

# What does Brexit mean for family law?



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# 'Brexit' – the basics

- The UK left the EU on 31.1.20 – the UK is a 'third state'
- There was a deal in late 2019: *Withdrawal Agreement* but no special deal for family law
- The 'status quo' remained during the transition period (**TP**) which ended at 11pm on 31.12.20
- You need to know:
  - Which regime applies (EU / new)
  - What the 'new' regime is
  - What to look out for in future (Lugano?)

# Two crucial questions

## **(1) Are there ongoing proceedings?**

- If so, where and when were they 'instituted'?

## **(2) Are there any existing orders?**

- If so, what is the date of the order?

(and what does it say?)

Why ask? ... to see if the terms of the Withdrawal Agreement apply to know which regime to use

*'Instituted'* ? ... there is no definition

# The Withdrawal Agreement

- Article 67 - transitional arrangements
- Proceedings under Brussels IIa and the Maintenance Regulation ('the EU Regs')
  - Art 67(1): jurisdiction provisions apply to legal proceedings instituted before the end of the TP [*i.e. ongoing cases*]
  - Art 67(2): recognition and enforcement provisions apply to judgments in proceedings instituted before the end of the TP [*i.e. existing orders*]
  - Art 67(3): cooperation provisions apply to requests and applications received by the CAs before the end of the TP
- Choice of court agreements are not covered in Art 67

# Choice of court clauses

- The Withdrawal Agreement does not deal with choice of court agreements ('COCAs') / jurisdiction clauses
- The UK legislated *unilaterally* to give effect to COCAs made before 31.12.20 in line with Art 4 MReg
  - SI 2019/519 **Reg 8** as amended by SI 2020/1574 (Reg 5)
  - **But** we cannot guarantee that the EU member states will operate on the same basis (down to their domestic law)
- COCAs for Lugano countries: SI 2019/479 Reg 92 (unilateral)
- New COCAs still useful for Hague 2007 Art 20



Take advice in any other countries concerned

# Crib sheet (new cases from 1.1.21)

*For transitional provisions see Withdrawal Agreement, Art 67 & domestic SIs*

| AREA                     | Old 'EU' Regs position                                                                                                                                   | New Regime – Hague Conventions + domestic law                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
|--------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>DIVORCE etc</b>       | <ul style="list-style-type: none"> <li>• Jurisdiction = BIIa</li> <li>• 'First in time' rules apply</li> <li>• Automatic recognition per BIIa</li> </ul> | <ul style="list-style-type: none"> <li>• Jurisdiction per <b>national law</b> – like BIIa Art 3 + sole domicile promoted [not in Scotland]</li> <li>• <i>Forum non conveniens</i> test for parallel proceedings (check law in other country)</li> <li>• Recognition per 1970 HC (not all EU27 states and note indirect rules of jurisdiction); otherwise national law (liberal rules in English domestic law but check position abroad)</li> </ul>                                                                                                                                                       |
| <b>MAINTENANCE</b>       | <ul style="list-style-type: none"> <li>• Jurisdiction = MR</li> <li>• 'First in time' rules apply</li> <li>• Recognition/enforcement per MR</li> </ul>   | <ul style="list-style-type: none"> <li>• Jurisdiction per <b>national law</b> (depends on the application) + <b>2007 HC Art 18 unless</b> we join Lugano (separate regime where Lugano applies, NB 'domicile')</li> <li>• <i>Forum non conveniens</i> test for parallel proceedings (check law in other country) <b>unless</b> we join Lugano (then back to first in time rules)</li> <li>• Recognition/enforcement per <b>2007 HC</b> or Lugano <i>if we join</i> (probably can choose?)<br/><b>NB</b> 2007 HC = Art 20 indirect rules of jurisdiction + greater discretion to refuse Art 22</li> </ul> |
| <b>CHILDREN</b>          | <ul style="list-style-type: none"> <li>• Jurisdiction = BIIa</li> <li>• Recognition/enforcement per BIIa</li> </ul>                                      | <ul style="list-style-type: none"> <li>• Jurisdiction per <b>1996 HC</b>; similar to BIIa, save:               <ul style="list-style-type: none"> <li>○ Court loses jurisdiction if child's hab res changes during proceedings – Art 5(2)</li> <li>○ No jurisdiction by agreement unless divorce proceedings – Art 10</li> <li>○ Some problems for transfers until BIIa is Recast + slight differences – Art 8/9</li> <li>○ Applicable law provisions – Art 15-22</li> </ul> </li> <li>• Recognition and enforcement per 1996 HC (or 1980 EC)</li> </ul>                                                 |
| <b>CHILD ABDUCTION</b>   | <ul style="list-style-type: none"> <li>• 1980 HC + BIIa</li> </ul>                                                                                       | <ul style="list-style-type: none"> <li>• <b>1980 HC</b> minus BIIa but with <b>1996 HC</b> (e.g. Art 11). Main differences:               <ul style="list-style-type: none"> <li>○ Potential for greater delay</li> <li>○ Possibility of more refusals to return</li> <li>○ No ability to override refusal to return by overseas court</li> </ul> </li> </ul>                                                                                                                                                                                                                                            |
| <b>DOMESTIC VIOLENCE</b> | <ul style="list-style-type: none"> <li>• Orders can be recognised and enforced = Protection Measures Regulation</li> </ul>                               | <ul style="list-style-type: none"> <li>• Incoming orders from EU will be recognised/enforced in UK unilaterally</li> <li>• Need to seek protection under national law in individual EU states</li> <li>• See SI 2019/493</li> </ul>                                                                                                                                                                                                                                                                                                                                                                      |

**NB** Keep an eye out in future regarding the 2007 Lugano Convention

# Children proceedings

- The 1996 Hague Convention is now the main source of jurisdiction in the UK now that Brussels IIa no longer applies (for new cases)
  - Brussels II Recast (in force on 1 August 2022) will not apply in the UK
- Its scope is almost the same as Brussels IIa
- Use the HCCH guides for help with the 1996 Convention

# Abduction cases


- The 1980 Hague Convention still operates but without the 'enhancements' found in Brussels IIa, Art 11
  - No more 6 week time limit
  - No more 'override' after a decision not to return
  - No more obligatory limitation regarding an Art 13(b) refusal to return if adequate protective measures can be put in place
  - No more formal obligation to ensure the child is heard
- Applicants may also consider an order under the 1996 Convention instead



# Private & public law

- No more '*perpetuatio fori*' – by Art 5(2) the court loses jurisdiction if the child's habitual residence changes during proceedings (save in abduction cases) – but see Art 13 (parallel proceedings) & Art 14
  - See case of *AA v BB* [2021] EFC 17 – Court of Appeal decision due imminently!
- Loss of free-standing prorogation akin to BIIa Art 12(3): they must be connected to divorce case – see Art 10
- Note enforceability of Art 11 urgent measures but cf Art 12
- Consider applicable law provisions in Art 15-22
- Differences in transfer provisions in Art 8-9
- See Art 23 for recognition and enforcement – discretionary rules + note also Art 28 consideration as to best interests of child

# Divorce jurisdiction & forum

- Finances post-divorce are still linked to divorce
  - Previous position: BIIa Art 3 grounds for all cases (domestic or international)
    - Only if no EU member state had jurisdiction under BIIa could we use national law (sole domicile)
  - New rules: jurisdiction
    - SI 2019/519 amends DMPA 1973, s5  
*MC (NI) Order 1978, Art 49*
  - No more *lis pendens* race to court
    - Back to *forum (non) conveniens* – will timing still matter?
-  Take advice in the 'other' country just in case it does matter

# Old BIIa Art 3 vs new regime

## BIIa Art 3(1)(a)

- HR of both now
- Last HR + residence of one now
- HR of respondent
- App HR if resided 1 yr
- App HR if resided 6m + domicile of app

## Art 3(1)(b)

- Domicile of both

*Sole domicile = Art 7 (NL)*

## DMPA 73 s5 / MC (NI) Order Art 49

- = a. HR of both now
- = b. Last hab res + residence of one now
- = c. HR of respondent
- [=] d. App HR + 1yr residence
- [=] e. App domiciled + HR + resided 6m
- [=] f. Domicile of both (?!)
- NL g. Domicile of either (*promotion!*)



Sole domicile petitions may be easier but think about consequences


# Divorce recognition

- No more automatic recognition without Brussels IIa
- 1970 Hague – note indirect grounds for divorce recognition (Art 2 & 3)
- If 1970 Hague does not apply, be careful to ensure grounds pleaded would satisfy requirements in country where recognition would be sought



Take advice in the 'other' country to avoid problems with recognition

# Maintenance - jurisdiction

- Previously: Maintenance Regulation
  - Applied to all cases – no recourse to national law (remember sole domicile dilemma!)
- Now: no Maintenance Regulation
  - National law (depends on type of application) + Hague 2007
  - No direct jurisdiction rules in 2007 HC (save Art 18 for variation)
  - No *lis pendens* rules so back to *forum (non) conveniens*
  - **NB** indirect rules for recognition & enforcement
-  Big question: will we have Lugano 2007?
  - If so, direct jurisdiction rules + *lis pendens* provisions

# Maintenance: domestic law

- Maintenance after divorce
  - Based on petition
- Part III claims – DMPA 1984 s15 (M&FP(NI)O 1989 Pt IV)
  - Domicile of either, either HR 1 year, FMH
- Failure to maintain – MCA s27 (MC(NI)O 1978 Art 29)
  - Domicile of either, app HR 1 year, res of R
- Maintenance agreements – MCA s35 (MC(NI)O 1978 Art 29)
  - Domicile or residence (not HR) of both parties
- Variation – MCA s31 ...??? (MC(NI)O 1978 Art 33)

# Schedule 1

- Jurisdiction for Schedule 1 cases in E&W = amended paragraph 14 (SI 2019/836):
  - Habitual residence or domicile at date of application of:
    - A parent
    - A guardian/special guardian
    - A person in a child arrangements order with whom the child is to live
    - The child

 This means wider jurisdiction grounds for Schedule 1 cases

# Schedule 1 - NI

- Jurisdiction for Schedule 1 cases in NI = amended [paragraph 16 of C \(NI\) Order 1995](#) (SI 2019/836):
    - On application of those below, court has power to make order against parent living in NI where child lives outside NI with those below
      - A parent
      - A guardian
      - A person with a residence order
- (limited to periodical payments orders)



# Hague 2007 (1)

- Hague 2007 is primarily concerned with recognition and enforcement of decisions about maintenance obligations
  - Two-stage process of registration
- Assistance is available via central authorities
  - Check if the relevant state has extended such support for spousal maintenance claims (the EU has)
- One ‘direct’ rule regarding jurisdiction
  - Art 18 – limitation on variation/new cases where creditor remains HR in place of original order (see exceptions in Art 18) – now signposted in primary legislation (as amended by SIs)



# Hague 2007 (2)

- Art 20 – bases for recognition & enforcement
  - a) Respondent was HR when proceedings instituted
  - b) Respondent submitted expressly/defending merits
  - c) Creditor was HR when proceedings instituted
  - d) Child for whom maintenance paid HR when instituted
  - e) Parties agreed to jurisdiction (save maintenance for minors)
  - f) Decision made in proceedings about status/PR unless based on ‘sole nationality’
- Check if reservation made re (c), (e) or (f)
- No review of merits per Art 28



*[Only US has made reservation re 20(f) so far]*

# Hague 2007 (3)

- Art 22 – grounds to refuse recognition and enforcement
  - a) if manifestly incompatible with public policy
  - b) where decision obtained by fraud in connection with a matter of procedure
  - c) if proceedings first instituted in other CS between same parties with the ‘same purpose’
  - d) if decision is incompatible with existing decision where R&E sought with same parties/purpose
  - e) if R did not appear/not represented + no notice
  - f) if decision made in violation of Art 18



Greater opportunities to try and oppose recognition/enforcement

# Pension sharing & intra-UK issues

- No Maintenance Regulation means...
  - No Art 7 – *forum necessitatis*
  - In particular this affects applications for pension sharing orders – it was previously used when no other connection existed to give jurisdiction under MFPA s15
- Intra-UK cases back to:
  - *Forum (non) conveniens disputes*
  - Use of Maintenance Orders Act 1950

# Lugano 2007 (1): if applicable...


- Applies to 'maintenance' (not rights in property arising out of a matrimonial relationship)
- Art 2: person domiciled in Convention state (CS) shall be sued in the courts of that state
  - Domicile: CJA 1982 s41A = residence + substantial connection (rebuttable presumption for residence of 3 months or more)
- Art 4: if defendant not domiciled in CS then national law applies (but see Art 22, 23)



Note the very different concept of 'domicile' that will apply

# Lugano 2007 (2): maintenance

- Art 5(2): person domiciled in CS may also be sued in matters relating to maintenance
  - In place where creditor is domiciled or habitually resident
  - In the court with jurisdiction to entertain proceedings regarding status *if* it is ‘ancillary’  
unless that jurisdiction is based on sole nationality
  - In the court with jurisdiction to entertain parental responsibility proceedings  
unless...based on sole nationality

 So whilst the sole domicile restriction has gone, a sole domicile petition may not be worth that much: check ahead!

# Lugano 2007 (3): exceptions

- Art 22: exclusive jurisdiction (rights *in rem* in immovable property)
- Art 23: prorogation of jurisdiction (agreement)
  - As long as one of the parties is domiciled in a CS
  - Required to be in writing or evidenced in writing
  - No prohibition regarding minor children
- Art 24: jurisdiction where defendant enters an appearance (save to contest jurisdiction / Art 22)

 You can include jurisdiction agreements for child maintenance!

# Lugano 2007 (4): the race is still on

- *Lis pendens* provisions
  - Art 27 – shall stay for ‘same cause of action’
  - Art 28 – may stay for ‘related actions’
- Not yet clear if it would apply intra-UK
- Recognition – Art 33-37 + Art 53-56
- Enforcement – Art 38-56
  - Requirement for declaration of enforceability (or, in the UK, registration of the decision)



Two-stage process required for all Lugano countries (no more two-tier)



# Lugano 2007 (5): R&E

- Art 34: grounds to refuse recognition or to appeal a declaration of enforceability/registration
  - 1) If manifestly contrary to public policy
  - 2) If given in default of appearance without notice or sufficient time to defend
  - 3) If irreconcilable with decision there between the same parties
  - 4) If irreconcilable with an earlier judgment bound by Lugano with same cause of action between same parties, if that decision would be recognisable
- No review of merits per Art 36 & 45

# Forward-thinking

- Always have a mind to potential enforcement issues
  - Hague 2007: Art 22(c), (d)
- Remember the different approaches to ‘maintenance’
- Listen out regarding Lugano and any date for its entry into force

# Resources

- Ministry of Justice – 31 December 2020

<https://www.gov.uk/government/publications/family-law-disputes-involving-the-eu-guidance-for-legal-professionals/family-law-disputes-involving-the-eu-guidance-for-legal-professionals> or for NI: <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/guide-legal-practitioners-family-cases-post-tp.pdf>

- Key SIs

- 2019/479 – the bumper ‘civil’ SI
- **2019/519** – the bumper ‘family’ SI inc transitional rules Reg 8 + amendments for divorce (SI 2019/495 for CP/SSM)
- 2019/836 – the ‘Schedule 1’ SI (new jurisdiction rules)
- **2020/1574** – the ‘fixing’ SI [inc updating Reg 8 transitional rules]
- 2020/1493 – the ‘terminology’ SI [updates for WA wording]

- The EU – 28 August 2020 (*re WA Art 67*)

[https://ec.europa.eu/info/sites/info/files/brexit\\_files/info\\_site/civil\\_justice\\_en.pdf](https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/civil_justice_en.pdf)

# Top tips

1. Know how the Withdrawal Agreement operates & which regime applies
2. Know the rules of the new regime: Hague 1980, 1996 & 2007 + domestic law and beware online resources not yet all updated
3. Be careful before assuming you can rely on choice of court agreements
4. Where you have cross-border cases, get advice in the other country
5. Always think ahead to enforcement
6. Keep an eye out regarding Lugano in future and if it will apply in future, plan properly for when it comes into force

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