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# Family law leaves the EU: Still relying on EU laws after all those years

David Hodson OBE MCIArb in his third article on family law leaving the EU looks at transitional arrangements. It will be possible to rely on EU laws for very many years to come but take action before 31 December 2020!

## Introduction

EU family laws end on New Year's Eve 2020 (although rather undramatically at 11.00pm). But it is possible to continue to have the benefit of EU laws, to rely on recognition and enforcement of orders around the EU, for many years, perhaps decades, after Big Ben has struck on NYE. This is as a result of the transitional arrangements negotiated between the UK and the EU. It is very important for practitioners to be aware of them this autumn and winter. There are likely to be a number of cases where it will be important for proceedings to be commenced on or before 31 December 2020. Equally there will be some cases where it will be beneficial to delay the proceedings until January. All that matters is for proceedings to be initiated. This is the term referred to in the Withdrawal Agreement 2019. But what does it mean to initiate proceedings?

This is the third article in the series by the author dealing with family law arrangements on the UK leaving the EU. Reference should also be made to the first which dealt with the distinctive interpretation and understanding of the transitional aspects and found here. The second set out the law as at 1 January 2021 for all new proceedings and can be found here. This note can only summarise some of the issues. The full background and explanatory guidance is set out in the book due to be published in mid-October 2020 by LexisNexis written by the author, called *'Family Law Leaves the EU: a summary guide for practitioners'.*

## Withdrawal agreement 2019 (WA)

The present arrangements are far simpler than the original proposals by the then Prime Minister, Theresa May, that EU law, the acquis, would be placed within UK law and then repealed as Parliament decided over the years, and simpler than the frantic no deal preparation legislation of March 2019.

Arts 67-69 of the WA provide transitional provision. This was negotiated and finalised in October 2019 between the EU and the UK and came into force on 1 February 2020 when the UK left the EU. This was subject to the transition period during which EU laws continue to apply until 31 December 2020. At that date EU laws, specifically in the family law context Brussels II (BII) and the Maintenance Regulation (MR) cease to have effect. The WA has the force of law.

The arrangements provide for matters of jurisdiction including forum and of recognition and enforcement. They cover the primary areas of divorce, children and needs based financial orders.

In general terms once proceedings have started, technically initiated, on or before 31 December 2020 EU laws will continue to apply to the eventual order even if made in 2021 or later. This will include recognition and enforcement around the EU under these EU laws. So, where there is any case in which there may need to be any subsequent reliance on EU laws, it is fundamental to start the proceedings on or before 31 December 2020. It must be recorded that there had been some uncertainty about whether it was necessary not only to commence the proceedings but also to commence the separate proceedings for recognition and enforcement. But very helpful guidance received from the EU in late August 2020 gave clear confirmation that only the commencement of the initial proceedings was required. The priority given by the WA then flowed into the final order and into the subsequent recognition and enforcement.

Given that a children order made when the child may be only a baby may last almost 20 years and given that a child support order for that child or spousal maintenance order may similarly last a couple of decades, it will be seen immediately that this provision in the WA will allow reliance on EU laws for very many years to come. Hence it is important for practitioners to take action this autumn and winter to secure the position for clients for many future years.

This article looks at the key areas and then at what is needed to initiate proceedings.

## Divorce

Provided the divorce petition is commenced on or before 31 December 2020, the final decree absolute will be recognised automatically around the EU pursuant to Brussels II even though pronounced in 2021 onwards. The forum criteria of lis pendens, first to issue, will still apply in 2020. Moreover, between the UK and the EU member states, if a petition is issued in 2020 in either the UK or an EU member state and a petition issued in 2021 in either an EU member state or the UK respectively, the latter petition must be stayed until jurisdiction is established and then dismissed once this occurs. This is irrespective of the fact that in 2021 the UK is not then a EU member state. This priority of forum remains.

For new proceedings after 2020, recognition of a UK divorce in an EU member state will depend on whether it is a member of the 1970 Hague divorce Recognition Convention. If it is then recognition should not be a problem. If it is not, and half of the EU member states are not signatories, then this may be a very good reason to make sure proceedings are commenced in 2020 if either party has or may have a connection with that member state.

## Children

In a similar fashion, if children proceedings are commenced on or before 31 December 2020, the final order will be recognised automatically and enforceable around the EU pursuant to Brussels II even though made in 2021 onwards. This may be important in child abduction proceedings where urgent applications are made. If proceedings are commenced in 2021 onwards, reliance instead will be placed primarily on the 1996 Hague Convention, to which all EU member states are signatories, which would thereby allow recognition and enforcement of children orders round the EU and other signatory countries across the world.

## Maintenance

In EU speak this means needs based orders rather than the traditional English meaning ofperiodical payments. The EU Maintenance Regulation provides that any Maintenance order, aneeds-based order, can be recognised and enforced across the EU. For UK orders there is a two-stage process for enforcement but for orders from all EU member states apart from the UK andDenmark, enforcement is an automatic process.

This will include recognition and enforcement of existing orders even though there may be no arrears as at 31 December 2020; this would include cases of child support and spousal maintenance which may last very many years before any arrears or non-compliance occurs. It may include cases where there are arrears now and continuing in 2021. It might be non-compliance with a needs-based order e.g. refusal to transfer real property intended to provide for the needs of one party. Provided the proceedings are commenced on or before 31 December 2020, the final order will be recognised and enforced around the EU. The forum criteria of *'lis pendens',* first to issue, will still apply in 2020.

Moreover between the UK and the EU member states, if a maintenance claim is issued in 2020 in either the UK or an EU member state and a maintenance claim issued in 2021 in either an EU member state or the UK respectively, the latter claim must be stayed until jurisdiction is established and then dismissed once this occurs. This is irrespective of the fact that in 2021 the UK is not then a EU member state. This priority of forum remains. The EU MR refers to related actions, which are claims not for maintenance but related to maintenance, often other financial claims. If there is such a claim in 2021 onwards and there is an existing maintenance claim in 2020, the discretion to transfer the former to the country dealing with the latter continues.

If it is a new claim brought in 2021 onwards, the jurisdictional provisions of the EU MR will no longer apply. At the moment, there is a restriction on the family courts making needs-based orders if the only jurisdiction is sole domicile. This has been a real disadvantage for some parties. There may therefore be an advantage in some cases, but with considerable care exercised, to hold off making the needs-based application until January onwards. The restriction on jurisdiction would not then apply, subject only to the Lugano Convention as below.

From 2021 onwards, recognition and enforcement around the EU and other countries around the world would be pursuant to the 2007 Hague Maintenance Convention. This has similarities to but is distinctly not the same as the equivalent EU law. It has no jurisdictional requirements. All EU member states are members. The UK is a member in its own right from January.

The UK wants to join the Lugano Convention, an international European law allowing for recognition and enforcement of civil judgements. All EU member states are members along with Switzerland, Norway and Iceland. It includes maintenance in the family context. The EU has not yet agreed to the UK joining and it is part of the trade negotiations later in October and November. If the UK does join, this will significantly affect maintenance cases around Europe. It will also reintroduce the race to court to gain priority. It has very complicated jurisdictional provisions.
There will be a separate article at the time if then applicable.

To have a pension sharing of a UK pension after a foreign financial arrangement an order is required under Part III MFPA 1984. If the parties have no other connection with the UK apart from the existence of a pension here, orders are presently made based on jurisdiction found in EU law. This ends. Despite significant pressure on the government to introduce an alternative power including as recommended by the Law Commission, nothing has happened. So, anyone seeking a pension sharing of a UK pension after a foreign divorce arrangement must apply before the end of the year otherwise the power will almost certainly not exist if there is no other connecting feature.

Different jurisdictional provisions will apply to Sch 1 CA, Part III etc., If a party can rely on existing jurisdiction but cannot from 2021 onwards, it is prudent to issue this year.

## Domestic violence

A very different position prevails. Under existing EU law, domestic protection orders made in any EU member state will be automatically recognised and enforceable across the EU. At an early stage in the EU negotiations, Theresa May very commendably said that the UK would continue to recognise EU domestic protection orders and invited the EU to reciprocate, in order to protect the victims of domestic violence. Regrettably, they have not. Instead in this instance the government has placed the EU law into national law and will continue to recognise incoming EU domestic protection orders from 2021 onwards. Under the transitional arrangements, the EU will continue to recognise UK domestic protection orders provided the order was made on or before 31 December 2020 with an appropriate certificate from the court. In other words, not just the making of the application but the actual order made itself. If important, in late December it will be necessary for a very urgent, perhaps without notice, application to be made for the order to be made immediately.

## Service and taking of evidence

EU laws provide for intergovernmental arrangements for the service of court papers and for evidence to be taken in another EU member state. Under the transitional arrangements, this continues as long as the request is received in the country which will be carrying out the service or taking the evidence is applicable. So, it will be very important for the practitioner not only to make the request but to ensure it is delivered and actually received on or before 31 December 2020.

## What does it mean to initiate proceedings?

This is fundamental for the practitioner. What must be done to make sure the client will have the protection of being able to rely on EU laws for years to come?

The WA refers to initiating proceedings. Initiation is not defined in EU law. EU guidance in August 2020 indicates that it should be read along with similar EU law. This often refers to a court being seized. This is not defined in EU law. Separately in respect of priority there is reference to proceedings being lodged. This is not defined in EU law but at least was subject to a CJEU judgement in an Anglo-Irish case about priority of divorce proceedings: MH v MH C-173/16. In summary, the divorce papers were sent by the wife's lawyers on a Friday evening from London to the Bury St Edmunds divorce centre, probably received on the Monday morning at about 8 AM and probably opened and put on a pile at about 9 AM; probably because this is generally what happened but no one knows about this precise set of divorce papers. On the Monday afternoon the husband issued in Dublin and served the wife in England on the Wednesday. On the Friday the English divorce papers were issued. Which were lodged first? The CJEU indicated that lodging could be earlier than issuing but because procedures around Europe varied so much, they would not say any more on what was specifically required. So, practitioners don't know.

But can it possibly be safe to rely on the possibility that papers were received on or before 31 December 2020? Or the possibility that the envelope was opened and put in a pile? Will this be good enough to give confidence for an order for the next 20 years?

Surely practitioners have to proceed on the basis that objectively the issuing of proceedings is the only reliable step to give confidence. Unless there is any indication such as a Practice Direction or similar that any other form of receipt is good enough in law, it should be issuing.

## A number of important practical aspects arise including:

- Practitioners need to know not only that proceedings have been issued but that they have been told they have been issued i.e. they have received confirmation. Until then, pressure will be brought by communications with court offices. So, it will be important for the court service to set up a good notification service in order to reduce this pressure
- Online filing after 4:30 PM counts as the next working day pursuant to FPR; so, don't file online after 4:30 PM on 31 December 2020.Make other arrangements
- Don't rely on a prayer in the petition and instead issue Form A
- Consent orders must now be filed online but this may be insufficient, in circumstances where a Form A has not previously been lodged and where the online process understandably doesn't require one. In these circumstances and as a matter of caution, file Form A in good time
- Applying on Form A or C100 automatically creates a timetable to the next hearing but it might only have been a cautionary filing to gain this EU priority and no hearing may actually be needed. There might be voluntary ongoing disclosure or various arrangements to discuss parenting. Nevertheless, this filing has the prospect of unnecessarily clocking up the court lists with these automatic hearings
- Court issuing offices often have a checklist of requirements before they will issue proceedings. Sometimes these are perceived as unduly restrictive, but they can therefore

prevent the proceedings being issued. It is to be hoped that in December a more lenient, relaxed approach will be adopted. Nevertheless, make sure applications are technically and procedurally correct

- Don’t seek expedited hearings or orders based on these EU priority requirements unless exceptional circumstances or a distinctive position in law, national or international, and then with a risk on costs.Is it genuinely necessary litigation per HHJ Wildblood
- Judges and court managers will be endeavouring to minimise pressure on court issuing offices and court lists
- MIAMs are not needed in instances of urgent filing in international cases
- Arguably Part III applications are initially only for leave and do not count as proceedings for the WA.If this is so, then there should be an urgent leave application followed by the substantive application on or before 31 December 2020
- Remember that December is always a busy month in the court office with increased applications due to Christmas contact and similar
- Remember that the court staff are still working under very difficult circumstances with a huge backlog and may be unable to cope understandably with many late applications
- Remember that court offices are often understandably short staffed between Christmas and New Year
- Do not leave applications until December which can be made in October and November

It is far from clear how many applications will be made before the end of the year to secure this

priority, to give the comfort and confidence of reliance on recognition and enforcement around the EU on EU laws for the future. Undoubtedly there will be some. There might be many. There have already been considerable discussions between practitioner representatives and the online managers of the court service to deal with this situation. There are discussions about any necessary changes in the rules. This is a situation which is very active and subject to change. This note will be updated as developments occur. For more information, full background and explanatory guidance see *"Family law leaves the EU: a summary guide for practitioners"*, LexisNexis, by the author published mid October 2020

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