



international  
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The end of EU laws:

what should I be doing before New Year's Eve and what will be different on New Year's Day?

# What is happening?

- 🌍 Left EU on 31 January 2020
- 🌍 Implementation/transition until 11 PM 31 December 2020
- 🌍 Present (existing) EU laws continue during that period incl CJEU decisions.
- 🌍 No change in law or practice
- 🌍 At 11 PM 31 December 2020 EU family laws cease to be law in the UK (with one exception, domestic violence)
- 🌍 UK has no power to enter into international treaties, laws or accessions during implementation period in 2020
- 🌍 UK has no involvement in any EU law changes in 2020

# What is happening?

- 🌍 Withdrawal Act 2019 provides that EU law, particularly recognition and enforcement around the EU for UK orders and in the UK for EU orders, continues in respect of all matters where proceedings instituted on or before 31 December 2020
- 🌍 All that matters is to *institute*. What does this mean?
- 🌍 What consequences in practice?
- 🌍 In what cases will it be important to start proceedings in 2020 and in what cases important not to start until 2021?

# What is happening?

- 🌍 Final slides on relevant primary and secondary legislation and other international guidance and provisions
- 🌍 Private International Law (Implementation of Agreements) Bill 2020
- 🌍 Says, for avoidance of any doubt, UK will be in 1996, 2005 and 2007 Hague Conventions from 1 Jan 2021
- 🌍 Three primary areas: divorce, maintenance/needs and children
- 🌍 Three component features always to be considered: jurisdiction, forum and combination of recognition and enforcement
- 🌍 New provisions on jurisdiction and forum from 1 January 2021

# Key dates on UK/EU relationship

<b>1 January 1973</b>	<b>UK joins the EU</b>
<b>1 March 2001</b>	Brussels II
<b>1 March 2005</b>	Brussels II bis
<b>1 January 2010</b>	Lugano 2007
<b>18 June 2011</b>	Maintenance Regulation
<b>10 January 2015</b>	Brussels I bis
<b>11 January 2015</b>	Mutual recognition of protection measures in civil matters Regulation 606/2013
<b>23 June 2016</b>	EU referendum
<b>16 March 2017</b>	EU (Notification of Withdrawal) Act 2017
<b>19 October 2019</b>	Withdrawal Agreement 2019
<b>12 December 2019</b>	General election
<b>23 January 2020</b>	EU (Withdrawal Agreement) Act 2020
<b>31 January 2020</b>	UK leaves the EU at 11 PM
<b>31 December 2020</b>	End of implementation period at 11PM; EU laws cease to have effect
<b>1 January 2021</b>	UK member of 1996 and 2007 Hague Conventions in our own right

## Present law: divorce

- 🌍 Divorce jurisdiction in national and international cases found in Brussels II: identical across the EU
- 🌍 Divorce forum in intra-EU case: *lis pendens*, the first to issue, the race to the divorce court
- 🌍 Divorce recognition: all EU civil law divorces recognised across the EU

## Present law: maintenance

- 🌍 In EU speak, maintenance means needs based provision. EU law separates needs and sharing. The UK is not a party to any EU law on sharing provision. Maintenance means more than just periodic payments
- 🌍 Jurisdiction found in EU Maintenance Regulation: primarily based on habitual residency but also ancillary to divorce and children proceedings. Can be based on choice of court agreements. Also form of necessity. Not allowed if only sole domicile.
- 🌍 Forum is again first to issue
- 🌍 Automatic recognition and enforcement of maintenance orders around the EU, although two-stage process for UK outgoing orders

## Present law: children

- 🌍 Significantly less changes in children law
- 🌍 Child abduction primarily in 1980 Hague; BII gave an overlap with some additional protections
- 🌍 Recognition and enforcement of children orders across the EU
- 🌍 Jurisdiction found in BII but invariably based on habitual residence of the child, the now global criteria



# What are the transitional provisions?

- 🌍 What happens about existing proceedings on 31 December 2020?
- 🌍 How can I bring any new proceedings within EU laws?
- 🌍 Will any steps taken before our family courts be recognised and enforced around the EU from 2021 onwards?
- 🌍 These questions are vital given the value and benefit for some cases in relying on EU family laws for recognition and enforcement of English orders around the EU from 2021 onwards

# What are the transitional provisions?

- 🌍 Position is in Arts 67-69 Withdrawal Agreement 2019
- 🌍 It has had a little controversy about interpretation but position now clarified through EU guidance late August 2020
- 🌍 Applies to UK cases involving an EU member state and cases in an EU member state involving the UK
- 🌍 In summary, if proceedings are *instituted* on or before 31 December 2020, any subsequent order will be recognised and enforced around the EU in accordance with EU laws
- 🌍 All that matters is instituting; the order itself e.g. final decree absolute can be made 2021 onwards
- 🌍 No need for separate application to recognise and enforce in 2020

## Initiating proceedings

Initiating, lodging or issuing? What's the difference?

- 🌍 In essence, to gain priority what must practitioners do?
- 🌍 Is it necessary to issue proceedings or something less?
- 🌍 What less will be good enough all around Europe?
- 🌍 What should practitioners cautiously and safely do?
- 🌍 What would we like the court service and the judiciary to do to help us?
- 🌍 How can we help the court service and the judiciary including court lists?

## Initiating proceedings

Initiating, lodging or issuing? What's the difference?

- 🌍 Unfortunately initiating, lodging or issuing is not defined in EU law
- 🌍 Referred to CJEU in *MH v MH* C-173-16.
- 🌍 Although they said lodging could be earlier than issuing, they declined to say specifically what was required

## Initiating proceedings

- 🌍 Practitioners are likely to insist on issuing to be cautious
- 🌍 Moreover practitioners need not only to know proceedings have been issued but to have had notification that they have been issued, otherwise they will continue to badger and press the family Court for confirmation thereby adding to the burden on the hard pressed Court service
- 🌍 Important to consider different forms of issuing: online, divorce regional centre, local family court
- 🌍 Ignore MIAMs: not required in urgent international cases

## Initiating proceedings

- 🌍 Making sure the application is technically correct, especially when no in-person issuing. (Should there be a relaxation of the rules on gatekeeping?)
- 🌍 Don't seek expedited hearings or orders unless exceptional circumstances or distinctive position in law, national or international, and then risk on costs
- 🌍 Is it genuinely necessary litigation, per HHJ Wildblood
- 🌍 Judges will be endeavouring to minimise pressure on court issuing office and court lists

## Initiating proceedings

- 🌍 Majority of divorces are now online. Automated acknowledgement but this is not issuing (or is it?). What more should happen to give confidence to the practitioner?
- 🌍 Consent financial orders now filed online, yet in many cases Form A will not have been previously issued. In practice no Form A, simply part of the online application (or is it?). So make preliminary application?
- 🌍 However Forms A and C100 create their own automatic timetable leading to the listing of a FA or FHDRA a couple of months later thereby clogging up the court lists if these are only cautionary, safety first applications. What should be done?
- 🌍 Prayers in the petition are not yet certain to give priority so issue Form A; again thereby clogging up court lists with a FA

## Initiating proceedings

- 🌐 Issuing online after 4:30 PM is deemed to be issuing the next working day: PD 5B 5.2 and 5.3
- 🌐 31 December 2020 is a working day. What do you do at 4:45 PM? Should a court office be open later that day? Until 11 PM?!
- 🌐 Many practical problems and hopefully there will be discussions for pragmatic solutions
- 🌐 But in any event .....



## Initiating proceedings

- 🌍 Don't leave it too late
- 🌍 December is always busy in the family courts
- 🌍 Additional strain of Christmas contact disputes
- 🌍 Existing strain of remote hearings
- 🌍 Existing strain of less court staff in court buildings
- 🌍 Existing strain of pandemic
- 🌍 Invariably short staffed between Christmas and New Year

## Initiating proceedings

- 🌍 There will be some genuine last-minute instructions and necessity for urgent issuing
- 🌍 Existing cases can be done before December
- 🌍 Leaving it until December carries risks for the practitioner which cannot and should not be put onto the court service

# Divorce: January 2021

- 🌍 Jurisdiction: now found in national law
  - a) both parties to the marriage are habitually resident in England & Wales;
  - b) both parties to the marriage were last habitually resident in England and Wales and one of them continues to reside there;
  - (c) the respondent is habitually resident in England and Wales;
  - (d) the applicant is habitually resident in England and Wales and has resided there for at least one year immediately before the application was made;
  - (e) the applicant is domiciled and habitually resident in England and Wales and has resided there for at least 6 months immediately before the application was made;
  - (f) both parties to the marriage are domiciled in England and Wales; or
  - (g) either of the parties to the marriage is domiciled in England and Wales

## Divorce: January 2021

- 🌍 Sole domicile is now an equal basis
- 🌍 Ministry of Justice resolved conflict in an interpretation of the EU law by taking the more generous approach, making it easier to bring proceedings in England and therefore better for parties with any English connection
- 🌍 All national cases: no change

## Divorce: January 2021

- 🌍 Forum: closest connection, forum *non-conveniens*
- 🌍 Same as existing law with all non-EU countries
- 🌍 Discretionary and therefore can have risk of higher costs
- 🌍 Perception of fairness
- 🌍 May cause difficulties in some UK EU cases

## Divorce: January 2021

- 🌍 Recognition
- 🌍 Incoming unlikely to be an issue as England is a very liberal jurisdiction on recognition of foreign divorces
- 🌍 Outgoing not an issue if the other EU country is a signatory of 1970 Hague Divorce Recognition Convention; but only half of member states are and some substantial countries aren't
- 🌍 If recognition needed in a non-1970 Convention country, take local advice as to what other steps may be needed
- 🌍 This may be a good reason to institute proceedings in 2020

## Maintenance: January 2021

- 🌍 Jurisdiction: depends upon the nature of the proceedings
- 🌍 Ancillary to divorce then follows divorce jurisdiction
- 🌍 Part III MFPA 1984, financial order after a foreign divorce, reverts to pre-2011 position: domicile or 12 months habitual residence at the time of the divorce or application, or interest in a matrimonial home here
- 🌍 Sch 1 CA: against parents if any of following are habitually resident or domiciled at date of application namely parent, guardian, special guardian, person named in child arrangements order or the child
- 🌍 Other distinctive provisions e.g. s27 MCA
- 🌍 Will change if UK joins Lugano Convention as UK wants

## Maintenance: January 2021

- 🌍 Forum again depends upon the nature of the proceedings
- 🌍 Ancillary to divorce then follows divorce forum; no distinctive provisions for needs-based orders
- 🌍 Part III MFPA 1984 does not apply on forum
- 🌍 Sch 1 CA is likely to follow forum in respect of the child, almost always based on habitual residence
- 🌍 Important to consider provisions of the 2007 Hague Convention if likely to be seeking to recognise or enforce
- 🌍 If UK joins Lugano, the race to issue will arise yet again with extremely distinctive circumstances on maintenance alone: race to divorce will continue to be first on maintenance claims



## Maintenance: January 2021

- 🌍 Recognition and enforcement will proceed under 2007 Hague Convention and/or Lugano Convention if the UK joins

## Maintenance: January 2021

- 🌍 Distinctive issues concerning pension sharing of a UK pension following a foreign pension sharing arrangement e.g. on divorce and financial settlement abroad: jurisdiction will not exist from 2021 onwards unless either party domiciled or habitually resident here. If this is a risk, apply now
- 🌍 Distinctive issue as to whether simply applying under Part III is good enough or whether leave is also needed with the subsequent substantive application also made before the end of 2020
- 🌍 Distinctive aspects concerning choice of court/law agreements entered into already and on or before 31 December 2020

## Children: January 2021

- 🌍 Jurisdiction: follows national law, mostly although certainly not entirely being the habitual residence of the child.
- 🌍 Forum: again unless distinctive circumstances it will be based on the habitual residence of the child
- 🌍 Recognition and enforcement: will follow 1996 Hague Convention
- 🌍 Child abduction: will revert just to using 1980 Hague Convention with relatively limited differences
- 🌍 Distinctive issues arise in respect of public law proceedings especially for local authorities, not covered in this presentation

## Domestic violence

- 🌍 EU Civil Protection Regulation provides that civil protection orders made in the EU will be automatically recognised and enforceable around the EU; primarily aimed at land border countries
- 🌍 UK made a commitment at an early stage in the negotiations to continue to recognise EU domestic protection orders in the UK.
- 🌍 The EU law has been put into national law and England will recognise and enforce orders made in any EU member state
- 🌍 Regrettably EU has not reciprocated, so outgoing will not be recognised
- 🌍 Under transitional provisions, domestic protection orders will be recognised if the order itself is obtained, along with the accompanying EU certificate, on or before 31 December 2020

## Service and taking of evidence

- 🌍 EU laws provide for intergovernmental cooperation on service of court papers and taking of evidence from abroad
- 🌍 To use these laws, the request must be received on or before 31 December 2020 by the appropriate authority in the country where the service or the taking of evidence is to occur
- 🌍 In practice UK practitioners tend to serve direct or through non-governmental means
- 🌍 From 2021, use will be made of the equivalent Hague Service and Taking of Evidence Conventions

## What global issues for a UK/EU future?

- 🌍 UK and EU have had a fraught relationship in the family context. Real differences on applicable law, marital agreements, marital property regimes etc
- 🌍 Yet UK and EU together represent a significant proportion of the worlds financially independent, mobile international families. Their laws are hugely influential in very many countries.
- 🌍 It must be hoped that with these differences in the past, the UK and the EU can work together for the benefit of the global International family community and for global international family laws, working with the Hague Conference, on a number of key areas

## What global issues for a UK/EU future?

- 🌍 Cross-border laws on domestic violence protection, to include digital domestic abuse which easily crosses national borders. To include cooperation and co-working on FGM, forced marriage and child trafficking
- 🌍 Finding a compromise in respect of marital agreements between the civil law expectation of no independent legal advice or disclosure and the common law expectations and preconditions to overcome anxieties about duress, misrepresentation and gender
- 🌍 Working towards a global forum law. The race to court will not be the answer. But discretion is too uncertain. What else? The creation of a hierarchy of jurisdiction, connectedness, thereby also deciding relevant law?

## What global issues for a UK/EU future?

- 🌍 Digital technology between countries in greater cooperation and efficiency
- 🌍 Application of personal, religious laws and recognition of potentially gender discriminatory laws
- 🌍 The clash of globalism and populism
- 🌍 Encouraging Islamic countries to become part of the International family Law community, with inevitable accommodation needed but how far should this go?
- 🌍 Towards a global ADR profession with recognised standards, branding, qualifications and accreditation and practices



## Conclusion

- 🌍 The fraught political discussion between the UK and the EU allows opportunity to reflect on how the EU itself can be more outward looking and work in partnership with The Hague Conference on global laws

## Conclusion

- 🌍 Europe is the cradle of civilisations and the foundry from which liberal ideas of justice, fairness and equality have flowed
- 🌍 There is much which the EU can bring to future international family laws and global families, and much which the specialist UK family law profession can contribute to the EU as good supportive friends
- 🌍 The EU must find a way in which the UK, with its huge international family traffic, can still have reciprocal recognition and enforcement
- 🌍 But not laws which encourage racing to court and discourage reconciliation and mediation

## Conclusion

- 🌍 Whatever happens, it is hoped that just as the UK will continue to recognise and enforce orders made in EU family courts, the EU will reciprocate with UK family court orders
- 🌍 Whatever the political aspects of the UK leaving the EU, all concerned must work to the best interests of international families and their children



## Conclusion

- 🌍 Meanwhile there are some huge issues affecting the global international family community and the global international family law community which need addressing.
- 🌍 This cannot be left to national jurisdictions.
- 🌍 There has been too much concentration on Continental regional issues.
- 🌍 It is time for family justice to go global!
- 🌍 Time for a New Hope! A blueprint for some UK family law global action

## Appendix: EU Departure Laws

- 🌍 UK EU Withdrawal Agreement 2018
- 🌍 UK EU Withdrawal Agreement 2019
- 🌍 EU (Withdrawal) Act 2018
- 🌍 EU (Withdrawal) Act 2020
- 🌍 Private International (Implementation of Agreements) Bill 2020
- 🌍 The International Recovery of Maintenance (Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance 2007) (EU Exit) Regulations 2018 1125 of 2018

## Appendix: EU Departure Laws

-  The Jurisdiction and Judgements (Family) (Amendment etc) (EU Exit) Regulations 2019 519 of 2019
-  The Jurisdiction and Judgements (Family) (Amendment) (EU Exit) (No 2) Regulations 2019, 836 of 2019
-  The Mutual Recognition of Protection Measures in Civil Matters (Amendment) (EU Exit) Regulations 2019, No 493 of 2019
-  Civil Jurisdiction and Judgements (Amendment) (EU Exit) Regulations 2019 479 of 2019
-  The Civil Jurisdiction and Judgements (Civil and Family) (Amendment) (EU Exit) Regulations 2020



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