Consequences on English family law of the UK leaving the EU

Executive summary

The UK left the EU on 31 January 2020, but the law stayed the same until 11 PM on 31 December 2020. From that time onwards, EU laws no longer applied in England and Wales in respect of new proceedings. But the consequence of transitional arrangements is that EU laws will continue to apply for many years, perhaps decades, in respect of proceedings already commenced before the end of 2020. This will have long term impact. All family lawyers with a case involving a connection between England and Wales on one hand and an EU member state on the other hand need to be aware of these aspects. For anyone with a divorce, maintenance order or children order it is important to know whether it may be automatically recognised and effective. This summary note sets out some of the consequences. The full background and explanatory guidance is set out in 'Family law leaves the EU: a summary guide for practitioners' (LEXIS-NEXIS) by the author.

The UK departure arrangements

The UK left the EU on 31 January 2020. But in matters of law, it fully left at 11 PM on 31 December 2020. All existing EU laws including CJEU continued to prevail until then. This was jurisdiction, forum, recognition and enforcement. The primary EU laws are Brussels II, BII, for divorce and children, and Maintenance Regulation, MR, for needs-based orders. The question of domestic violence orders is also dealt with as it is a hybrid form of arrangement.

The original intention of the then Prime Minister, Theresa May, was that all EU law, the so-called acquis, would be put into English law once the UK left. It would then be a matter for Parliament, as and when it wanted, to decide which laws it would no longer apply. This had two major problems. First, under no circumstances could this be any essence of leaving the EU per the referendum. Secondly unless there was mutuality, adopting the acquis i.e., keeping EU law within national law was pointless. With some exceptions, international laws work on mutuality. Each country

recognises and enforces with other signatory countries. So simply adopting into domestic law doesn't help unless the EU was willing to reciprocate and there was no obvious evidence.

In October 2019 the now Prime Minister, Boris Johnson, secured a quite different Withdrawal Agreement (WA). This became the European Union (Withdrawal Agreement) Act 2020 although reference in this note is to the Agreement itself. In February 2020 the government produced a paper[1] indicating that it would no longer be subject to EU laws on the final departure date. This required many changes to primary and secondary legislation.

For family law the crucial element in WA is Articles 67-69, primarily 67 which deals with transitional provisions i.e., proceedings already underway at the point of departure, 11 PM on 31 December 2020. It separates jurisdiction, 67.1, recognition and enforcement, 67.2 and requests for inter-government assistance through Annexes or similar, 67.3. The intention was that EU laws would continue to be relied on for recognition and enforcement purposes after 2020 provided proceedings had been instituted on or before 31 December 2020.

Any lawyer in the UK or the EU wanting to rely on EU laws in a UK/EU member state case had to institute proceedings before 11 PM on 31 December 2020. If so, this provided for jurisdiction including forum. Moreover, EU recognition and enforcement provisions would apply to orders subsequently made i.e., after December 2020. Given that recognition of divorces and enforcement of financial orders or children orders may be many years, perhaps a couple of decades after the orders were made, it was important to bring those proceedings in 2020 wherever possible. Practitioners must always check with any order not only the date of the order but when the proceedings were instituted to see whether EU laws continue to apply.

The Ministry of Justice also produced helpful guidance for the public and practitioners[2].

Jurisdiction is the connectedness of a case with country to allow the courts of that country to deal with proceedings in the case. Forum is the criteria to decide where proceedings should take place if they could occur in more than one country. Recognition is a court recognising a foreign order, often as if it had been made locally. Enforcement is the opportunity to enforce locally a foreign order.

This note looks at the three primary areas namely divorce, maintenance and children and deals also with domestic violence, service and taking of evidence.

Divorce: jurisdiction, forum and recognition

Jurisdiction

Divorce jurisdiction for pre-2021 is found in Art 3 BII for all national cases as well as international cases. It was the same law across the whole of the EU.

From 1 January 2021, the terms of BII Art 3 are mostly placed into national law[3]. It is as follows:

- both parties to the marriage are habitually resident in England and Wales
- both parties to the marriage were last habitually resident in England and Wales and one of them continues to reside there
- the respondent is habitually resident in England and Wales
- the applicant is habitually resident in England and Wales and has resided there for at least one year immediately before the application was made
- 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
- both parties to the marriage are domiciled in England and Wales; or
- either of the parties to the marriage is domiciled in England and Wales

The following should be noted:

Sole domicile was only available pre-2021 if the other jurisdiction grounds were not available[4]. From January 2021 it is equally available alongside the other grounds.

Controversially, grounds (d) and (e) do not follow the strict EU law wording as this new national law says, *'and has resided'* whereas the EU law said, *'if has resided'*. This follows the Marinos[5] decision of the High Court which, purporting to interpret EU law, held that it was necessary just to be habitually resident on the day the proceedings were issued as long as there was ordinary residence for the 6 or 12 months as applicable. Other High Court decisions along with practice

across much of Europe had held that the habitual residence itself had to be for the 6 or 12 months as applicable; a much more substantial jurisdictional requirement. The Ministry of Justice was apparently advised that Marinos was definitely the legal position and so they specifically re-defined in the national law. This will mean it will be far easier to bring proceedings in England with habitual residence only needed on the day of issue rather than for a much longer period.

From 6 April 2022 when there is new divorce law and the opportunity of an application for a divorce being made jointly, there will be an additional basis of jurisdiction namely habitual residence of either joint applicant.

Although sole domicile is now available as a primary basis of divorce jurisdiction, care should be taken in relying on it in particular circumstances when there may need to be recognition of divorces abroad and local advice should always be taken.

For cases with no international element, there will be no change with continued reliance on joint habitual residence.

Forum

Divorce forum pre-2021 in a case where more than one EU member state had jurisdiction was the race to court, first party to issue, *'lis pendens'*[6]. This continued until the end of 2020. So, the first party to issue had priority and secured forum.

Moreover, if a divorce petition was issued before the end of 2020 and thereafter in 2021 a petition was presented in the UK involving an EU member state or in an EU member state involving the UK, BII continued to apply and the second seized had to be stayed until jurisdiction is established and then dismissed[7]. By January 2022, the date of this note, this is unlikely to be continuing relevance From 1 January 2021, divorce forum law becomes the same as with cases with non-EU countries namely forum non conveniens[8], closest connection. There will now be one forum law for all international family law divorce cases. However, it is far from clear what will now happen between the UK and EU member states if e.g., the UK has the closest connection but is second in time. It may in practice be determined by where are the primary assets about which orders are needed.

Recognition

In 2020 and earlier, a final divorce order, a decree absolute, in England and Wales, was

automatically recognised across the EU. Following the WA 2019, this includes all divorce orders made after 2020 provided that proceedings were instituted on or before 31 December 2020. So for example if someone issued a divorce in England in December 2020 and obtained the final decree of divorce in December 2021 and wanted to remarry in the EU in December 2041, there would be automatic recognition of the divorce.

Recognition of divorces from 2021 onwards is more problematical.

There isn't any real anxiety about recognition of incoming EU divorces; the UK is an exceptionally liberal country in the recognition of foreign family court orders and non-recognition rarely arises.

It is outgoing orders. If the other country is a 1970 Hague Divorce Recognition Convention signatory, then it should be not be a problem; the UK Divorce will be recognised. However only half of EU member states are signatories[9] and those outside include countries such as France, Germany, Spain et cetera. If the other country is a non-1970 Hague signatory, local advice should be taken to see if there is any risk of nonrecognition. Some countries such as the Republic of Ireland have created new laws to provide for automatic recognition of UK divorces as if EU laws continue to apply.

Maintenance: jurisdiction, forum and recognition

It is in this arena, in contrast to divorce and children, where it is anticipated there will be greater difference. The relevant EU law, the Maintenance Regulation (MR), provides distinctive jurisdictional measures setting out when a national court can, and cannot, make any Maintenance orders. In EU speak, Maintenance is needs based provision rather than just orders of a periodic nature. Specifically, Maintenance is separate to sharing claims which could not be enforced under EU laws. MR provides for recognition and enforcement of Maintenance orders around the EU. The UK has already a substitute law, the 2007 Hague Convention, which is similar in many ways to MR although it doesn't have the jurisdictional elements.

Along with children orders, this is where the transitional provisions will mean opportunity to continue to rely on EU laws for very many years to come. It might be a joint lives maintenance order which may be for joint lives or at least until retirement a couple of decades hence. It might be child support for a child still only a baby. Yet these orders of 2020 and earlier can be enforced by relying on EU laws.

Jurisdiction

Jurisdiction for maintenance up to the end of 2020 was in Arts 3 – 7 MR. It included the habitual residence of the claimant or of the defendant. It included claims ancillary to divorce or proceedings relating to children, parental responsibility, although not if the only basis was sole domicile. This remained the relevant law of Jurisdiction for proceedings instituted on or before 31 December 2020.

Jurisdiction from 2021 onwards depends upon the nature of the proceedings. Claims ancillary to divorce will follow divorce Jurisdiction. In this respect it must be noted that the sole domicile restriction on maintenance claims is removed.

If relying on Part III MFPA 1984, the jurisdictional provisions of the Maintenance Regulation have been removed and jurisdiction returns to the original basis of domicile or 12 months habitual residence at the time of the foreign divorce or of the application, along with the more restricted provisions if an interest in a matrimonial home here[10]. This is much narrower than under EU law. In respect of pension sharing after a foreign divorce arrangement, which uses Part III to put into effect, there are real limitations on how orders can be made in the future given that the jurisdiction of forum of necessity[11] will be no more[12]. Any foreign lawyer negotiating a financial settlement which may involve sharing a UK based pension should contact English specialist international family lawyers before finalising the settlement to make sure any sharing order may be possible and effective.

If relying on Sch 1 Children Act, jurisdiction exists from 1 January 2021[13] in respect of a child for a financial order against parents if a number of parties are habitually resident or domiciled in England and Wales at the date of the application. This includes parent, guardian, the child and persons named in the child arrangements order as a person with whom the child is to live. Where the application is respect of a child over 18, jurisdiction is if the applicant or a parent against whom the order is sought is habitually resident or domiciled.

There are also distinctive new jurisdictional provisions for s27[14] MCA and s35[15] MCA. There are various other lesser used categories of financial claims and jurisdiction in each should be considered separately and carefully.

Forum

As with divorce, priority up to the end of 2020 was based on which party was first to issue proceedings. Moreover, again similar to divorce, there is priority for the first to issue even if maintenance proceedings are commenced elsewhere in the EU in 2021 onwards[16]. Moreover, if there are proceedings in 2020 and proceedings elsewhere in the EU for so-called related actions i.e., not maintenance but other financial claims, the discretion to stay the related action remains. Forum in any maintenance, needs-based proceedings, instituted in 2021 onwards will depend on the nature of the proceedings. If divorce it will invariably follow Forum criteria on the divorce. Forum rarely arises on Part III. Forum criteria in relation to Sch 1 cases are complex with the interrelationship of the overriding jurisdiction of the habitual residence of the child.

Recognition and enforcement

Any final maintenance order made before the end of 2020 is automatically recognised and enforced around the EU under the maintenance Regulation. By the WA 2019 this is extended to orders made in proceedings instituted before the end of 2020 even if made subsequently.

Recognition and enforcement of post 2000 maintenance orders will follow the 2007 Hague maintenance Convention. This is a similar international law although certainly not the same as MR. The UK is a member in its own right rather than as an EU member. The UK has sought to re-join the Lugano Convention, but the EU has so far refused to allow this.

In respect of choice of law agreements which are invariably part of marital and premarital agreements, there is a distinctively intra-UK position. On EU insistence, they were not in the WA. So, an agreement choosing the law of England will not bind maintenance proceedings in an EU member state as to jurisdiction from 2021. Nevertheless, the UK government has stipulated[17] that the UK will follow jurisdiction based on a choice of law agreement after 2020. jurisdiction in the MR will continue to apply, although only intra-UK, to proceedings, in 2020 or subsequently, in reliance upon an Art 4 MR choice of court agreement concluded on or before 31 December 2020. So, this provides the UK courts with jurisdiction based on such an agreement. This will be important in those cases in which the courts of any of the UK countries have been chosen and recorded in a marital agreement. Much care is needed with this relatively complicated intra-UK provision.

Children

In a similar way, orders in respect of children, when proceedings have been instigated on or before

31 December 2020, will be recognised and enforced around the EU in the manner ordained by BII in 2021 and beyond pursuant to the WA 2019. For proceedings in respect of a very young child, this may be reliance on EU laws for almost two decades.

Brussels II had created an overlay to the 1980 Hague Child Abduction Convention including as to timetable, trumping provisions, residual jurisdiction et cetera. These ended for the UK on 31 December 2020. The UK now relies entirely on 1980 Hague and 1996 Hague (when 1980 Hague is not available). All EU states are signatories of 1980 and 1996 Hague.

The primary issue in international children work is invariably recognition and enforcement. This was in BII in 2020 and is in 1996 Hague from 2021 onwards for all new cases. BII had previously taken precedence over 1996 Hague which is similar although certainly not the same as BII with some key differences.

Jurisdiction and forum were found in BII but worldwide Jurisdiction is invariably based on the habitual residence of the child. forum disputes are far less frequent in children work. From 2021 for all new cases, Jurisdiction is based on Family Law Act 1986 and other provisions.

There are relatively narrow and complex distinctive differences between BII and 1996 Hague and specialist advice should be taken.

Domestic violence

The EU Civil Protection Regulation came into force in 2015. EU member states recognise and automatically enforce civil protection orders made around the EU. At an early stage in the EU negotiations, Theresa May said that the UK would continue to recognise civil protection orders made by EU member states even after departure and invited the EU to agree the same for the UK orders. The EU law has now been put into national law for England and Wales and Northern Ireland, although not Scotland, simply putting the EU Regulation into national law with appropriate amendments. So, any EU member state civil protection order made in 2021 onwards will be recognised and enforced[18] in the UK as if it were a local order. This will give much protection for EU citizens seeking orders in the UK.

Regrettably the EU has not reciprocated. Automatic recognition and enforcement will not go in the opposite direction. A UK citizen with a domestic protection order cannot have automaticrecognition and enforcement in the EU as can an EU citizen in the UK. Separate proceedings haveto be commenced in the EU member state.

There are transitional arrangements[19] but these are unlikely to have long-term impact.

Service and taking of evidence

These come within the WA 2019[20] so the request to the other government must be received on or before 31 December 2020. Again, this required enquiries from this country of progress made in dispatch and then in the other country to make sure there had been receipt. From January 2021, practitioners use the Hague Convention equivalents. There are also references to mediation and legal aid in WA.

Conclusion

The departure of the UK from the EU has been described as one of the biggest events in European history since the end of the Second World War. It was accompanied by the most appalling rancour, dispute and disagreement both within the UK and between the UK and Europe. Family law was too often an observer, with a feeling that its interests have been neglected in the wholesale fallout and then concentration on trade and commerce. Yet there are many millions of families and children with a UK/EU connectedness. For times during the EU negotiations, the position for them has seemed quite grim. As it happens, the position in the WA 2019 has much sense and fairness about it. There was opportunity in 2020 to commence proceedings to secure ongoing reliance on EU laws.

For 2021 onwards for new cases, new jurisdictional and forum provisions have been laid down by national law. Certainly, practitioners wanted some elements to be different or additional provisions. But in the scheme of what has been presented, it will work.

Crucially the family law landscape changed in that the UK is now looking out across the entire world. The UK can now enter into family law international treaties with whichever country it chooses. It can entertain proceedings without EU restrictions on law or policy. It can develop and initiate procedures and practices as it has done previously and which have been borrowed extensively around the world. Of course, it will continue its historic closeness with the common law

world. It will remain close to European neighbours. But geopolitics is changing dramatically. There are now very many countries outside the conventional common law and civil law, with relatively little in the way of national laws for cross-border families and yet whose citizens are living and working around the world and for whom international family law will be vital. The UK must continue to work closely with the EU in the realm of international families, and hopefully now better with the past disagreements out of the way. There are very many opportunities ahead which must now be taken for the benefit of the international family community.

Citations

[1] The Future Relationship with the EU: The U.K.'s approach to negotiations
[2] https://www.gov.uk/government/publications/family-law-disputes-involving-the-eu-guidance-for-legal-professionals-from-1-january- 2021
[3] Reg 8 of Sch of 519/2019 and same throughout for civil partnership
[4] Art 7 BII
[5] 2007 EWHC 2047
[6] This was highly controversial and contentious, directly discouraging attempts at mediation or other dispute resolution, putting doubt on attempting to reconcile or sort out marital difficulties, and giving the significant benefit to the party wishing to break up the relationship or the party with financial funds to take urgent specialist advice
[7] Art 67.1 WA continuing Art 19 BII
[8] The Jurisdiction and Judgements (Family) (Amendments etc) (EU exit) Regulations 2019 para 15.4, amending Sch 1 of the Domicile and Matrimonial Proceedings Act 1975
[9] Cyprus, Czech Republic, Denmark, Estonia, Finland, Italy, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Sweden, United Kingdom. Moreover, the UK had not acceded with two EU member states, Poland and Estonia.
[10] SI 2019/519, Sch, para 13
[11] Art 7 MR
[12] See the article written by iFLG partner, Michael Allum: https://www.iflg.uk.com/blog/only-four-months-left-obtain-english-pension-sharing-orders-abroad
[13] SI 2019/836 with new para 14 Sch 1 CA from 1 January 2021
[14] Clause 5(3) of the fixing SI still going through Parliament
[15] SI 2019/519, Sch, para 6
[16] Art 67.1 WA
[17]

Clause 5 of the so-called fixing SI amending clause 8 of 519/2019

[18] The Mutual Recognition of Protection Measures in Civil Matters (Amendment) (EU Exit) Regulations 2019, No 493 of 2019 and made on 6 March 2019

[19] Art 67.3.6 WA

[20] Art 68.1 and 68.2 respectively

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