Service Regulation), which will also create an important practical disadvantage in the race to jurisdiction between France and the UK (it seems that this requirement for a translation does not apply in the event of direct service)[4].
TAKING OF EVIDENCE	The *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* will apply in relations between the United Kingdom and France.

[4] See : https://www.hcch.net/en/status-table/notifications/?csid=427&disp=resdn

The purpose of this presentation is to describe the rules applicable before the Dutch courts whenever there is a foreign element with the United Kingdom. It is important to recall that according to Art. 66-68 of the withdrawal agreement, the European Regulations will continue to apply during the transition period. Therefore, such Regulations will apply for all decisions rendered in legal proceedings initiated ***before 31st Dec. 2020****. Conversely, any proceedings initiated* ***after that date*** *will be subject to the rules set out below.*

DIVORCE AND MARRIAGE BREAKDOWN

A. APPLICABLE RULES FOR JURIDICTION, APPLICABLE LAW, RECOGNITION AND ENFORCEMENT

MATTER	JURISDICTION	APPLICABLE LAW	RECOGNITION AND ENFORCEMENT
DIVORCE	jurisdiction of the Dutch court will be determined pursuant to articles 3, 6 and 7 of the Regulation n° 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (called *'Brussels IIbis ' Regulation*). It is important to note that in in the situations, where the jurisdiction for divorce cannot be determined under Brussels-II-bis, jurisdiction will be determined pursuant art. 4	The Netherlands is not a party to Regulation n° 1259/2010 of 20 Dec. 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (called '*Rome III' Regulation*). Dutch Private International law provides in art. 10:56 paragraph 1 Dutch Civil Code (DCC) that divorce is pronounced under the application of Dutch law.	Regarding the recognition and enforcement of English divorce judgments, in the absence of applicability of the rules of the *Brussels IIbis Regulation*, English decisions will no longer be eligible for the European certificate for the circulation of decisions provided for in the *Brussels IIbis Regulation*. The Netherlands is like the United Kingdom a Party to the *Hague Convention of 1st June 1970 on the Recognition of Divorces and Legal Separations.* However, On the basis of art. 17 of the Hague Convention 1970, it follows that States parties

[1] This chart has been prepared by Sandra Verburgt, international family lawyer and partner at Delissen Martens in The Hague

MATTER	JURISDICTION	APPLICABLE LAW	RECOGNITION AND ENFORCEMENT
DIVORCE (CONTINUED)	paragraph 1 Dutch Code of Civil Procedure (DCCP). This article provides for the application of art. 3, 4 and 5 of Brussels II-bis For example: British couple resides in England, the husband emigrates to the Netherlands and starts divorce proceedings after 9 months. The Dutch court has no jurisdiction under art. 3 Brussels II-Bis, nor any other court of a EU Member State has jurisdiction. Then we will apply art. 4 paragraph 1 DCCP, which refers back to Brussels II-bis. Since art. 4 paragraph 1 DCCP does not have residual grounds of jurisdiction, art. 4 paragraph 1 DCCP only has limited significance. Only in case of a natural disaster or a (civil) war in the country of origin, jurisdiction may be vested on art. 9 DCCP (*forum neccesitatis*)	**Exception in paragraph 2:** By way of derogation from paragraph 1, the law of the State of a common foreign nationality of the spouses shall be applied in divorce proceedings , if: a. a choice for this law has been made jointly by the spouses or such a choice by one of the spouses has remained uncontested; or b. this law has been chosen by one of the spouses and both spouses have a genuine social link with the country of that common nationality. A choice of law must be expressly made or otherwise be sufficiently clear from the terms used in the application or defense statement.	are free to formulate and apply a more favorable (national) recognition scheme. Although recognition of English divorce order is possible on the basis of art. 2, paragraph 2, 3, 4 and 5 of the Hague Convention 1970, the regulation of article 10:57, paragraph 1 of the Dutch Civil Code is broader and therefore more favorable than the treaty regulation, so that it can be applied. Pursuant to art. 10:57 paragraph 1 of the Dutch Civil Code, an English divorce will be accepted for recognition if: - the English decision was taken in legal proceedings that meet the requirements of proper and sufficiently safeguarded justice, (for example "fair trial" from art. 6 paragraph 1 ECHR, duly summoned, possible to put forward a defense, etc.); - divorce has been pronounced by the decision of a court or other competent authority - and such jurisdiction was based on an acceptable basis by international standards.

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MATRIMONIAL PROPERTY REGIME	In matters of matrimonial property regimes, the Dutch court will apply the rules of jurisdiction of Articles 4 to 11 of the Regulation n° 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 (*'Matrimonial Property Regime' Regulation*). **Remarks:** The Dutch divorce court will have jurisdiction to rule on the settlement of the matrimonial property regime only ancillary to a divorce request, which in case of English spouses results that : - either both shall reside there at the time of filing the divorce application or - at least one of them should reside there one year or longer and there is an agreement of the spouses on the basis of Art. 5 of the "Matrimonial Property Regimes" Regulation, - or the last habitual residence of the spouses was in the	To determine the law applicable to matrimonial property regimes, the Dutch court will continue to apply the conflict of law rules below: (i) For spouses married before 1st Sept. 1992, ordinary rules of private international law: (HR 10 December 1976, ECLI:NL:HR:1976:AE1063 *Chelouche / Van Leer decision Dutch Supreme Court*): - choice of law, if not - common nationality of the spouses, if not - first marital domicile, if not - law of the closest connection; (ii) For spouses married between 1st Sept. 1992 and 29 Jan. 2019, *the 1978 Hague Convention on the Law Applicable to Matrimonial Property Regimes*: - choice of law, if not - first marital domicile, if not - common nationality, if not - law of the closest connection;	The recognition and enforcement of the property settlement is not covered by any treaty between the Netherlands and the United Kingdom. Recognition and enforcement must take place on the basis of art. 431 paragraph 2 DCCP. In order to obtain an exequatur, the judgments must meet the following conditions (HR 26 September 2014, ECLI:NL:HR:2014:2838 *Gazprom decision Dutch Supreme Court*): - the jurisdiction of the English Court is based on a ground of jurisdiction which is generally acceptable by international standards - the English decision was taken in legal proceedings that meet the requirements of proper and sufficiently safeguarded justice, - that the decision is binding and can no longer be appealed against and further that it can be enforced in England and Wales (HR 26 September 2014, ECLI: NL: HR: 2014: 2838) - the recognition of the foreign

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MATRIMONIAL PROPERTY REGIME (CONTINUED)	Netherlands and one of them still resides there. **Separate proceedings** Art. 7 in case of choice of court, or Art. 6 Common Habitual residence at time of filing ? (art. 6 sub a) Last habitual residence where one of them still resides? (art. 6 sub b) Respondent has her/his residence in one of the 18 MPR Regulation countries (art. 6 sub c) Dutch law applicable on the basis of art. 22 (choice of law) or art. 26 (applicable law in the absence of choice by the parties)? Real estate (subject to the settlement) in the Netherlands? (art. 10) Possible to start proceedings in third state closer connected to the parties? (art. 10)-> most likely this results in a reference to the English Courts.	**Remark**: the Netherlands has made a declaration under article 5 of the Convention, which gives priority to common nationality above first marital domicile. (ii) For spouses married after 1st Sept. 1992, article 22 and 26 of the *'Matrimonial Property Regime' Regulation.* - Choice of law - First common habitual residence, unless the spouses had their last common habitual residence for a significant longer period of time in that state than in the state of the first common habitual residence and both spouses had relied on that law - Common nationality - Law of the closest link Dutch courts may for this reason apply English law to the settlement of the matrimonial property regime of two English nationals.	decision is not contrary to Dutch public order - the English decision is not incompatible with a decision of the Dutch court given between the same parties, or with a previous decision of a foreign court that was given between the same parties in a dispute that concerns the same subject matter and is based on the same cause, provided that earlier decision is eligible for recognition in the Netherlands.

MATTER	JURISDICTION	APPLICABLE LAW	RECOGNITION AND ENFORCEMENT
MAINTENANCE OBLIGATIONS BETWEEN SPOUSES	In matters relating to maintenance obligations between spouses, the Dutch court will apply the rules of jurisdiction set out in art. 3 et seq. of the Regulation n° 4/2009 of 18 Dec. 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (*'Maintenance Obligations' Regulation*). **Remarks**: the Dutch court seized with jurisdiction for divorce may also have jurisdiction to rule on maintenance obligations between spouses pursuant to art. 3 sub c) of the *'Maintenance Obligations' Regulation* (unless such jurisdiction is based solely on the nationality of one of the parties). In the Netherlands it is also possible to start separate maintenance proceedings for spousal maintenance under art. 3 sub a (habitual residence respondent) and art. 3 sub b	As regards the law applicable to maintenance obligations, the Dutch judge will continue to apply the rules of the *Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations*. By default, the law applicable will be the law of the place of habitual residence of the maintenance creditor (art. 3). However, if another law has closer connection to the marriage, such law may be applicable (art. 5). Dutch courts may for this reason apply English law to any request for maintenance obligations between spouses upon divorce.	The United Kingdom deposited on 28 Sept. 2020 its instrument of accession to the *Hague Convention of 23 Nov. 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance. This Convention will therefore be applicable between The Netherlands and the United Kingdom*. This Convention establishes cooperation between the authorities of the Contracting States as regards the international recovery of maintenance obligations. **Remarks:** A request for recognition and enforcement of an English order will therefore follow the regime the regime of the Hague Maintenance Convention 2007. However, it will only apply if the request for recognition and enforcement is made simultaneously / together with the request for recognition and enforcement of the child maintenance (art. 2 paragraph 1 opening lines and under a and b of the Hague Maintenance Convention 2007).

MATTER	JURISDICTION	APPLICABLE LAW	RECOGNITION AND ENFORCEMENT
MAINTENANCE OBLIGATIONS BETWEEN SPOUSES (CONTINUED)	(habitual residence creditor). Please be aware that spousal support is upon request of the maintenance creditor only.		**If the Lugano Convention 2007 is in place before the English spouse issued her proceedings in England and Wales** (art. 63 paragraph 1 Lugano Convention) then the English spousal support order shall be recognised in the Netherlands without any special procedure being required, unless the decision shall not be recognized under art. 34 or 35 of the Lugano Convention, i.e.: - recognition is manifestly contrary to Dutch public policy - where it was given in default of appearance, if Dave was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defense, unless Dave failed to commence proceedings to challenge the judgment when it was possible for him to do so; - if it is irreconcilable with a judgment given in a dispute between the same parties in the Netherlands - the English decision is incompatible with a decision of the Dutch court given between the same parties, or

MATTER	JURISDICTION	APPLICABLE LAW	RECOGNITION AND ENFORCEMENT
MAINTENANCE OBLIGATIONS BETWEEN SPOUSES (CONTINUED)			with a previous decision of another foreign court that was given between Sam, and Dave in a dispute that concerns the same subject matter and is based on the same cause, provided that earlier decision is eligible for recognition in the Netherlands. - English jurisdiction was only based on national jurisdiction grounds, unless it is concerning real estate England and Wales; - If the grounds for English jurisdiction in the decision contradicts with Lugano Convention. **If the Lugano Convention 2007 is in place after the English spouse issued her proceedings in England and Wales, but before the English order was made** (art. 63 paragraph 2 Lugano Convention) then the English spousal support order shall be recognised in the Netherlands without any special procedure being required, if it would meet with the standards under Title III of the *Lugano Convention*, i.e.: - if jurisdiction was founded upon rules which accorded with those provided for either:

MATTER	JURISDICTION	APPLICABLE LAW	RECOGNITION AND ENFORCEMENT
MAINTENANCE OBLIGATIONS BETWEEN SPOUSES (CONTINUED)			○ in Title II (Jurisdiction) of the *Lugano Convention 2007* or ○ in a convention concluded between the UK and the Netherlands which was in force when the proceedings were instituted. -> *Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations 1973*.

The Netherlands is a participating Member State in the *Registered Partnership Property Law Regulation,* Regulation n° 2016/1104 of 24 June 2016. However, this regulation is not applicable on matters related to the existence, validity or recognition of a registered partnership, as this does not fall within the scope of application of the Regulation (art. 1, paragraph 2, preamble and under b of the *Registered Partnership Property Law Regulation*) The recognition of the registered partnership or civil partnership will be considered under art. 10:61 paragraph 1 in conjunction with paragraph 5 DCC.
If the registered partnership or civil partnership is valid, then **termination of the registered partnership** is not subject to *Brussels II-bis Regulation*. Whether a registered partnership entered into in the Netherlands or abroad can be terminated in the Netherlands by mutual consent or by dissolution and on what grounds, is determined by Dutch law (art. 10:86 and art. 10:87 DCC).

If it is a registered partnership or civil partnership the **partnership property regime** will follow the regime of the *Registered Partnership Property Law Regulation*, which is similar as set out for the matrimonial property regime in the chart above. If it is a de facto cohabitation (and has no formal status in country of origin) this regulation will not apply to the settlement of the property regime, but this will be settled under the Regulation on the law applicable to contractual obligations n° 593/2008 of 17 June 2008*, Rome I-Regulation.* **Recognition and enforcement** of such decision will be under the scope of Regulation on jurisdiction and the recognition of judgments in civil and commercial matters (recast) n° 1215/2012 of 12 December 2012, *Brussels I-regulation*.

Maintenance obligations between registered partners will be subject to the Maintenance Regulation as set out in the chart above.

However, a **same-sex marriage** is a marriage and therefore subject to the same rules and regulations on divorce, maintenance and matrimonial property regime as set out in the chart above.

MATTER	JURISDICTION	APPLICABLE LAW	RECOGNITION AND ENFORCEMENT

As we apply Brussels II-bis Regulation to all divorces, either on the basis of Brussels II-bis itself or on the basis of art. 4 paragraph 1 DCC, the **lis pendens rule** of art. 19 Brussels II-bis will continue to be applied in relation to the United Kingdom after Brexit. In the Netherlands the application **first filed** will be the first in time. The jurisdiction of the English Court should be based on a ground of jurisdiction which is generally acceptable by international standards.

The *Forum (non) conveniens rule* is considered an exorbitant basis of jurisdiction in the Netherlands and therefore will not be considered as a ground generally acceptable by international standards. Therefore in the event that a divorce is filed in England on this basis first in time, it is very likely that the Dutch court will not apply lis pendens rule, as the basis for the jurisdiction of the English Court is not generally acceptable by international standards. A English order rendered on the jurisdictional ground of *forum (non) conveniens* will most likely not be recognized and enforced in the Netherlands. See, the chart above.

RULES APPLICABLE IN SWITZERLAND WHEN FOREIGN ELEMENT WITH THE UK[1]

This chart demonstrates the different rules applicable in Switzerland when there is a foreign element with the UK. The Lugano Convention will continue to apply to the UK during the transition period, and the UK will continue to be treated as a state bound by the Convention until December 31st 2020.
The UK's accession to the Lugano Convention is pending, thus Switzerland has welcomed the intent of the UK to accede to the Lugano Convention.

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Divorce	The Swiss courts have jurisdiction over divorce proceedings in the following cases: - If one of the parties has his or her habitual residence in Switzerland. If that is the case, the courts of the domicile have jurisdiction. It is important to note that if the respondent has his or her habitual in Switzerland or if the applicant has his or her habitual residence in Switzerland and is Swiss, the divorce application can be lodged at any time. However, if the applicant is the only one to have his/her habitual residence in Switzerland and is not Swiss, the divorce application must be lodged a year after having moved to Switzerland.	Swiss law is applicable. Article 61 Private International Law Act *Divorce and legal separation are governed by Swiss law.*	Both Switzerland and the UK are parties of the Hague Convention of the 1st June 1970 on the Recognition of Divorces and Legal Separations. Thus, divorce judgments will be recognized pursuant to article 2 of the Hague Convention. The foreign judgment is then transcribed in the civil register pursuant to article 32 of the Private International Law Act and article 23 of the Swiss Civil Register Act. Article 2 of the 1970 Hague Convention *Such divorces and legal separations shall be recognised in all other Contracting States,*

[1] This document has been prepared by Magda KULIK; Lawyer admitted to the Geneva bar (KULIK SEIDLER)

MATTER	JURISDICTION	APPLICABLE LAW	RECOGNITION AND ENFORCEMENT
Divorce (continued)	- If none of the parties have their habitual residence in Switzerland and one of them is Swiss, the Swiss courts have jurisdiction. The place of origin of the party has jurisdiction over the divorce proceedings. It is important to note that in this case, Switzerland's jurisdiction is only subsidiary if the divorce cannot be (or cannot reasonably be) lodged at the habitual residence of one of the parties. Article 59 Private International Law Act *The following courts have jurisdiction to entertain an action for divorce or legal separation:* *a. the Swiss courts at the domicile of the defendant spouse;* *b. the Swiss courts at the domicile of the plaintiff spouse, provided that the latter has been residing in Switzerland for a year or is a Swiss national.* Article 60 Private International Law Act *When the spouses are not domiciled in Switzerland and at least one of them is a Swiss national, the courts at the place of origin have jurisdiction to entertain an action for divorce or legal separation, provided the action cannot be brought at the domicile of either spouse or cannot reasonably be required to be brought there.*		*subject to the remaining terms of this Convention, if, at the date of the institution of the proceedings in the State of the divorce or legal separation (hereinafter called "the State of origin") –* *(1) the respondent had his habitual residence there; or* *(2) the petitioner had his habitual residence there and one of the following further conditions was fulfilled – a) such habitual residence had continued for not less than one year immediately prior to the institution of proceedings; b) the spouses last habitually resided there together; or* *(3) both spouses were nationals of that State; or* *(4) the petitioner was a national of that State and one of the following further conditions was fulfilled – a) the petitioner had his habitual residence there; or b) he had habitually resided there for a continuous period of one year falling, at least in part, within the two years preceding the institution of the proceedings; or* *(5) the petitioner for divorce was a national of that State and both the following further conditions were fulfilled – a) the petitioner was present in that State at the date of institution of the proceedings and b) the spouses last habitually resided together in a State whose law, at the date of institution of the proceedings, did not provide for divorce.* Article 32 Private International Law Act *1 A foreign decision or deed pertaining to civil status shall be recorded in the register of civil*

MATTER	JURISDICTION	APPLICABLE LAW	RECOGNITION AND ENFORCEMENT
Divorce (continued)			*status pursuant to a decision of the cantonal supervising authority in matters of civil status.* *2 The permission to record shall be granted provided that the requirements set forth in Articles 25 to 27 are fulfilled.* *3 The persons concerned shall first be heard if it is not established that the rights of the parties have been sufficiently respected during the proceedings in the foreign state where the decision was rendered.*
Matrimonial property regime	Matrimonial property regime being excluded from the Lugano Convention at its article 1(2), we must turn to the Private International Law Act which states at its article 51 when the Swiss courts have jurisdiction. Article 51 Private International Law Act *The following courts or authorities have jurisdiction to entertain actions and to order measures relating to marital property:* *a. with respect to the liquidation of marital property upon the death of either spouse: the Swiss judicial or administrative authorities having jurisdiction to deal with the inheritance estate (Art. 86 to 89);* *b.* ***with respect to the liquidation of marital property upon a divorce or a separation: the Swiss judicial authorities having jurisdiction in this respect (Art. 59, 60, 63, 64);***	According to article 52 of the Private International Law Act, the applicable **law is the one that the parties have chosen** (either the law of the State they had their habitual residence in after the marriage, or the State of which one of them has citizenship). The choice of law must be agreed to in writing. The document in which the parties agree to the choice of law is governed by the chosen law. The parties can choose a different applicable law at any time; however, it has retroactive effects to the date of the marriage (if nothing else has been provided by the parties).	Article 58 of the Private International Law Act is applicable in cases of recognition of foreign decisions on matrimonial property regimes. Article 58 Private International Law Act *1 Foreign decisions* ***relating to marital property relations shall be recognized in Switzerland****:* *a. if they were rendered, or are recognized, in the* ***state of domicile of the defendant spouse****;* *b. if they were rendered, or are recognized, in the* ***state of domicile of the plaintiff spouse, provided that the defendant spouse was not domiciled in Switzerland****;* *c. if they were rendered, or are recognized, in the* ***state whose law applies to the marital property relations pursuant to this Act****; or* *d. to the extent that they* ***relate to real property****, if they were rendered, or are*

MATTER	JURISDICTION	APPLICABLE LAW	RECOGNITION AND ENFORCEMENT
Matrimonial property regime (continued)	*c. in all other cases: the Swiss judicial or administrative authorities having jurisdiction to rule on the personal effects of marriage (Art. 46, 47).*	If the parties **have not chosen an applicable law**, article 54 of the Private International Law Act provides that the applicable law is: - The law of the State in which both parties have their habitual residence; - If they do not have their habitual residence in the same State, the law of the last State in which they both had their habitual residence - If they have never had similar habitual residences, the law of the State in which they are both citizens applies - If they have never had a habitual residence in the same State, nor have a common citizenship, their matrimonial property regime is that of the separation of assets under Swiss law. Article 52 Private International Law Act *1 Marital property relations are governed by the law chosen by the spouses.* *2 The spouses may choose the law of the state in which they are both domiciled or will be domiciled after the marriage celebration, or the law of a state of which either of them is a national. Article 23, paragraph 2, does not apply.*	*recognized, in **the state in which such real property is located**.* *2 The recognition of decisions relating to marital property relations taken in the context of measures of protection of the marital union, or upon a death, a declaration of nullity of marriage, a divorce or a separation is governed by the provisions of this Act relating to the personal effects of marriage, to divorce or to inheritance (Art. 50, 65 and 96).*

MATTER	JURISDICTION	APPLICABLE LAW	RECOGNITION AND ENFORCEMENT
Matrimonial property regime (continued)		Article 53 Private International Law Act *1 A choice of law must be agreed in writing or result with certainty from the provisions of a marital property agreement; furthermore, such choice is governed by the chosen law.* *2 A choice of law may be made or amended at any time. A choice of law made after the marriage celebration has retroactive effect as of the date of the marriage, unless otherwise agreed.* *3 The chosen law remains applicable as long as the spouses have not amended or revoked such choice.* Article 54 Private International Law Act *1 Absent a choice of law, marital property relations are governed: a. by the law of the state in which both spouses are domiciled at the same time, or, if that is not the case, b. by the law of the state in which both spouses were for the last time domiciled at the same time.* *2 If the spouses were never domiciled at the same time in the same state, their common national law applies.* *3 Spouses who were never domiciled in the same state and who do not have a common nationality are subject to the Swiss rules about separate property.*	
Maintenance obligations between spouses	In terms of maintenance obligations between spouses, the rules of jurisdiction in the Lugano Convention (2007) apply.	Regarding the law applicable to maintenance obligations, the Private International Law Act applies the rules of the Hague Convention of 1973 on the	If one wishes to enforce a judgment rendered by a State that has ratified the Lugano Convention, said judgment is immediately recognized (art. 33 of the

MATTER	JURISDICTION	APPLICABLE LAW	RECOGNITION AND ENFORCEMENT
Maintenance obligations between spouses (continued)	Article 5 of the Lugano Convention provides that the following courts have jurisdiction: the courts of where the maintenance creditor has its habitual residence, the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties or the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility, if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties. The parties can also **choose the jurisdiction provided it's specified in writing** (article 23 of the Lugano Convention). Article 2 of the Lugano Convention *1. Subject to the provisions of this Convention, persons domiciled in a State bound by this Convention shall, whatever their nationality, be sued in the courts of that State.* *2. Persons who are not nationals of the State bound by this Convention in which they are domiciled shall*	law applicable to maintenance obligations, even if the UK has not ratified it. The Hague Convention of 1973 is applicable *erga omnes*. If a divorce procedure is ongoing in Switzerland, Swiss law will also govern maintenance obligations between spouses (article 8 of the Hague Convention). Article 49 Private International Law Act *Maintenance obligations between spouses are governed by the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations.* Article 4 of the 1973 Hague Convention *The internal law of the habitual residence of the maintenance creditor shall govern the maintenance obligations* *In the case of a change in the habitual residence of the creditor, the internal law of the new habitual residence shall apply as from the moment when the change occurs.* Article 5 of the 1973 Hague Convention *If the creditor is unable, by virtue of the law referred to in Article 4, to obtain maintenance from the debtor, the law of their common nationality shall apply.*	Lugano Convention) without going through any sort of procedure. For the judgment to be enforced, a party must make a formal request to the Court (art. 33 of the Lugano Convention). The criteria of article 53 Lugano Convention must be followed. - The party seeking recognition must produce of copy of the judgment with all the elements to establish its authenticity (art. 53 (1) Lugano Convention). - The party must also produce a certificate using the standard form in Annex V of the Convention (art. 53 (2) and art. 54 Lugano Convention). - If the party has not produced a certificate according to Art. 54, the court can allow more time to produce it, or can accept any equivalent document if the judge considers it to be sufficient (art. 55 (1) Lugano Convention). The court can also require a translation done

MATTER	JURISDICTION	APPLICABLE LAW	RECOGNITION AND ENFORCEMENT
Maintenance obligations between spouses (continued)	*be governed by the rules of jurisdiction applicable to nationals of that State.* Article 5 of the Lugano Convention *A person domiciled in a State bound by this Convention may, in another State bound by this Convention, be sued:* *[…]* *2. in matters relating to maintenance:* *(a) in the courts for the place where the maintenance creditor is domiciled or habitually resident; or* *(b) in the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties; or* *(c) in the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility, if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.* Article 23 of the Lugano Convention *1. If the parties, one or more of whom is domiciled in a State bound by this Convention, have agreed that a court or the courts of a State bound by this Convention are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have*	Article 6 of the 1973 Hague Convention *If the creditor is unable, by virtue of the laws referred to in Articles 4 and 5, to obtain maintenance from the debtor, the internal law of the authority seised shall apply.* Article 8 of the 1973 Hague Convention *Notwithstanding the provisions of Articles 4 to 6, the law applied to a divorce shall, in a Contracting State in which the divorce is granted or recognised, govern the maintenance obligations between the divorced spouses and the revision of decisions relating to these obligations. The preceding paragraph shall apply also in the case of a legal separation and in the case of a marriage which has been declared void or annulled.*	by a qualified translator (art. 55 (2) Lugano Convention). Article 33 of the Lugano Convention *1. A judgment given in a State bound by this Convention shall be recognised in the other States bound by this Convention without any special procedure being required.* *2. Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Title, apply for a decision that the judgment be recognised.* *3. If the outcome of proceedings in a court of a State bound by this Convention depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question.* Article 53 of the Lugano Convention *1. A party seeking recognition or applying for a declaration of enforceability shall produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity.* *2. A party applying for a declaration of enforceability shall also produce the certificate referred to in Article 54, without prejudice to Article 55.*

MATTER	JURISDICTION	APPLICABLE LAW	RECOGNITION AND ENFORCEMENT
Maintenance obligations between spouses (continued)	*agreed otherwise. Such an agreement conferring jurisdiction shall be either:* *(a) in writing or evidenced in writing; or* *(b) in a form which accords with practices which the parties have established between themselves; or* *(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.* *2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.* *3. Where such an agreement is concluded by parties, none of whom is domiciled in a State bound by this Convention, the courts of other States bound by this Convention shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.* *4. The court or courts of a State bound by this Convention on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.* *5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to the provisions of Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.*		Article 54 of the Lugano Convention *The court or competent authority of a State bound by this Convention where a judgment was given shall issue, at the request of any interested party, a certificate using the standard form in Annex V to this Convention.* Article 55 of the Lugano Convention *1. If the certificate referred to in Article 54 is not produced, the court or competent authority may specify a time for its production or accept an equivalent document or, if it considers that it has sufficient information before it, dispense with its production.* *2. If the court or competent authority so requires, a translation of the documents shall be produced. The translation shall be certified by a person qualified to do so in one of the States bound by this Convention.* <u>Please note</u>: If the Lugano Convention is not ratified, we will apply the Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations

MATTER	JURISDICTION	APPLICABLE LAW	RECOGNITION AND ENFORCEMENT
Maintenance obligations between spouses (continued)	If the Lugano Convention does not apply, article 46 of the Private International Law Act provides that the courts of the place where the spouses have habitual residence in Switzerland have jurisdiction (subsidiarily, if neither of them have habitual residence in Switzerland and one of them is Swiss, their place of origin has jurisdiction) (article 47 of the Private International Law Act). However, since it's a financial matter, **the spouses can choose the place that will have jurisdiction, provided they've put it in writing** (art. 5 of the Private International Law Act) Article 46 Private International Law Act *The Swiss judicial or administrative authorities of the domicile or, in the absence of a domicile, those of the habitual residence of either spouse have jurisdiction to entertain actions or other measures relating to the effects of marriage.* Article 5 Private International Law Act *1 In matters involving an economic interest, parties may agree on the court that will have to decide any potential or existing dispute arising out of a specific legal relationship. The agreement may be entered into in writing, by telegram, telex, telecopier or any other*		

MATTER	JURISDICTION	APPLICABLE LAW	RECOGNITION AND ENFORCEMENT
Maintenance obligations between spouses (continued)	*means of communication which permits it to be evidenced by a text. Unless otherwise agreed, a choice of forum is exclusive.* *2 A choice of forum has no effect if it results in abusively depriving a party from the protection granted to it by a forum provided by Swiss law.* *3 The chosen court may not deny jurisdiction:* *a. if a party is domiciled or has its habitual residence or a place of business in the canton where the chosen court sits; or* *b. if, pursuant to this Act, Swiss law is applicable to the dispute.*		
Parental responsibility	In terms of parental responsibility, the Swiss courts will apply the Hague Convention of 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children. Article 5 of the 1996 Hague Convention: *The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property. (2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.*	Regarding the applicable law, the 1996 Hague Convention also applies. It's important to note that if the child changes habitual residence, the applicable law is the one of the State in which the child has moved (art. 17 Hague Convention 1996). Thus, there is no *perpetuatio fori*. Article 15 of the 1996 Hague Convention *(1) In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.* *(2) However, in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into*	Any measures taken by a Contracting state is *de facto* recognized in all other Contracting States, subject to the restrictions of article 23 (2) of the 1996 Hague Convention. Article 23 of 1996 Hague Convention *(1) The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.* *(2) Recognition may however be refused –* *a) if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II;* *b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be*

MATTER	JURISDICTION	APPLICABLE LAW	RECOGNITION AND ENFORCEMENT
Parental responsibility (continued)	Article 6 of the 1996 Hague Convention *(1) For refugee children and children who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Contracting State on the territory of which these children are present as a result of their displacement have the jurisdiction provided for in paragraph 1 of Article 5.* *(2) The provisions of the preceding paragraph also apply to children whose habitual residence cannot be established.* Article 7 of the 1996 Hague Convention *(1) In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.* *(2) The removal or the retention of a child is to be considered wrongful where –* *a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which*	*consideration the law of another State with which the situation has a substantial connection.* *(3) If the child's habitual residence changes to another Contracting State, the law of that other State governs, from the time of the change, the conditions of application of the measures taken in the State of the former habitual residence.* Article 16 of the 1996 Hague Convention *(1) The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child.* *(2) The attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State of the child's habitual residence at the time when the agreement or unilateral act takes effect.* *(3) Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State.* *(4) If the child's habitual residence changes, the attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the new habitual residence.*	*heard, in violation of fundamental principles of procedure of the requested State;* *c) on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard;* *d) if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child;* *e) if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State;* *f) if the procedure provided in Article 33 has not been complied with.*

MATTER	JURISDICTION	APPLICABLE LAW	RECOGNITION AND ENFORCEMENT
Parental responsibility (continued)	*the child was habitually resident immediately before the removal or retention; and* *b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.* *(3) So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child.*	Article 17 of the 1996 Hague Convention *The exercise of parental responsibility is governed by the law of the State of the child's habitual residence. If the child's habitual residence changes, it is governed by the law of the State of the new habitual residence.*	
Maintenance obligations for children	In terms of maintenance obligations for children, the rules of jurisdiction in the Lugano Convention apply. Article 5 of the Lugano Convention provides that the following courts have jurisdiction: the courts of where the maintenance creditor has its habitual residence, the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that	Regarding the law applicable to maintenance obligations, the Private International Law Act applies the rules of the Hague Convention of 1973 on the law applicable to maintenance obligations, even though the UK has not ratified it. Article 83 Private International Law Act: *Maintenance obligations between parents and child are governed by the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*	If one wishes to enforce a judgment rendered by a State that has ratified the Lugano Convention, said judgment must follow the criteria of art. 53 Lugano Convention: - The party seeking recognition must produce of copy of the judgment with all the elements to establish its authenticity (art. 53 (1) Lugano Convention). - The party must also produce a certificate using the standard form in Annex V of the Convention (art.

MATTER	JURISDICTION	APPLICABLE LAW	RECOGNITION AND ENFORCEMENT
Maintenance obligations for children (continued)	jurisdiction is based solely on the nationality of one of the parties or the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility, if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties. The parties can also choose the jurisdiction provided it's specified in writing (article 23 of the Lugano Convention). Article 2 of the Lugano Convention *See above under maintenance obligations between spouses* Article 5 of the Lugano Convention *See above under maintenance obligations between spouses* Article 23 of the Lugano Convention *See above under maintenance obligations between spouses* If the Lugano Convention does not apply, the place where the child has habitual residence or the place where the respondent parent has habitual residence has	Article 4 of the 1973 Hague Convention *The internal law of the habitual residence of the maintenance creditor shall govern the maintenance obligations* *In the case of a change in the habitual residence of the creditor, the internal law of the new habitual residence shall apply as from the moment when the change occurs.* Article 5 of the 1973 Hague Convention *If the creditor is unable, by virtue of the law referred to in Article 4, to obtain maintenance from the debtor, the law of their common nationality shall apply.* Article 6 of the 1973 Hague Convention *If the creditor is unable, by virtue of the laws referred to in Articles 4 and 5, to obtain maintenance from the debtor, the internal law of the authority seised shall apply.*	53 (2) and art. 54 Lugano Convention). - If the party has not produced a certificate according to Art. 54, the court can allow more time to produce it, or can accept any equivalent document if the judge considers it to be sufficient (art. 55 (1) Lugano Convention). The court can also require a translation done by a qualified translator (art. 55 (2) Lugano Convention). Article 53 of the Lugano Convention *See above under maintenance obligations between spouses* Article 54 of the Lugano Convention *See above under maintenance obligations between spouses* Article 55 of the Lugano Convention *See above under maintenance obligations between spouses* <u>Please note</u>: If the Lugano Convention is not ratified, we will apply the Hague Convention of 2 October 1973 on the Recognition and Enforcement of

MATTER	JURISDICTION	APPLICABLE LAW	RECOGNITION AND ENFORCEMENT
Maintenance obligations for children (continued)	jurisdiction (subsidiarily, if neither of them have habitual residence in Switzerland and one of them is Swiss, their place of origin has jurisdiction) (articles 79 and 80 of the Private International Law Act). In case of an ongoing divorce proceeding, the place that had jurisdiction for the divorce, has jurisdiction for maintenance obligations for children (article 63 of the Private International Law Act). However, since it's a financial matter, the parties can choose the place that will have jurisdiction, provided they've put it in writing (art. 5 of the Private International Law Act) Article 5 Private International Law Act *See above under maintenance obligations between spouses* Article 79 Private International Law Act *1 Swiss courts at the child's habitual residence or those of the domicile and, in the absence of a domicile, those of the habitual residence of the respondent parent have jurisdiction to entertain an action relating to the relationship between parents and child, including an action relating to child support.*		Decisions Relating to Maintenance Obligations

A few things: Four ways to act in Switzerland

- **Possibility of freezing the assets with a foreign decision**
  (*article 271 Federal Act on Debt Enforcement and Bankruptcy*)

- **Possibility of freezing the assets without foreign decision in order to ensure the fulfilment of a pecuniary obligation arising out of marriage**
  If there is a serious and current danger on matrimonial assets
  Even if there is a divorce proceeding pending outside of Switzerland
  But the assets should be in Switzerland
  (*article 10 Private International Law Act and article 178 Swiss civil code*)

- **Possibility of requesting the payment of maintenance contributions directly from a debtor of the maintenance debtor (employer, tenant, etc.)**
  (*article 10 Private International Law Act and article 132 Swiss civil code*)

- **Legal action (pursuit) against a debtor domiciled in Switzerland**
  (*articles 46 and 67 Federal Act on Debt Enforcement and Bankruptcy*)

SKO
FAMILY LAW SPECIALISTS

Brexit and marriage breakdown- a view from Scotland

Rachael Kelsey

Some context:

- Scots law is a distinct legal system. There are material differences in the substantive law, procedure and terminology from that in both England and Wales and Northern Ireland.

- Our law comes from three places: Acts of the Scottish Parliament; Acts from Westminster (UK Houses of Parliament) and Scots common law.

- The way that devolution works in the UK differs across the UK too- The Scottish Parliament has exclusive competency to enact law, other than in limited, reserved areas (which are areas where a UK wide approach is sensible, for example, immigration and defence and security). So, family law is dealt with by the Scottish Parliament. The constitutional settlement in Wales, for example is different- it is a devolved model, where Westminster retains competency, other than in specified areas that are devolved to the Welsh Assembly.

- Where there are areas that are within Scottish competency, like family law, if it would make sense for a UK wide approach, the Scottish Parliament can grant a 'LCM'- Legislative Consent Motion- which allows Westminster to legislate.

- Why does any of this matter? Because when it comes to Brexit you need to know where to look.

  The European Union (Withdrawal Agreement) Act 2020 applies across the UK and deals with transitional cases. But all this Act does is incorporate the treaty (the Withdrawal Agreement) domestically, it doesn't amend any of our day-to-day law.

  For that there is secondary legislation- 'SI's (Statutory Instruments), or SSIs (Scottish Statutory instruments). This is where the nitty gritty is. And there

are, to date, no Keeling Schedules (copies of legislation showing prospective changes to the law that are not yet in force).

Most of the SI were passed in preparation for 'no deal' in 2018 and 2019. Not all have application in Scotland. Some alter each other. And most, if not all, are about to be altered again….

These are the ones that are already on the statute books.

- the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 **
- the Jurisdiction and Judgments (Family) (Amendment Etc.) (EU Exit) Regulations 2019 **
- the Civil Partnership and Marriage (Same Sex Couples) (Jurisdiction and Judgment) (Amendment etc.) (EU Exit) Regulations 2019 *
- the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019
- the Cross-Border Mediation (EU Directive) (EU Exit) Regulations 2019
- the Service of Documents and the Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provision) (EU Exit) Regulations 2018
- the European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendment etc.) (EU Exit) Regulations 2018
- the Mutual Recognition of Protection Measures in Civil Matters (Amendment) (EU Exit) Regulations 2019
- the Civil Procedure (Amendment) (EU Exit) Rules 2019
- the Family Procedure Rules 2010 and Court of Protection Rules 2017 (Amendment) (EU Exit) Regulations 2019
- the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018
- the International Recovery of Maintenance (Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance 2007) (EU Exit) Regulations 2018
- the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) (No.2) Regulations 2019 **

There are going to be two more before the end of the year:

- the Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020
- The Civil and Family Justice (Amendment) (EU Exit) Regulations 2020)

Read the excellent joint Resolution and Law Society of England and Wales Note to family lawyers in England and Wales ahead of the end of the Brexit transition period dated 30 November 2020 BUT keep in mind that the position in Scotland is not exactly the same and there are some big differences!

Rachael Kelsey

Edinburgh

2nd December 2020

Joint Resolution and Association of Lawyers for Children
Note to children lawyers in England and Wales ahead of the end of the Brexit transition period

November 2020

Overview

The UK left the EU on 31 January 2020. At the time of writing, the UK is in an 'implementation period' or 'transition period' which is due to end at 11pm on 31 December 2020. During this period, EU law has continued to apply to all family law matters, but that will change for new cases when the transition period comes to an end.

Our organisations have identified some key points for children practitioners in England and Wales to consider now, before 31 December 2020, and from 1 January 2021. We will look at cases already underway as well as longer-term practical points in cross-border children cases. It should be noted that this document reflects the Withdrawal Agreement entered into force on 1 February 2020, after having been agreed on 17 October 2019, and supersedes previous versions (which were based on the earlier position, in respect of which different arrangements were proposed for the post-transition period).

This note is not legal advice, opinion or guidance, nor represents policy. It cannot cover every situation or eventuality. Practitioners should consider the relevant international laws and national statutory instruments and, where applicable, take local legal advice on the likely position in relevant EU member state/s. Practitioners should also refer to the Government's published advice on Brexit and family law, and guidance produced by the EU.

Introduction

Pursuant to the European Union (Withdrawal Agreement) Act 2020, the transition period is due to end at **11pm on 31 December 2020**. EU law has applied in its entirety during the transition period.

The 2020 Act gives effect to the Withdrawal Agreement reached between the EU and UK in October 2019. Article 67 of the Withdrawal Agreement, in summary, provides that the jurisdiction, recognition and enforcement provisions of Brussels IIa will apply to proceedings instituted before the end of the transition period and the cooperation provisions will apply to applications received by central authorities by that date. From 1 January 2021 onwards, Brussels IIa will no longer apply to new cases in the UK. Practitioners should therefore consider whether they need to take steps urgently to

issue proceedings before the end of the transition period so that Brussels IIa applies vis-à-vis jurisdiction and recognition and enforcement the other side of the transition period.

There is no definition of what 'instituted' means but it is assumed that a case should be issued to be sure that the case can be considered to have been 'instituted'. **Please do not leave it until mid/late December 2020 to issue cases if this is required before the end of the transition period.**

Matters Concerning Parental Responsibility and Child Protection

Brussels IIa applies to all EU member states other than Denmark. Brussels IIa takes priority over the 1996 Hague Convention in relation to matters governed by Brussels IIa, where a child is habitually resident in an EU member state (Brussels IIa Article 61(a); Article 62(1)). This may mean that the jurisdictional provisions of the 1996 Hague Convention are used relatively infrequently by some at present. However, for cases issued after the end of the transition period, the 1996 Hague Convention will apply to cases between the UK and the EU member states (as well as all Contracting States outside of the EU).

Jurisdiction

For proceedings issued before the end of the transition period which are based on a jurisdictional ground in Brussels IIa, those proceedings will continue to be governed by the jurisdictional provisions in Brussels IIa after the end of the transition period (Withdrawal Agreement Article 67(1)).

The EU has confirmed that this addresses situations where proceedings involving the same cause of action and between the same parties are instituted in the courts of an EU member state and the United Kingdom ("*lis pendens*") before and after the end of the transition period respectively (or *vice versa*).

Proceedings concerning children instituted after the end of the transition period will be governed by the 1996 Hague Convention.

It should be noted that there are some differences between the jurisdictional provisions of Brussels IIa and the 1996 Hague Convention, in particular:

a) 1996 Hague Convention Article 5 states that jurisdiction can be founded on the basis of a child's habitual residence. However, unlike Brussels IIa Article 8, this is not based on the principle of *perpetuatio fori*. This means that a court can lose jurisdiction on the basis of Article 5 1996 Hague Convention if a child changes their habitual residence during the course of court proceedings (other than in cases of wrongful removal/retention) (See *Re NH (1996 Child Protection Convention: Habitual Residence)* [2015] EWHC 2299 (Fam); [2015] Fam. Law 1342). Do bear in mind though that pursuant to Article 13(1) of the 1996 Convention, a court is required to refrain from exercising jurisdiction that it may have under Articles 5-10 if corresponding measures have already been requested from another contracting state which is still considering them.

b) The absence of a 3-month continuing jurisdiction in relation to contact in the state of the child's former habitual residence after a lawful move (Brussels IIa Article 9) in the 1996 Hague Convention.

c) Prorogation of jurisdiction under the 1996 Hague Convention Article 10 is only available where there are divorce proceedings in the relevant Contracting State, and the circumstances in which this is possible are more limited. There is no 'free standing' power to prorogue jurisdiction in relation to children matters (contrast with Brussels IIa Article 12(3)).

d) There is a more comprehensive scheme for the taking of provisional measures in relation to a child who is present but not habitually resident in a Contracting State under the 1996 Hague Convention (Articles 11 and 12) than comparable provisions of Brussels IIa (Article 20) and measures taken under Article 11 have extra-territorial effect (not those under Article 12), whereas measures under Article 20 of Brussels IIa do not (until Brussels IIa is Recast in 2022).

Practitioners should also familiarise themselves with the applicable law provisions in Articles 15-22 of the 1996 Hague Convention.

Transfers of Jurisdiction

Currently, it is possible to transfer jurisdiction from one EU member state to another under Brussels IIa Article 15.

It appears that it will still be possible to do this after the end of the transition period, provided that proceedings were issued before the end of the transition period.

For proceedings issued after the end of the transition period, there is a mechanism for a transfer of jurisdiction under the 1996 Hague Convention.

Practitioners should be aware that there is a potential conflict between Brussels IIa and the 1996 Hague Convention which may impact incoming transfers of jurisdiction from the EU in cases issued after the end of the transition period. Brussels IIa takes priority over the 1996 Hague Convention in relation to children habitually resident in the territory of an EU member state in matters governed by Brussels IIa (Article 61(b) and Article 62). Article 15 of Brussels IIa only provides for transfers of jurisdiction between EU member states rather than between EU member states and 1996 Hague Convention Contracting States (Article 15(1)). Accordingly, it may be argued that it is not possible within these legal frameworks for jurisdiction to be transferred from an EU member state (applying Brussels IIa) and the UK (which is a third state for the purposes of Brussels IIa).

This is a particular problem in cases where children are moved from the UK to other EU member states to evade child protection interventions. At the moment, jurisdiction is often transferred back to the UK in these cases. This specific problem will, it appears, be resolved in Brussels IIa Recast, which includes an amendment to Brussels IIa permitting transfers of jurisdiction from EU member states to Contracting States.

However, Brussels IIa Recast will not apply to the participating member states until August 2022 (see Article 105 of Brussels IIa Recast).

Recognition and Enforcement

The Withdrawal Agreement confirms that the recognition and enforcement provisions of Brussels IIa will apply to judgments given in legal proceedings issued before the end of the transition period, and to documents formally drawn up or registered as authentic instruments, and agreements concluded before the end of the transition period (Withdrawal Agreement Article 67(2)).

The relevant point in time for this provision of the Withdrawal Agreement is the date when proceedings were instituted (i.e. was it before or after the end of the transition period?), rather than the date that any order was made.

This means that Brussels IIa can be used to recognise/enforce an order in the EU member states provided that the proceedings in which the order was made were instituted before the end of the transition period, even if that recognition/enforcement action needs to take place a long time after 1 January 2021.

Guidance from the EU states that this provision works both ways – i.e. if an order is made in a participating EU member state in proceedings issued before the end of the transition period, that order can be recognised and enforced in the UK using Brussels IIa after the end of the transition period.

If the proceedings were issued after the end of the transition period, the 1996 Hague Convention will govern the recognition and enforcement of any orders between the UK and the EU member states (and any Contracting States outside of the EU). There are subtle differences between the recognition and enforcement provisions of Brussels IIa and the 1996 Hague Convention (Article 23 in both) for example mandatory versus discretionary rules respectively to refuse recognition and enforcement. Also, enforcement takes place in accordance with the law of the place of enforcement but under Article 28 of the 1996 Hague Convention, there is an extra consideration that the best interests of the child are to be taken into account.

Practitioners should note that whilst legal aid is available on a means tested basis for recognition and enforcement (and appeals against the same) under Brussels IIa (LASPO 2012 Sch. 1, para. 17(1)(c)), legal aid is not available for the same type of cases involving applications for recognition and enforcement (or related appeals) under the 1996 Hague Convention (other than via an application under the Exceptional Case Funding scheme which has no guarantee of success).

Practitioners should also note the following differences between the recognition and enforcement provisions of Brussels IIa and the 1996 Hague Convention:

a) Brussels IIa uses certificates (Annex II, III and IV) to assist with recognition and enforcement of orders. There is no system of certificates under the 1996 Hague Convention.

b) Brussels IIa contains provisions for the direct enforcement of contact/access orders, and orders for the return of a child made pursuant to Brussels IIa Article 11 (6) – (8) following a wrongful removal/retention. There is no provision for the direct enforcement of orders under the 1996 Hague Convention.

Cross-Border Co-Operation

Chapter IV Brussels IIa contains provisions for cross-border co-operation between member states through Central Authorities in matters relating to parental responsibility.

The Withdrawal Agreement states that the cooperation provisions of Brussels IIa shall apply to requests and applications received by the central authority or other competent authority of the requested State before the end of the transition period (Withdrawal Agreement Article 67(3)).

Therefore, requests for co-operation made after the end of the transition period must be made using the co-operation provisions under the 1996 Hague Convention.

This would appear to be the case even if the proceedings in question were issued before the end of the transition period on the basis of Brussels IIa.

Assessments in EU member states

The existing rules about the ability of professionals to work in the EU member states on the basis of qualifications gained in their home state is affected by Brexit. There is therefore an even greater need for social workers and other professionals who propose to undertake assessments in an EU member state to ensure that they will not be contravening law within that state. This is in addition to ascertaining, in the first instance, whether assessments can be procured through cross border co-operation with professionals in the relevant state, in consultation with the Central Authority designated by the 1996 Hague Convention.

Placement of Children Overseas

Provisions concerning the placement of children in the EU member states/contracting States are set out within the co-operation provisions of Brussels IIa and the 1996 Hague Convention.

The 1996 Hague Convention contains similar provisions to Brussels IIa for the placement of a child in institutional care or with a foster family/kinship placement in another Contracting State. The relevant provisions are Brussels IIa Article 56 and 1996 Hague Convention Article 33.

Under both provisions, where an overseas placement of a child is contemplated, it is necessary to obtain consent in advance to the placement from the relevant competent authority in a member state/Contracting State. The requirements of the 1996 Hague Convention are more detailed than Brussels IIa because, when seeking the appropriate consents, a report on the child must be transmitted together with the reasons for the

proposed placement. In any case, consent from the relevant competent authority is vital as a failure to obtain consent could be a ground for non-recognition of an order placing a child overseas.

Where a co-operation request relating to an overseas placement is made before the end of the transition period, Brussels IIa will govern that request. Where it is made after the end of the transition period, the 1996 Hague Convention will apply (irrespective of when the proceedings were issued).

Child Abduction

The provisions of Brussels IIa relating to child abduction take precedence over the 1980 Hague Convention. Article 11 of Brussels IIa enhances the provisions of the 1980 Hague Convention but after the end of the transition period the following enhancements will be lost:

a) The requirement under Article 11(3) Brussels IIa for 1980 Hague Convention cases to be heard expeditiously and requiring courts to issue judgment no later than 6 weeks after the application is lodged (albeit there is provision for expedition and a six week expectation within the 1980 Convention itself, Article 11).

b) Articles 11(6)–11(8) Brussels IIa, which provide an unsuccessful applicant the opportunity to make submissions within 3 months of a non-return order pursuant to Article 13 of the 1980 Convention to the court in the member state where the child was habitually resident immediately before the wrongful removal or retention, so that that court can examine the question of the custody of the child. If it wishes, it can make a return order which is then enforceable under Brussels IIa (the so-called 'second bite of the cherry').

c) The provision in Article 11(4) Brussels IIa, which provides that a court cannot refuse to return a child on the basis of Article 13(b) 1980 Hague Convention if it is established that adequate arrangements (protective measures) have been made to secure the protection of the child after his or her return. Practitioners should note that under the Article 11 1996 Hague Convention, the court can make protective measures which, as noted above, have extra territorial effect and are binding in other Contracting States. A potential issue is that the EU member states may take a different approach when dealing with cases involving the UK as the Article 11(4) Brussels IIa obligation will no longer apply and they may not use Article 11 1996 Hague Convention to make binding protective measures for children returning to this jurisdiction.

d) The requirement under Article 11(2) Brussels to ensure that a child is given the opportunity be heard during 1980 Hague Convention proceedings unless this appears inappropriate having regard to the child's age or degree of maturity. The requirement to hear the voice of a child in 1980 Hague Convention cases is not a feature of the 1996 Hague Convention. This obligation is drawn from Article 12 of the UN Convention on the Rights of the Child and the EU Charter of Fundamental Rights. The UN Convention on the

Rights of the Child is not incorporated into domestic law in England but it is widely applied by English judges in abduction cases.

Other Child Protection Measures

For child protection measures which do not currently fall within the scope of Brussels IIa, practitioners will be aware of the EU Regulation on mutual recognition of protection measures in civil matters 2013, which provides for mutual recognition of such protection measures across the EU member states. Protection measures made before the end of the transition period will continue to be governed by the provisions of that regulation but only if the relevant certificate has been issued (see Article 67(3).

However, the UK has decided to continue the application of the Protection Measures Regulation for incoming orders going forwards (not something agreed on a reciprocal basis by the EU). From the end of the transition period, the Mutual Recognition of Protection Measures in Civil Matters (Amendment) (EU Exit) Regulations 2019 provide that an incoming civil protection measure from a participating EU member state shall be recognised without any special procedure being required, and enforceable in the UK without the requirement for a declaration of enforceability. Outgoing UK civil protection measures will not benefit from reciprocity unless such measures are otherwise enforceable under 1996 Hague Convention. The 1996 Hague Convention provides protection for children and there is no corresponding provision for adults. Local advice should always be taken because, if it is not possible to use the 1996 Convention, then the person with the benefit of a UK protection measure may have to apply abroad for an order there.

Please refer to the separate note prepared by Resolution and the Law Society in relation to matters of divorce, finance and maintenance, and domestic violence.

This note has been prepared by Maria Wright (mw3140@bristol.ac.uk) of Resolution's Brexit Working Party and Resolution International Committee members, Nina Hansen (nh@freemanssolicitors.net), Amy Rowe (A.Rowe@bindmans.com) and Michael Wells-Greco (michael.wells-greco@crsblaw.com). It is endorsed by the Association of Lawyers for Children.