

# Brexit and Family Law

## Paper A – Summary of Jurisdictional Provisions & Forum Issues

### INTRODUCTION

This is the first of two longer papers we have prepared dealing with the changes to family law after the conclusion of the Transition Period ('TP'), which ends on 31 December 2020.

**Paper A** – this document – is a general overview of the jurisdictional provisions in different areas of family law. It summarises the existing positions under various international instruments and identify how these are likely to change following the conclusion of the TP. It does not deal with the transitional provisions governing proceedings commenced before the end of the TP which are contained in Article 67 of the Withdrawal Agreement.

**Paper B** contains a series of case scenarios looking at divorce, maintenance, children cases and domestic violence.

### A1. Table of International Instruments: Before → After TP

The following table sets out the current international instruments governing different aspects of family law and those that will apply after the TP (see **Annex** at end for full definitions):

AREA OF LAW	Current Instruments		Instruments after TP
<b>DIVORCE</b> Jurisdiction	Brussels IIa (2201/2003)	→	<b>No replacement jurisdiction rules</b>
<b>DIVORCE</b> Recognition/ Enforcement	Brussels IIa (2001/2003)	→	<b>1970 Hague</b> Convention (but <u>not</u> all EU27)
<b>MAINTENANCE</b> Jurisdiction	Maintenance Regulation (4/2009)	→	<b>No replacement jurisdiction rules</b> <i>unless the UK joins the <b>2007 Lugano</b> Convention in its own right</i>
<b>MAINTENANCE</b> Recognition/ Enforcement	Maintenance Regulation (4/2009)	→	<b>2007 Hague</b> Convention (all EU27) <i>+ recognition and enforcement provisions of <b>2007 Lugano</b> Convention if applicable</i>
<b>CHILDREN</b> Jurisdiction	Brussels IIa	→	<b>1996 Hague</b> Convention (all EU27)
<b>CHILDREN</b> Recognition/ Enforcement	Brussels IIa	→	<b>1996 Hague</b> Convention (all EU27) <b>+ 1980 European</b> Convention (all EU27)
<b>CHILD</b> <b>ABDUCTION</b>	1980 Hague Convention + Brussels IIa + 1996 Hague Convention	→	<b>1980 Hague</b> Convention (all EU27) <b>+ 1996 Hague</b> Convention (all EU27)
<b>DOMESTIC</b> <b>VIOLENCE (DV)</b>	Protection Measures Regulation (606/2013)	→	<b>No replacement</b> – left with national law

## A2. Overview

What is known about the position at the end of the TP is as follows:

- i. We will cease to be a party to the all EU Regulations (those relevant are set out below):
  - **Brussels Ia** (*jurisdiction and recognition and enforcement in relation to divorce and children proceedings*)
  - The **Maintenance Regulation** (*jurisdiction and recognition and enforcement in relation to maintenance proceedings*)
  - The **Protection Measures Regulation** (*recognition and enforcement of protection measures in domestic violence cases*)
- ii. We will not become parties to the **Brussels Ia (recast)** Regulation (1111/2019) from 1.8.22.
- iii. What we will have instead (or in some cases not have) is known for divorce, children (including abduction) and domestic violence and known in part for maintenance cases:
  - **Divorce:** we will not be parties to an international instrument governing jurisdiction. We will be parties to the 1970 Hague Convention which concerns the recognition of overseas divorces. Not all EU Member States are parties to this Convention.
  - **Maintenance:** we will be parties to the 2007 Hague Convention. This deals with recognition and enforcement but not jurisdiction.
  - **Children (jurisdiction):** this will be governed by the 1996 Hague Convention.
  - **Children (recognition and enforcement):** this will be governed by the 1996 Hague Convention and the 1980 European Convention.
  - **Child Abduction:** this will be governed by the 1980 Hague Convention. However, we will no longer parties to the provisions of Brussels Ia which complement the Convention. We will not become parties to the provisions of Chapter III of Brussels Ia (recast) which complement the Convention.
  - **Domestic Violence:** we will not be a party to any instrument equivalent to the Protection Measures Regulation.

What we do not know at the moment is whether or not the UK will be permitted to join the 2007 Lugano Convention (as a party in its own right). If we do not join the Convention:

- We will not be a party to any international instrument governing maintenance **jurisdiction**. Jurisdiction will be determined under national law. Whether jurisdiction should be exercised will be a question of *forum conveniens*.
- The procedure for **recognising and enforcing** maintenance orders in other EU member states will be governed by the 2007 Hague Convention.

If the UK is permitted to join the 2007 Lugano Convention in its own right:

- The 2007 Lugano Convention will provide rules regarding jurisdiction and forum.
- The 2007 Lugano Convention also contains provision regarding recognition and enforcement.

### **A3. Jurisdiction / forum / recognition and enforcement**

In this document we use the terms ‘jurisdiction’, ‘forum’ and ‘recognition and enforcement’ to mean:

- **Jurisdiction:** the rules for when a country is able to use its powers regarding a case
- **Forum:** where a case should proceed when more than one court has jurisdiction and there are competing proceedings – which court should exercise its powers?
- **Recognition and enforcement:** treatment of orders across international borders

#### **A3.1 Jurisdiction**

It is helpful for all potential litigants if there are straightforward rules of jurisdiction which apply across different states. The advantages include:

- It makes it easier for lawyers to advise clients when a country will / will not have jurisdiction to hear a case.
- Clients do not have to incur large legal fees instructing lawyers in multiple jurisdictions.
- Having common rules of jurisdiction can help promote the recognition and enforcement of orders across borders later.

Where a case is heard can be important because different countries have different substantive laws and the clients may want to know if they have the desired connection to start a case somewhere.

The current EU Regulations provide common jurisdiction rules which apply in EU Member States<sup>1</sup>:

- Divorce jurisdiction rules are contained in Brussels IIa.
- Children jurisdiction rules are also contained in Brussels IIa.
- Maintenance jurisdiction rules are contained in the Maintenance Regulation.

**Note – ‘maintenance’:** there are no common jurisdiction rules in relation to financial proceedings arising from divorce which fall outside the scope of ‘maintenance’. Maintenance in this context includes financial claims by one party against the other based upon financial **needs**. It does not include claims based upon a **right to share** assets built up over the course of a marriage.

#### **A3.2 Forum**

As noted above, in some circumstances more than one country may have jurisdiction to deal with a case. For example, Brussels IIa allows a country to assume divorce jurisdiction on several grounds. One is that both parties are habitually residence in the country in question; another is both parties are nationals of that country. If two German nationals are habitually resident in Spain, both countries will have jurisdiction over divorce.

In cases where more than one country has jurisdiction, the critical question becomes which of those countries should *exercise* its jurisdiction.

There are essentially two methods by which the question of forum can be resolved:

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<sup>1</sup> Brussels IIa (divorce and children) does not apply in Denmark. The Maintenance Regulation has an associated 2007 Protocol which does not apply to the UK or Denmark, where aspects of that Regulation apply differently.

- *Lis pendens* or 'first in time' rules.
- A *forum conveniens* or 'convenient forum' investigation.

The various European Regulations and the 1996 Hague Convention have *lis pendens* rules to regulate what happens when there are competing proceedings in two countries which have jurisdiction. Essentially the first in time to court wins the race – the court which is 'first seised' assumes jurisdiction and the court that is 'second seised' must stay its proceedings unless and until the first seised court later decides that it does not have jurisdiction after all.

The main advantage of these 'first in time' rules is that they are simple. The proceedings will take place in the country where they are first issued. There is rarely any scope for doubt where this is. The simplicity of the rules means that they avoid expensive and sometimes complex legal arguments about whether country X or country Y is *more appropriate* to hear the case.

The main disadvantage of the 'first in time' rules is that they are crude and can result in unfairness. The hypothetical German couple may only recently have moved to Spain for work reasons. They may not speak Spanish. All of their asset base may be in Germany. Should it be the case that Spain *automatically* assumes jurisdiction merely because proceedings are issued there first?

The issue of forum may be more significant in cases about divorce and maintenance than in cases about children.

#### A3.2.1 *Forum in children cases*

So far as children cases are concerned:

- The relevant international instruments (Brussels IIa and the 1996 Hague Convention) which deal with jurisdiction start from the position that the country where the children are **habitually resident** has jurisdiction.
- There are exceptions to the habitual residence rule (for example in cases involving abduction), but the rules have been devised in a way which means that generally **only one** country can have jurisdiction at any one time.
- If there is a dispute about which country has *jurisdiction* to deal with the case (for example, because it is not clear where the child is habitually resident) that dispute will be resolved in the country that is 'first seised' under the *lis pendens* rules.
- If a country determines that it has jurisdiction but considers that it is in the best interests of the child for the case to be dealt with in another country with which the child has connections, both Brussels IIa and the 1996 Hague Convention contain provisions which allow jurisdiction to be transferred from one country to another.
- The countries which are parties to Brussels IIa and the 1996 Hague Convention all determine disputes about children by deciding what is in 'the best interests' of the children concerned.

#### A3.2.2 *Forum issues in divorce and maintenance cases*

So far as divorce and maintenance claims are concerned:

- Under the relevant international instruments it is possible for more than one country to have *jurisdiction* at the same time.

- When more than one country has jurisdiction, the country which exercises that jurisdiction will be the one which is first seised of proceedings under the *lis pendens* provisions.
- There is no scope for transferring jurisdiction from one country to another.
- The disparity in the substantive laws which apply in different countries means that one party may perceive that they have a financial advantage in litigating in one country rather than another.

### A3.2.3 *Forum issues in future*

After the end of the TP we will continue to operate ‘first in time’ rules in relation to **children** proceedings.

We will not be subject to any international rules of jurisdiction in relation to **divorce** (save that the 1970 Hague Convention requires certain rules of jurisdiction to be followed if a divorce is to be recognised in other countries that are party to that Convention).

Whether or not we have forum rules for competing proceedings is uncertain only in relation to **maintenance cases**.

- The **1996 Hague** Convention which will apply to **children** cases contains direct rules of jurisdiction and it has ‘first in time’ provisions to avoid parallel proceedings. It does not apply to maintenance.
- The **2007 Hague** Convention which will apply to **maintenance** cases does not contain direct rules of jurisdiction and does not regulate parallel proceedings. It only considers jurisdiction at the later stage of recognition and enforcement (by which time there may have been long, expensive, competing proceedings)

If we were to have the **2007 Lugano** Convention in force, that would contain direct rules of jurisdiction and regulate parallel proceedings (through *lis pendens* or ‘first in time’ provisions) in relation to maintenance.

### A3.2.4 *The competing arguments for and against having forum provisions based on ‘first in time’ in maintenance cases: should we have Lugano and the race to court?*

- The ‘first in time’ rules – sometimes also described as a ‘race to court’ approach - which we have now under the EU Regulations, the 1996 Hague Convention (in relation to children cases) and which also exist under the Lugano Convention, are perceived by those who favour them to bring legal certainty and predictability. They may also provide greater protection for a recipient of maintenance or ‘maintenance creditor’ (usually the more vulnerable party) as it is normally the person seeking maintenance who initiates a claim (although in some jurisdictions it is possible for a person to apply to court for a determination of maintenance against themselves).
- The potential advantages for a maintenance creditor from a ‘first in time’ approach are enhanced by the rules of jurisdiction in both the Maintenance Regulation and the 2007 Lugano Convention. Both sets of rules generally allow the person seeking maintenance to issue proceedings in EITHER the country of their habitual residence OR the country of habitual residence of the person from whom they seek maintenance. By contrast, the person liable to pay maintenance can generally only issue proceedings in the country where the maintenance creditor is habitually resident. **[NB: These general rules are subject to alternative rules where the parties have concluded a choice of court agreement or where there are ongoing divorce**

*proceedings. When the court is concerned with child maintenance, proceedings can also be brought in the country with jurisdiction to deal with issues of parental responsibility for the child.]*

- There are others who dislike the ‘race to court’ as they say it can reduce the possibility of reconciliation and negotiation and disadvantage the economically weaker party who may be less informed about the need to enter the race. It can also result in a bifurcation or split of proceedings as between maintenance cases and the non-maintenance element of an asset division post-divorce. They prefer a discretionary approach where the court has the ability to decide if it is the most appropriate forum – a *forum conveniens* test.
- We use the *forum conveniens* system with non-EU countries at present but there is a concern that this may be unmanageable with the EU27 after the end of the TP due to the huge numbers of intra-EU families. The *forum conveniens* cases can be lengthy and expensive and the decision by one country as to forum may not always be respected by the other country dealing with competing proceedings.
- It is probably fair to say that all would agree that neither system is perfect.

#### *Caveat*

- 1) *There are further, more detailed, legal nuances between the various instruments than are identified in this paper; further information can be provided on request.*
- 2) *This paper does not deal with the ‘transitional provisions’ set out in the Withdrawal Agreement, by Article 67 of which ongoing proceedings as at 31.12.20 will continue under the EU regime and orders arising out of cases that started before 31.12.20 can be recognised and enforced under the EU Regulations even if the need for such recognition and enforcement arises after 31.12.20.*

### **A3.3 Recognition and Enforcement**

After the end of the TP, the recognition and enforcement of orders relating to children will be governed by two instruments:

- The 1996 Hague Convention
- The 1980 European Convention

In practice it is likely that the large majority of applications for recognition and enforcement in **children** cases will be brought under the 1996 Hague Convention. The main reason for this is that the potential for resisting enforcement under the 1980 Convention would appear to be greater; those seeking enforcement will therefore generally consider it more advantageous to use the 1996 Convention.

The recognition of **divorces** granted overseas will be governed by the 1970 Hague Convention. Not all of the EU27 member states are parties to this Convention. As between countries not governed by this Convention recognition will be dealt with under their national law,

Recognition and enforcement of **maintenance** orders will be governed by the 2007 Hague Convention unless we become a party to the Lugano Convention, in which case the priority between the two instruments is not clear. Parties may have the option of using either instrument to recognise/enforce.

There will be no international instrument to which we are a party governing the recognition and enforcement of measures of protection in domestic violence cases.

#### **A4. International Child Abduction**

The main international instrument governing international child abduction is the 1980 Hague Convention. This is given effect in UK domestic law under the Child Abduction and Custody Act 1985. It will remain fully in force after the end of the TP.

Brussels IIa contains certain provisions which 'complement' the 1980 Hague Convention. In particular:

- Art 11(2) makes it mandatory to hear the voice of a child unless of insufficient age/maturity.

*This is the position in any event under UK domestic law.*

- Art 11(3) requires proceedings to be concluded within 6 weeks unless exceptional circumstances make it impossible to comply with such a deadline.

*Article 11 of the 1980 Hague Convention contains a similar provision which will continue to apply but it is expressed in less stringent terms. It is possible that parents seeking to recover abducted children from EU Member States will encounter greater delays than at present.*

- Art 11(4) stipulates that a court cannot refuse to return a child on the basis of the 'grave risk of harm' exception in Art 13(b) of the Hague Convention if it is established that 'adequate arrangements' are in place to secure the return of the child.

*Under our domestic law it has been held that the exception in Art 13(b) of the Hague Convention will not be met if adequate 'protective measures' are in place to mitigate any risks to the child which might otherwise arise. This will continue to be the case after Brussels IIa ceases to apply. It remains to be seen whether the other EU Member States will more readily apply the Art 13(b) exception vis-à-vis the UK than they do at present.*

- Art 11(5) provides that a court cannot refuse to order the return of a child unless the person requesting return is given the opportunity to be heard.

*This is the position in any event under UK domestic law. There will not be any change after Brussels IIa ceases to apply.*

- Arts 11(6)-(8) contain a scheme whereby, in circumstances where a court refuses to return a child on the basis of one of the exceptions in Art 13 of the Hague Convention, the courts of the 'home state' can go on to make their own return order if they deem it appropriate. That order is enforceable under enhanced enforcement procedures in Brussels IIa.

*Once Brussels IIa ceases to apply this scheme will no longer have effect. If the courts of England and Wales have jurisdiction under the 1996 Hague Convention it will be possible (in theory at least) to seek a return order under domestic law and then apply for it to be recognised and enforced under the 1996 Hague Convention. In practice, such a course is likely to prove difficult. There will be no speedy mechanism for enforcement (as exists under Brussels IIa). The courts will be entitled to refuse recognition and enforcement on several grounds which do not apply to scheme currently available in Arts 11(6)-(8).*

It should be noted that Brussels IIa will be replaced in 2022 by the Brussels IIa (recast) Regulation. The new Regulation contains an enhanced emphasis on dealing with abduction cases expeditiously including on appeal. This requirement for expedition in cases involving other EU member states may mean that UK cases are treated as a lower priority.

## Annex – Definitions

Within this document we refer to various international instruments as follows:

<b>Divorce</b>	
The 1970 Hague Convention	The Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations
<b>Children</b>	
The 1980 European Convention	The European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children signed in Luxemburg on 20 May 1980
The 1980 Hague Convention	The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
The 1996 Hague Convention	The Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children
Brussels IIa or BIIa	Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000
Brussels IIa (recast)	Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)
<b>Maintenance</b>	
The Maintenance Regulation	Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations
The 2007 Hague Convention	Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance
The 2007 Lugano Convention	Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 21 December 2017
<b>Other</b>	
The Protection Measures Regulation	Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of measures in civil matters

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# Brexit and Family Law

## Paper B – Case Scenarios

### INTRODUCTION

This is the second of the two longer papers we have prepared dealing with the changes to family law after the conclusion of the Transition Period ('TP'), which ends on 31 December 2020.

**Paper A** is a general overview of the jurisdictional provisions in different areas of family law. It summarises the existing positions under various international instruments and identifies how these are likely to change following the conclusion of the TP. It explains the main considerations regarding issues of jurisdiction, forum and recognition and enforcement. It also highlights the advantages/disadvantages of having common international rules which should be borne in mind when considering the implications in the case scenarios below.

**Paper B** – this document – contains a series of case scenarios for the following topics:

1. Divorce [p3]
2. Maintenance [p4]
3. Private child [p5]
4. Public child [p6]
5. Child abduction [p7]
6. Domestic violence [p8]

Each of the scenarios sets out hypothetical factual situations and then:

- Describes the current jurisdictional position;
- Notes the position after the end of the TP;
- Addresses some of the implication of the changes which take effect after the TP.

We use the terms 'jurisdiction', 'forum' and 'recognition and enforcement' to mean:

- **Jurisdiction:** the rules for when a country is able to use its powers regarding a case
- **Forum:** where a case should proceed when more than one court has jurisdiction and there are competing proceedings – which court should exercise its powers?
- **Recognition and enforcement:** treatment of orders across international borders

Before turning to the case scenarios, it may assist to summarise that after the end of the TP:

- We will cease to be a party to all EU Regulations (those relevant are set out below)
- We know what the position will be for divorce, children and domestic violence cases
- The position regarding maintenance is only partially known: we do not yet know if the UK will be permitted to join the 2007 Lugano Convention (in its own right) which will affect the position regarding maintenance cases. Most particularly this will affect jurisdiction and forum rules in such cases.

The following table (reproduced from Paper A for ease of reference) sets out the current international instruments governing different aspects of family law and those that will apply after the end of the TP:

AREA OF LAW	Current Instruments		Instruments after TP
<b>DIVORCE</b> Jurisdiction	Brussels IIa (2201/2003)	→	<b>No replacement jurisdiction rules</b>
<b>DIVORCE</b> Recognition/ Enforcement	Brussels IIa (2001/2003)	→	<b>1970 Hague</b> Convention (but <u>not</u> all EU27)
<b>MAINTENANCE</b> Jurisdiction	Maintenance Regulation (4/2009)	→	<b>No replacement jurisdiction rules</b> <i>unless the UK joins the 2007 Lugano Convention in its own right</i>
<b>MAINTENANCE</b> Recognition/ Enforcement	Maintenance Regulation (4/2009)	→	<b>2007 Hague</b> Convention (all EU27) <i>+ recognition and enforcement provisions of 2007 Lugano Convention if applicable</i>
<b>CHILDREN</b> Jurisdiction	Brussels IIa	→	<b>1996 Hague</b> Convention (all EU27)
<b>CHILDREN</b> Recognition/ Enforcement	Brussels IIa	→	<b>1996 Hague</b> Convention (all EU27) <b>+ 1980 European</b> Convention (all EU27)
<b>CHILD ABDUCTION</b>	1980 Hague Convention + Brussels IIa + 1996 Hague Convention	→	<b>1980 Hague</b> Convention (all EU27) <b>+ 1996 Hague</b> Convention (all EU27)
<b>DOMESTIC VIOLENCE (DV)</b>	Protection Measures Regulation (606/2013)	→	<b>No replacement</b> – left with national law

#### *Key issues arising after the TP*

- **Jurisdiction:**
  - There will be common jurisdiction rules in children cases
  - There will be no common jurisdiction rules for starting divorce cases (there are rules in the 1970 Hague Convention for recognising divorces that require certain rules of jurisdiction to have been used)
  - Unless/until the UK is subject to the 2007 Lugano Convention in its own right there will be no common rules of jurisdiction in relation to ‘maintenance’ cases [cases which make provision for needs]
- **Forum:**
  - There will be rules about forum in competing children cases
  - Unless/until the UK is subject to the 2007 Lugano Convention in its own right there will be no forum rules to control competing proceedings about maintenance
- **Recognition/enforcement:**
  - There will be no EU-wide provision to recognise divorces (only 1970 Hague states)
  - There will be no provision for recognising UK domestic violence orders in the EU

## 1. Divorce

- a) Thomas is German, Sarah is English. They married and lived in Germany until separation. Sarah returned to England six months ago. They both issue separate divorce proceedings.
- b) Two Irish citizens are living in England, their place of 'habitual residence'. Each retains their Irish 'domicile'. Their marriage breaks down and one of them issues divorce proceedings in England on the basis of their shared habitual residence. The divorce is granted and finances are dealt with in England. They move back to Ireland and each wishes to remarry.

### *The current position*

- Brussels IIa ('BIIa') governs both jurisdiction and the rules for recognition and enforcement.
- The various jurisdictional grounds have no hierarchy. If, and only if, no EU member state has jurisdiction under BIIa, jurisdiction may be determined under national domestic law (which includes the ability in the UK to proceed on the basis of the sole domicile of one party).
- Within BIIa there is a system of *lis pendens* or 'first in time' to avoid parallel proceedings: in scenario (a) proceedings would continue in the first place where proceedings were issued out of Germany and England. The courts in the other country would be obliged to stay proceedings.
- BIIa provides for automatic recognition of divorces amongst the EU member states.

### *After the TP*

- The BIIa jurisdictional grounds will be copied into English law but making sole domicile an equal ground. In Scotland the jurisdiction will be domicile or 12 months' habitual residence.
- There would be no *lis pendens* system to govern who should proceed as between Germany/England. Thomas could argue the German court is the more appropriate forum.
- The 1970 Hague Convention operates between only 13 of the EU27 to recognise divorces (but has no direct rules for jurisdiction and does not apply to nullity cases/civil partnerships).

### *Implications*

- In scenario (a) Thomas and Sarah will likely have to litigate in both countries about where the case proceeds. It can be extremely expensive for parties to litigate in two countries in parallel and it is very unhelpful for them if they have inconsistent judgments in different countries. There is a risk that Germany would not respect a *forum* decision in favour of the UK if the UK was not first in time. If the English court made an '*anti-suit injunction*' or a '*Hemain injunction*' to stop Thomas taking steps in the German proceedings, Germany may just ignore that injunction.
- Why it really matters: financial matters are usually resolved in the country that deals with the divorce so a perceived legal advantage for/against that country's system for resolving the finances is usually the driving factor. But it is essential that a divorce (i.e. status) is properly recognised between countries - e.g. to permit re-marriage or for tax/inheritance consequences.
- There is particular concern about English 'sole domicile' divorce petitions as these are often not recognised as a valid basis for an associated maintenance claim. Sole domicile is often used by expats wanting to divorce here and that will be a possibility for them after the TP ends. The extent to which maintenance orders made in conjunction with a divorce based upon a sole domicile petition will be enforceable in EU member states remains to be seen.
- Scenario (b) above is important as it shows the problem of Ireland not being a signatory to the 1970 Hague Convention. Under BIIa the English divorce is automatically recognisable in Ireland. After the TP, the English divorce would not be recognised under current Irish law because neither of the parties was domiciled in the country that granted the divorce. A new divorce in Ireland would be required. In fact, it is understood Ireland intends to reform its law.

There is nothing to be done about these implications: we are told there will be no bespoke divorce deal.

## 2. Maintenance

- a) Thomas is German, Sarah is English. They married and lived in Germany. Following separation Sarah returns to England where Sarah petitions for divorce and gets an order from the English court for Thomas to pay her maintenance, but Thomas refuses to pay. Sarah wants to enforce the maintenance order in Germany where Thomas has assets. Later on Sarah's circumstances change and she wants to vary the order in England.
- b) Ben is English, Maria is French. They marry and live in France. When the marriage breaks down, Ben returns to England with their son Charlie, Maria remains in France. Maria starts divorce proceedings in France and asks the French court to deal with spousal and child maintenance issues. A few days later, Ben starts divorce, financial and child proceedings in England, including asking the court to determine the child maintenance Maria should pay.

### *The current position*

- The Maintenance Regulation ('MReg') sets out the jurisdictional rules for when parties can bring claims, with various options and no hierarchy.
- The *lis pendens* provisions prevent parallel proceedings on the same issue.
- There is a system for recognition/enforcement under MReg.

### *After the TP if we have Lugano*

- The 2007 Lugano Convention does have jurisdiction and *lis pendens* rules and contains a system of recognition/enforcement. It is similar to MReg but perhaps a little less efficient.
- Lugano applies if the defendant is 'domiciled' in a Lugano state. The definition of this is very different to 'domicile' in other areas of law, e.g. divorce. This may be confusing (although some practitioners may have experience of this from our existing EU-based Lugano membership).

### *After the TP if we do not have Lugano*

- We would have only the 2007 Hague Convention. This has direct jurisdictional rules for maintenance cases and jurisdiction would depend on the type of claim being made. Each has different rules. A return to this system will lead to confusion and uncertainty. England will have jurisdiction to make spousal maintenance orders in connection with divorce proceedings.
- 2007 Hague has no *lis pendens* provisions. Therefore there would exist the potential for contested proceedings about *forum conveniens*. The advantages and disadvantages of such a system are similar to those which apply in divorce cases (as noted in **Paper A**).
- The 2007 Hague Convention assists with recognition/enforcement but arguably there will be more scope to avoid recognition and enforcement under its terms than under MReg/Lugano.

### *Implications*

- In scenario (a) with Lugano and/or Hague, there will be a scheme for recognition/enforcement of orders. One way or another, there will be assistance for Sarah to enforce an English order against Thomas in Germany. **However** if Sarah obtains an order in Germany and later wants to vary it in England, without Lugano, there is nothing in English domestic law for her advisors to tell her what the jurisdiction is for her to bring a claim. We need this clarified in domestic law.
- In scenario (b), if we do not have Lugano, only Hague, there is no scheme to decide in which country as between England and France the litigation should continue. There is CJEU case law from the EU regime (*A v B*, 2014) which says that the country with jurisdiction to deal with child arrangements (here, England) should also deal with child maintenance, even if the divorce/finances are being considered elsewhere (e.g. if France went ahead with those). If there is not a consistent approach, scenario (b) might result in costly parallel proceedings and/or inconsistent orders. This may cause significant financial pressure and/or delay.

Family lawyers **urgently** wish to know if Lugano will apply or not and if so, what happens in any gap.

### 3. Private law children proceedings

Ben is English, Maria is French. They marry and live in France. When the marriage breaks down, Charlie lives with Ben nearby, but Ben wants to return to England with Charlie. Maria starts proceedings in France where an interim order is made specifying the time each parent spends with Charlie and permitting Ben to relocate to England with Charlie on an interim basis. Whilst the case is ongoing, Ben argues that Charlie's habitual residence has now changed to England and he stops letting Maria spend time with Charlie.

#### *The current position under Brussels IIa ('BIIa')*

- BIIa contains rules of jurisdiction to avoid parallel proceedings. Cases can be transferred from one country to another if appropriate.
- BIIa contains rules for recognition/enforcement of orders with limited opportunity to challenge them. Contact orders can be automatically enforced without the need to seek recognition first, so Maria can enforce contact in England.
- Under BIIa, if the proceedings start in France (where Charlie was initially habitually resident), they continue in France until their conclusion – to deal with contact and the relocation issues.
- The parents can also agree to confer or 'prorogue' free-standing jurisdiction under BIIa on a state which would not otherwise have jurisdiction (subject to certain conditions).
- After the relocation, BIIa lets France keep jurisdiction for 3 months to deal with any contact issues e.g. to adjust arrangements as required so that a fresh case in England is not needed.

#### *After the TP – the 1996 Hague Convention*

The 1996 Convention also contains a system with rules of jurisdiction, recognition/enforcement **but**:

- If the child's habitual residence changes during the case, it appears that the court may lose jurisdiction (but not if the change is caused by an abduction) – see below.
- The 1996 Convention does not permit free-standing jurisdiction agreements – there must be linked divorce proceedings ongoing.
- There is no *automatic* enforcement of contact orders without the need first to seek recognition.
- There is no equivalent provision which allows jurisdiction to be retained for 3 months.
- There is no legal aid available for recognition/enforcement of orders under the 1996 Hague Convention (there is under BIIa), which many consider is unfair. It may well adversely affect family relationships for those who cannot afford to pay lawyers privately to resolve disputes.

#### *Implications*

- Under the 1996 Hague Convention, Maria may have to wait longer to enforce her French contact order in England, which may mean a delay in Charlie seeing her if Ben is obstructive.
- If Charlie's habitual residence changes to France during proceedings, it appears that England may lose its ability to make further orders: how this will work in practice is unknown as there are no reported cases. It may make courts very reluctant to make orders for interim relocation. More orders may be stayed pending appeal if jurisdiction can be lost in this way.
- If the case continues to completion in France and Ben/Charlie then move formally, France cannot keep hold of the case for 3 months to deal with any disputes about contact – Maria would have to start a new case in England, resulting in a delay and more cost before resolution.

There is nothing to be done about the implications: we are told there will be no bespoke deal for children.

#### 4. Public law children proceedings

Katya is from Poland but is living in England with her baby, Hanna. The authorities are concerned about Kata's care of Hanna due to Katya's mental health difficulties and consider she is not suitable to care for the baby, so they are considering issuing care proceedings and seek approval of their plan to remove Hanna from her care. Katya has family in Poland (and England) who may be suitable to care for Hanna. Katya flees to Poland with Hanna before any applications can be issued in England. The English authorities seek Hanna's return and cooperate with the Polish authorities to protect Hanna in the interim. One consideration long term is placement with an aunt in Poland.

##### *The current position*

- Brussels Ila contains jurisdiction rules to start a case, transfer cases and to recognise/enforce orders. It also provides jurisdiction to make provisional/protective orders in urgent cases.
- BIIa contains provisions for requests for member states to share information via 'central authorities' e.g. to locate family members, and conduct assessment of family members or share concerns about people.

##### *After the TP – the 1996 Hague Convention*

- The 1996 Convention also contains jurisdiction rules, provision for transfer, recognition/enforcement, cooperation and the ability to make provisional/protective orders in urgent cases.

##### *Implications*

The provisions in BIIa and the 1996 Hague Convention are similar but, as with private child cases, there are some differences which are worthy of note:

- As with private child cases, if Hanna's habitual residence were to change during proceedings (and it was not an 'abduction' case), it appears that the English court may lose jurisdiction and fresh proceedings would be necessary in Poland. There cannot be proceedings in parallel.
- The English and Polish authorities are still able to cooperate using the 1996 Convention as they can under BIIa, albeit there is a bit less flexibility.
- A benefit of the 1996 Convention over BIIa *at present* is that any provisional/protective measures made in Poland to protect Hanna would be enforceable in England too. The equivalent measures under BIIa are only enforceable in the country that made them. This will change when the BIIa (recast) Regulation comes into force on 1 August 2022.
- Until BIIa (recast) is in force, it appears that there may be problems with transferring cases from EU member states to the UK (being a non-EU member state). Therefore if Kayta had managed to flee to Poland before proceedings were initiated in England and became established there, the authorities in Poland could start proceedings after liaising with the English authorities (who can share their concerns) but Poland may not be able to transfer the case back to England (a non-EU member state) under the terms of BIIa (which will continue to apply in Poland). This mis-match will be resolved when BIIa (recast) is in force (as of 1 August 2022).
- If, as part of the English proceedings, the ultimate plan is to place Hanna in the care of a relative in Poland, the requirements for placement abroad under the 1996 Hague Convention are a little more onerous than they are under BIIa because a formal report is required (not so under BIIa).

There is nothing to be done about the implications: we are told there will be no bespoke deal for children.

## 5. International child abduction

Ben is English and Maria is French. They live together with their child, Charlie in England. The parents separate and disagree about where Charlie should live. Maria takes Charlie to France without Ben's knowledge or permission. Ben wants Charlie to be returned to England. Maria says that Charlie would be at a risk of grave harm due to Ben's abusive behaviour towards her.

### *The current position*

- The 1980 Convention contains special provisions to deal with child abduction and has been used for a long time. It provides for a 'summary return' procedure which assumes a return will be ordered unless specific exceptions under Art. 12 and 13 are established by the respondent. One of the purposes of the Convention is to deter abduction. It is based on the idea that the country of the child's habitual residence is best able to make welfare decisions about their long-term future. Proceedings under the 1980 Hague Convention need to be dealt with speedily and therefore do not involve lengthy welfare investigations. The provisions of the 1980 Hague Convention are supplemented intra-EU by Brussels IIa to speed things up and reduce opportunities for an abducting parent to resist return if they will be safe in the home state.
- BIIa Art 11(2) requires the voice of the child to be heard
- BIIa Art 11(3) requires the court to decide whether or not to return the child within six weeks.
- BIIa Art 11(4) means an EU member state cannot refuse to return a child on the basis of 'grave risk of harm' if adequate protective measures can be put in place in the home country.
- Art 11(6)-(8) gives an override mechanism to the 'home' country to make a final determination after France makes its initial determination. So if France refuses to return Charlie, England can reconsider the situation and if it orders Charlie to be returned, France must enforce that order.
- The 1980 Convention will be further supplemented when BIIa (recast) comes into force in 2022.

### *After the TP*

- The 1996 Hague Convention also complements the 1980 Convention but not to the same extent. It gives the court jurisdiction to make 'protective measures' when a return order is made; such measures are enforceable in other Contracting States.
- There is no equivalent in the 1996 Hague Convention to the BIIa Article 11 provisions noted above. With the exception of the override scheme in Art 11(6)-(8) the other provisions in Article 11 reflect the position in any event under English domestic law.

### *Implications*

- The EU member states will continue to be bound by BIIa but the extent to which they will operate those enhancements – especially those in Art 11(6)-(8) - vis-à-vis England remains to be seen, as England will be a 'third state'. Most significant losses will be:
  - Currently, if Ben can show there were sufficient protective measures available in England, France would not be able to refuse to return Charlie to England. This protection for Ben will be lost; so it may be easier for Maria to argue against a return, even if Ben could show she would be safe back in England (e.g. with injunctions to protect her).
  - Currently, if France refuses to return Charlie, England is permitted to review that order and if, upon reconsideration, it orders Charlie to be returned, France must enforce that order and send Charlie back to England. That protection for Ben in the English court will be lost.
- It is noted that aside from the special regime of the 1980 Hague Convention, Ben could seek an order in England for a return of Charlie to England. Such an order would be based on jurisdiction conferred by the 1996 Hague Convention. An order could then be recognised and enforced in France but, with no legal aid and with a less speedy procedure.

There is nothing to be done about the implications: we are told there will be no bespoke deal for children.

## 6. Domestic Violence

Thomas is German and Sarah is English. They live in England together. Thomas is abusive to Sarah and very controlling of her, including tracking her movements online and harassing her electronically. Sarah obtains an injunction against Thomas in England. Thomas then moves to Germany but continues to harass Sarah verbally and online. Sarah wishes to enforce her English injunction against Thomas in Germany.

### *The current position*

- The EU Protection Measures Regulation ('PM Reg') means that Sarah's injunction is automatically enforceable in Germany. Germany will apply its own law to enforce the order against Thomas as required.

### *After the TP*

- There is no equivalent Hague Convention for the PM Reg.

### *Implications*

- The absence of any equivalent Convention means that Sarah would have to apply afresh in Germany and bear the additional cost and delay of doing so, with a gap in protection against harassment from Thomas.
- Theresa May previously gave a commitment that England and Wales would adopt the PM Reg into domestic law (Scotland was not included) so that 'incoming' injunctions would be recognised, but this would not help Sarah with her 'outgoing' injunction in Germany.
- The PM Reg is relatively new and not often used so far but in a fast-moving digital world where people do not need to cross geographical borders to abuse/harass/stalk someone, which can be done digitally, it is essential to have meaningful mechanisms to recognise and enforce protective orders across borders.
- The PM Reg also applies to forced marriage protection orders and female genital mutilation protection orders which in certain cases are essential for the protection of vulnerable people.

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# Brexit and Family Law

## Executive Summary

This summarises key changes to family law in England and Wales after the end of the Transition Period on 31.12.20. The accompanying **Paper A** sets out the position in more detail. **Paper B** gives practical examples of the effect of the changes.

*BIIa = Brussels IIa 2201/2003; MR = Maintenance Regulation 4/2009; PMR = Protection Measures Regulation 606/2013; HC = Hague Convention; EC = European Convention*

AREA	Current position	Position after end of TP
<b>DIVORCE etc</b>	<ul style="list-style-type: none"> <li>• Jurisdiction per BIIa</li> <li>• 'First in time' rules apply (court first seised deals with case)</li> <li>• Automatic recognition per BIIa</li> </ul>	<ul style="list-style-type: none"> <li>• Jurisdiction per national law (same as BIIa + domicile of one party)</li> <li>• Most 'convenient forum' to decide which country deals with the case (bespoke but more complex / expensive than first in time)</li> <li>• Recognition per 1970 HC (not all EU27 states); otherwise national law</li> </ul>
<b>MAINTENANCE</b>	<ul style="list-style-type: none"> <li>• Jurisdiction per MR</li> <li>• 'First in time' applies</li> <li>• Recognition and enforcement per MR</li> </ul>	<ul style="list-style-type: none"> <li>• Jurisdiction per national law (England: spousal maintenance if divorce here, child maintenance if either party or child hab res in England <i>inter alia</i>) – unless we join Lugano</li> <li>• 'Convenient forum' to decide country – unless we join Lugano (then 'first in time')</li> <li>• Recognition &amp; enforcement per 2007 HC or Lugano if we join</li> </ul>
<b>CHILDREN</b>	<ul style="list-style-type: none"> <li>• Jurisdiction per BIIa</li> <li>• Recognition and enforcement per BIIA</li> </ul>	<ul style="list-style-type: none"> <li>• Jurisdiction per 1996 HC; similar to BIIa, save:               <ul style="list-style-type: none"> <li>➢ No jurisdiction by agreement unless divorce proceedings</li> <li>➢ Potential to lose jurisdiction before end of proceedings if child's hab res changes</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>• 1980 HC minus BIIa. Main differences:               <ul style="list-style-type: none"> <li>➢ May be 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 per PMR</li> </ul>	<ul style="list-style-type: none"> <li>• Need to seek protection under national law in individual states</li> <li>• We understand law may be introduced in England for recognising EU orders</li> </ul>