IAFL European Chapter Young Lawyers Award 2020

- 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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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)