



# Divorce and financial claims after Brexit: Jurisdiction, forum, recognition and enforcement

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# Speaker



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*'He is a one-man encyclopaedia on Brexit and its potential impact on international clients. He is a trusted and respected speaker and writer'*

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## It's happened: now what?

- The UK left the EU (in law) with a last-minute flourish on Christmas Eve
- What do lawyers need to know?
  - About EU Family laws
  - About proceedings commenced or orders made in 2020 or earlier (“legacy cases”)
  - The law in 2021 concerning international cases including EU

## What happened?

- 🌍 Left EU on 31 January 2020
- 🌍 Implementation/transition until 11 PM 31 December 2020
- 🌍 At 11 PM 31 December 2020 EU family laws ceased to be law in the UK (with one exception, domestic violence)

## What happened?

- 🌍 Withdrawal Act 2020, Articles 67 – 69, provide 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
- 🌍 Brussels II, divorce and children
- 🌍 Maintenance Regulation, needs-based orders
- 🌍 Any lawyer wanting to rely on EU laws in a UK/EU member state case had to institute proceedings before 11 PM on 31 December 2020. If so, this provided for jurisdiction including forum. Moreover recognition and enforcement would apply to orders subsequently made
- 🌍 There were some cases where it was beneficial to delay until 2021
- 🌍 Judicial experience between Christmas and New Year

# What impact?

- **Three** primary areas (but also minor on domestic violence):
  - Divorce
  - Maintenance/needs (but what about other financial claims)
  - Children (not covered in this presentation)
- **Three** component features always to be considered:
  - Jurisdiction
  - Forum
  - Recognition and enforcement
- **Three** elements
  - Pre 2021
  - Transitional provisions
  - 2021 new cases

# Divorce

## Divorce: Jurisdiction and forum pre 2021

- 🌍 **Divorce jurisdiction** in national and international cases found in Art 3 Brussels II plus residual basis
- 🌍 Identical in law across the EU although not always applied the same way in practice
- 🌍 **Divorce forum** in intra-EU case: *lis pendens*, the first to issue, the race to the divorce court
- 🌍 This law is/was hugely detrimental to prospects of mediation and negotiation when one party found out the other had tactically and secretly issued proceedings first in the more advantageous country even though far lesser connections with that country

## Divorce: Jurisdiction and forum pre 2021

- 🌍 Final divorce orders (decrees absolute) already made in 2020 and earlier have priority on forum under Brussels II
- 🌍 If divorce application (petition) made in 2020 and identical application made in 2021 in a UK/EU member state case, priority given to the first in time; short term impact only
- 🌍 Lawyers should find out in any case **with any EU connection** where there is an order in 2021 onwards whether the proceedings were instituted in 2020 or earlier. If so, then EU laws will continue to apply

## Divorce: Jurisdiction and forum from 2021

- **Jurisdiction** from January 2021 found in national law
  - Both parties to the marriage are habitually resident in England & Wales
  - Both parties to the marriage were last habitually resident in England and Wales and one of them continues to reside there
  - The respondent is habitually resident in England and Wales
  - The applicant is habitually resident in England and Wales and has resided there for at least one year immediately before the application was made
  - 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
  - Both parties to the marriage are domiciled in England and Wales; or
  - Either of the parties to the marriage is domiciled in England and Wales

## Divorce: Jurisdiction and forum from 2021

- Sole domicile is now an equal basis
- Disputed Marinos case law: can the 6/12 months residence be only ordinary residence as long as habitual residence on the day of issuing or habitual residence throughout 6/12 months
- English practice very different to most EU countries
- Ministry of Justice resolved conflict by taking the more generous approach, making it easier to bring proceedings in England and therefore better for parties with any English connection.
- This will produce conflicts with EU countries
- Will High Court reinterpret the legislation? Take care
- All national cases: no change

## Divorce: Jurisdiction and forum from 2022

- 🌍 New divorce law from April 2022
- 🌍 Opportunity for joint petitions
- 🌍 Brussels II has jurisdiction based on joint petitions but irrelevant for England and Wales hitherto
- 🌍 Now jurisdiction in the case of a joint petition/application is habitual residence of either joint applicant
- 🌍 Observe that in the case of a sole petition, the petitioner, applicant, has to show either 12 months habitual residence or six months habitual residence plus domicile. But could Jess show sole domicile one of the contradictions of the drafting
- 🌍 No jurisdictional benefits of joint petitions

## Divorce: Jurisdiction and forum from 2021

- 🌍 **Forum** is now 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 by the public

## Divorce: Jurisdiction and forum from 2021

- 🌍 A number of direct problems are likely in practice
- 🌍 England is first in time and France is second in time but will France allow England to go ahead? England no longer in the EU so BII does not apply
- 🌍 England first in time and France is second in time but England decides France has the closest connection and transfers case to France. Will France accept the proceedings? No transfer power in BII
- 🌍 France first in time and England second but England decides it has the closest connection and should proceed. How will France respond? Return of the temporary anti-suit injunction?
- 🌍 Where are the assets? May determine position taken by lawyers

## Divorce: Jurisdiction and forum from 2021

- 🌍 All orders made by civil courts around the EU were recognised automatically in all EU member states
- 🌍 Applies to all final divorce orders made on or before 31 December 2020
- 🌍 Also applies to all final divorce orders made in proceedings instituted on or before 31 December 2020; transitional provisions again apply
- 🌍 This may have very long-term impact e.g. somebody wanting to marry in the EU in 2030 but relying on decree absolute on divorce issued in December 2020

## Divorce: Recognition & enforcement Pre-2021

- 🌍 **Incoming recognition** of divorce orders made around the EU unlikely to be an issue as England is a very liberal jurisdiction on recognition of foreign divorces, and in any event will be automatic recognition if from a 1970 Hague Divorce Recognition Convention signatory country
- 🌍 **Outgoing recognition** of divorce orders is more problematical
- 🌍 UK divorce orders are recognised around the EU if the other EU country is 1970 Hague signatory
- 🌍 Will there be any issues dependent upon the basis of jurisdiction?
- 🌍 Not yet known but care needed especially if relying on sole domicile

## Divorce: Recognition & enforcement from 2021

- 🌍 But only half of EU member states are 1970 signatories
- 🌍 Some substantial countries are not
- 🌍 UK tried to encourage the EU to encourage EU member states to sign up to 1970 but seems to have had no impact
- 🌍 Some countries e.g., Ireland have created own national laws to allow recognition
- 🌍 If recognition of a UK divorce order is needed in a non-1970 Convention country, take local advice as to what other steps may be needed

# Maintenance

## Maintenance: Jurisdiction & forum pre-2021

- 🌍 In EU speak, maintenance means needs based provision
- 🌍 EU law totally separates needs and sharing
- 🌍 The UK was not a party to any EU law on sharing provision
- 🌍 Maintenance means more than just periodic payments
- 🌍 EU Maintenance Regulation since 2011
- 🌍 **Jurisdiction** primarily based on habitual residence of claimant or defendant but also ancillary to divorce and children proceedings
- 🌍 Not allowed if only sole domicile
- 🌍 **Forum** was again first to issue, *lis pendens*

## Maintenance: Jurisdiction & forum transition

- 🌐 Final maintenance orders already made in 2020 or earlier have priority on **forum**
- 🌐 If maintenance application made in 2020 and identical application made in 2021 in a UK/EU member state case, priority given to the first in time. Short-term impact only
- 🌐 If maintenance application made in 2020 and application made in 2021 in a UK/EU member state case in respect of a “*related matter*” e.g., other financial claims, the court second in time has discretion to stay proceedings to allow the first in time to deal with all matters

## Maintenance: Jurisdiction & forum from 2021

- 🌍 Jurisdiction: depends upon the nature of the proceedings
- 🌍 Ancillary to divorce: follows divorce jurisdiction
- 🌍 Part III MFPA 1984, financial order after 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. Much reduced
- 🌍 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

## Maintenance: Jurisdiction & forum from 2021

- 🌍 Jurisdiction will change dramatically if the UK joins the Lugano Convention as the UK has asked and so far (mid April and confirmed early July) the EU Commission has refused. Seems unlikely EU Parliament will overrule the Commission
- 🌍 Perception that jurisdiction in Lugano Convention is incredibly complex and complicated. Far more so than MR. Moreover because of its history, it relies on historic forms of jurisdiction and enforcement and similar
- 🌍 Unlike civil litigation, family law already has the benefit of 2007 Hague

## Maintenance: Jurisdiction & forum from 2021

- 🌍 **Forum** again depends upon 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: Recognition & enforcement pre-2021

- 🌍 In 2020 and from 2011, automatic recognition around the EU of maintenance orders; system of certificates provided by the court making the order
- 🌍 This automatic recognition also applied to maintenance orders made in respect of maintenance proceedings instituted on or before 31 December 2020
- 🌍 In 2020, enforcement of maintenance orders around the EU, as if made in the country of the intended enforcement
- 🌍 Enforcement was automatic without the need of any registration process if the court making the order used applicable law; as did all EU member states except UK and Denmark
- 🌍 A UK maintenance order needed first to be registered before it could be enforced. This was directly disadvantageous

## Maintenance: Recognition & enforcement from 2021

- 🌍 **Recognition and enforcement** proceeds under 2007 Hague Convention (and/or Lugano Convention if the UK joins)
- 🌍 The Lugano Convention has jurisdictional provisions which 2007 Hague does not
- 🌍 However once the order has been made, recognition and enforcement can proceed under either 2007 Hague or Lugano
- 🌍 Will always involve the registration process

## Maintenance distinctive issues

- 🌍 Pension sharing of UK pension following a foreign pension sharing arrangement e.g., on divorce and financial settlement abroad: jurisdiction does not exist from 2021 onwards unless either party domiciled or habitually resident here
- 🌍 Distinctive aspects concerning choice of court/law agreements entered pre-2021; English national provisions only apply in England. How will marital agreements with the choice of court clause of England be treated across the EU?
- 🌍 If not a needs-based order, no international law and rely on local law which may mean starting proceedings afresh in the country where the asset is situated
- 🌍 Distinctive issues in some EU countries about real property as may need local orders

## Domestic violence

- 🌍 EU Civil Protection Regulation provided that civil protection orders made in the EU would 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
- 🌍 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 UK outgoing Orders will not be automatically recognised around EU
  - 🌍 *Problem in practice: what can European practitioners do to help victims of domestic violence who cannot enforce UK orders in the EU although can enforce EU orders in the UK?*

## 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 the political aspects of the UK leaving the EU, all concerned must work to the best interests of international families and their children



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