Divorce Jurisdiction and Forum after Brexit

By David Hodson OBE MICarb

What will be divorce jurisdiction for England and Wales after we leave the European Union?

So far, most discussions of the impact of leaving the EU on family law has only affected those lawyers undertaking cases with an international element. However there is one fundamental piece of EU family law which affects all family lawyers. It is the law relating to the jurisdiction for divorce proceedings. Often overlooked by many family lawyers, it is found in EU law, the Brussels Regulation[1].

Even though in the vast majority of cases the default position of joint habitual residence is used, nevertheless it is based on EU law. When the UK leaves the EU, new law will be needed. What should it be? On what basis should couples be able to engage the jurisdiction of the UK courts in order to divorce (and linked with that, for now, their financial applications).

This has been discussed by a small group of about 20 lawyers with significant international practices who have been meeting two or three times a year over the past few years to discuss and share informally about international matters, primarily as they pertain to the EU Maintenance Regulation. The group met in early February 2017[2]. The group considers that there are three different scenarios for the possible ways forward. This note sets out those scenarios and the group’s proposals which they commend to the profession and to government.

First, if the decision is that the whole of the Brussels Regulation should be incorporated into national law and, fundamentally, that we should retain complete reciprocity with all other EU member states (with the decisions of the CJEU remaining binding upon us[3]), then divorce jurisdiction would continue as at present, as found in the Brussels II. Any other law would be illogical if the EU law were to be domesticated within national law. The *lis pendens* provisions (the ‘race to issue’) would remain as below. This option has been the preferred choice of many who wanted the UK to stay within the EU. It is increasingly recognised as unachievable politically and as a matter of policy.

Second, an alternative may be for the Brussels Regulation to be incorporated within national law but with no reciprocity with the other EU member states. It was recognised by the group that this has many problems. CJEU judgements would not be binding on our country. There would be a risk that changes to EU law would not automatically occur in this country. But particularly the *lis pendens* provisions would not apply on a reciprocal basis giving rise to...
arguments about which forum as between the UK and other EU member states is appropriate, a complete antithesis to the EU approach under Brussels II. The group did not pursue consideration of divorce jurisdiction in these circumstances.

**Third**, another option is for no part of the Brussels Regulation to remain in English national law once we leave the EU. Therefore we would need a new divorce jurisdiction law. Although we could simply adopt Art 3 of Brussels II, there is little point if there is no more reciprocity with the EU. We would lose the *lis pendens* provisions and return to a *forum conveniens* system. Accordingly the group looked at what should then be the new divorce jurisdiction law. However the group was also concerned to have as relatively little change as possible given Brussels II has been settled law over the past 15 years.

**Proposals for divorce jurisdiction**

The proposal is as follows for the grounds which should be available for divorce jurisdiction:

- joint habitual residence
- habitual residence of the respondent
- habitual residence of the petitioner for six months before and as at the date of the petition
- sole domicile of either party
- sole nationality of either party and a greater connection with England and Wales than any other country within the UK

*Joint habitual residence* is the default position for the vast majority of divorces at the present. It should continue. It would be habitual residence as at the date of the petition. As a matter of law, a person can have only one habitual residence at any one time.

*Habitual residence of the respondent* is also the present law. It is found in other laws such as the EU Maintenance Regulation. It is the country in which the respondent has his or her habitual residence and therefore indicates a strong connecting factor.

*Habitual residence of the petitioner for six months before and at the date of the petition*. The group felt that there should be a higher burden of ‘connectedness’ on the petitioner than the respondent. It would discourage some blatant forum shopping and is in keeping with the present jurisdiction law in Brussels II which gives a substantially higher burden of ‘connectedness’ for the petitioner than the respondent. The group felt that it should be habitual residence over the entire six months rather than habitual residence on the day of issuing and simple residence for a period of time (the latter being the current law albeit a different interpretation to many other EU member states[4]). This would overcome the complications of the English case law in *Marinos*[5]. Longer than six months could cause conflicts with other laws and might be considered unreasonable. There are other common law countries which follow this pattern.

*Sole domicile* is the present law if no other EU member state has jurisdiction and it was the
The group felt it should always be an option, rather than an option only available if the other options do not apply as at present.

*Sole nationality and a greater connection with England and Wales than any other UK country.*

The group looked at divorce jurisdiction across many common law countries. A good number have either only nationality or nationality and domicile as connecting factors. There are some people who are only nationals of our country and not domiciled here. Nationality is undoubtedly a connecting factor. It is also much easier to prove than domicile. As nationality is ‘UK’ rather than ‘England and Wales’, it would have to be with a closer connection to England and Wales than any other country within the UK.

The group looked at the possibility of having some form of agreement as to divorce jurisdiction but decided that at present it would be far too problematical. Unlike civil law jurisdictions but the same as many other common law countries, England and Wales requires opportunity for independent legal advice before giving weight to a marital agreement. There would in any event have to be some connecting features.

Another possible approach would be to have a hierarchy of jurisdiction, and this is favoured by a number of us. It was proposed to the EU but rejected by them. The group felt that there would not be sufficient time for a consensus to be reached before the law had to be agreed and introduced for the time of the EU departure. However the group would hope that discussion on a hierarchy of jurisdiction could continue.

So the group prepared and published a paper along these lines which it commends for further discussion and in particular for consideration by those planning the future of our legislation.

**The Hague 1970 Divorce Recognition Convention: filling an EU divorce gap?**

On 22 March 2017, the House of Commons Justice committee produced its report on the implications of Brexit for the justice system. In respect of family law, chapter 3 of the Report, the recommendation is that the *government should seek to maintain the closest possible cooperation with the EU on family justice matters, and in particular to retain a system for mutual recognition and enforcement of judgements.* These areas of judgements include orders in respect of children, financial outcomes and divorce. The third is presently within Brussels II. This gives automatic recognition of divorces made by courts across the member states. I wrote an analysis and commentary which can be found here[^6].

But Brussels II has a number of major difficulties, particularly the forum choice when two or more countries have jurisdiction for a divorce. See below.

Might there be another international law which could be used in the context of cross-border recognition of divorce orders, without the baggage of the Brussels Regulation? Step forward from the shadows and historic obscurity the Hague Convention of 1 June 1970 on the
Recognition of Divorces and Legal Separations[7].

The Convention regulates the recognition of divorces and legal separations provided they have been performed according to the correct legal process in the state where the divorce was obtained.

There are 20 signatories. These are: Albania, Australia, China in respect of Hong Kong, Cyprus, the Czech Republic, Denmark, Egypt, Estonia, Finland, Italy, Luxembourg, Moldova, the Netherlands, Norway, Poland, Portugal, Slovakia, Sweden, Switzerland and the UK to include Bermuda, Gibraltar, Guernsey, Jersey and the Isle of Man. In other words it covers 12 of the EU member states plus the UK.

Brussels II supersedes the Convention between member states. Once the UK leaves the EU and presuming no reciprocal arrangements with the EU,, this Convention will again be effective between the UK and the signatory member states.

Issues regarding marriage and divorce were one of the first topics of international treaties established by the Hague Conference on Private International Law. The first on divorce and separation was in 1902. The 1970 Convention aims to facilitate the recognition in one contracting state of divorces and separations obtained in another contracting state. It came into English law by the Recognition of Divorces and Legal Separations Act 1971. Therefore it assures divorced spouses that their new status will receive the same recognition abroad as in the country where the divorce was obtained. It simplifies the opportunity of remarriage by the automatic recognition of the divorce. It clarifies the legal relationship of the couple concerned.

It applies to divorces which have followed judicial or other proceedings officially recognised in the state and which are legally effective there[8]. Although talaqs and similar religious divorces do not apply to the civil justice systems around Europe, such divorces would be recognised in England if they were registered with a state approved agency. The definition includes “other” proceedings which might be administrative in some way but still with the official recognition of the country where it was pronounced.

The Convention only applies to the final decree or order of divorce. It does not apply to any findings of fault or any ancillary orders to the divorce[9]. Annulment of marriages are outside the Convention. Any registration system of a foreign divorce is left to the country concerned and not within the Convention.

It does not establish direct rules of jurisdiction, unlike Brussels II. However recognition of a divorce is conditional on certain connections with the state where the divorce occurred. These are fairly broad[10]. They are the habitual residence of the respondent, the habitual residence of the petitioner along with either one year habitual residence or last joint habitual residence, joint nationality, the nationality of the petitioner along with habitual residence or one year habitual residence in the previous two years, or the nationality of the petitioner along with physical presence at the time of institution of the proceedings and the parties last
resided together in a country whose law, at the time of commencement of the proceeds, did not provide for divorce.

For countries such as England and Wales which uses domicile instead of nationality, it provides\(^{[11]}\) that habitual residence shall be deemed to include domicile.

Refusal of recognition can occur where adequate steps were not taken to give notice of the proceedings to the respondent\(^{[12]}\) or if the divorce is incompatible with a previous decision determining the matrimonial status of the spouses and that decision was in effect recognised in the state in which recognition is sought\(^{[13]}\). Recognition can be refused if it would be manifestly incompatible with public policy\(^{[14]}\). There are other distinctive provisions on refusal of recognition which rarely arise. If proceedings concerning divorce or legal separation are going on in one country, a signatory state can suspend those proceedings if there are also proceedings going ahead regarding matrimonial status of either party in another contracting state\(^{[15]}\).

Once there is recognition under this Convention, a state cannot then prevent either spouse from remarrying on the ground that the law of another state does not recognise that divorce\(^{[16]}\).

Reservations are possible at the time of ratification or accession.

The Convention has featured in a number of cases. Since Brussels II was brought into force in March 2001, there hasn’t been the need to refer to it in intra-EU cases. The Convention has either been relied on or positively supported in the following cases amongst others

H v S (Recognition of Overseas Divorce)\(^{[2]}\)\(^{[17]}\) The Saudi Arabian husband and Bahraini wife married in a civil register office in London following an Islamic ceremony. The husband pronounced Talaq in Jeddah and presented a deed of confirmation before the local Sharia court. The Talaq became effective according to Saudi Sharia law 3 months after pronouncement. This enabled the husband and wife to register the change of status in the civil register; without doing so the wife would be unable to remarry. Registration was required in Saudi Arabia for a number of practical purposes including obtaining official documents. The court granted recognition to the Saudi divorce as a proceedings divorce within s 46(1) Family Law Act 1986. The purpose and policy of s 46(1) and the Hague 1970 Convention provided a mechanism to afford recognition to a Sharia divorce so that there could be no issue as to whether it had been pronounced. The Saudi process, using the machinery adopted by the husband, had produced a religiously valid divorce, as certified by a religious court, and effecting a full change of civil status in the eye of the State and society in which it was pronounced via the registration mechanism. It was difficult to classify that result and the process by which it was achieved as outside the intention and boundaries of the recognition code

Golubovich v Golubovich\(^{[3]}\)\(^{[18]}\) Thorpe LJ quoted from the Law Commission report on the Hague 1970 Convention, Law Com No 34 (HMSO, 1970). Para 11 of the report states that ‘Article 10 says that recognition may be refused if recognition would be manifestly contrary to the public policy of the recognising state and Article 8 deals with two specific aspects of this,
namely, where adequate steps were not taken to give notice to the respondent or where he
was not afforded sufficient opportunity to state his case. We consider that legislative effect
should be given to these articles in order specifically to preserve the power, which our courts
have exercised in the past, of refusal to recognise decrees obtained in a manner that
corrupves principles of natural justice. While we believe that legislation in the terms of
Article 8 alone would cover most of the circumstances in which recognition has in the past
been refused on the grounds of public policy, we have, after some hesitation, come to the
conclusion that the basis of Article 10 should also be expressly incorporated in the statute,
lest cases should arise in which our courts would be forced to recognise a foreign decree in
circumstances in which it would seem unconscionable to do so’.

H v H (The Queen’s Proctor Intervening) (Validity of Japanese Divorce)[19] [4]
The judge,
Stephen Wildblood QC, in para 74 refers to the case of Quazi v Quazi[20] and Lord
Scarman’s judgment. Lord Scarman considers[21] the phrase ‘judicial or other proceedings’
and states that it is not possible to restrict the meaning of those words to proceedings in
which “the state or some official organisation recognised by the state must play some part in
the divorce process at least to the extent that, in proper cases, it can prevent the wishes of
the parties or one of them, as the case may be, from dissolving the marriage tie as of right”.
No hint of any such restriction appears in the …1970 Convention … ; nor is any such
restriction to be implied, if not expressly stated, in a convention or statute the purpose of
which is to facilitate the recognition of divorces and legal separations … For these reasons I
construe s 2 (of the Recognition of Divorces and Legal Separations Act 1971) as applying to
any divorce which has been obtained by means of any proceeding, ie any act or acts,
officially recognised as leading to divorce in the country where the divorce was obtained, and
which itself is recognised by the law of the country as an effective divorce. Specifically,
“other proceedings” will include an act or sequence of acts other than a proceeding instituted
in a court of law …’

Re Fatima R v Secretary of State for the Home Department Ex Parte Fatima [5][22]
Discussion of the 1970 Hague Convention is at Question 2 of Lord Ackner’s judgment, in
which he refers to Quazi v Quazi and relies on Lord Diplock’s assertion in that case that the
purpose of the Recognition of Divorces and Legal Separations Act 1971 was to enable the
UK to give effect in its domestic law to the 1970 Hague Convention. Lord Diplock described ‘
the mischief which the Convention was designed to cure as that of ‘limping marriages’, that
is to say ‘marriages that were recognized in some jurisdictions as having been validly
dissolved, but in other jurisdictions as still subsisting’.

Lawrence v Lawrence [6][23] Purchas LJ stated that ‘The object of the signatories to the
Convention was ‘desiring to facilitate the recognition of divorces and legal separations
obtained in their respective territories’. He quoted Lord Diplock in Quazi v Quazi at para
805A that ‘The solution adopted by the Recognition Convention was to require all contracting
states to recognize as valid grounds of jurisdiction in matters of divorce and legal separation
all three concepts, nationality, domicile and habitual residence.’ On the assumption that all
signatory states have passed domestic legislation in accordance with article 11, any
remarriage in a signatory state will be valid by the lex loci contractus and recognized in the
United Kingdom. To go beyond this may well cause difficulties. Suppose that the wife had
remarried illegally in Brazil, it is unlikely that Parliament intended that the United Kingdom courts should nevertheless recognize such a marriage.

It is undoubtedly a fairly simple legal instrument. It has none of the complexities (and undesirable elements) of the Brussels Regulation, even in the context of recognition of divorces across the EU. For this reason it is simple to use and would not cause any major difficulties. Circumstances of refusal of recognition are fairly limited. There is a general public policy basis for refusal. The invariable objection to recognition is failure of the respondent to have been properly notified and so able to take part in the proceedings, and this is specifically covered in the Convention.

It’s simplicity should not detract from its simple effectiveness. It does what it says. It provides a basic resolution for mutual recognition of divorces and legal separations pronounced according to the law of the country where it occurs and as officially recognised and legally effective in that country.

It is difficult to understand why this 1970 Convention, already in place and already operating between 20 countries, should not take the place of Brussels II. Of course the EU would have to enter into it on behalf of all EU member states because it demands the exclusive legal and political competency to do so. There is no good reason why the EU should not use this international law in order that UK divorces are recognised across the EU and EU member states are confident that divorces in their countries will be recognised in the UK.

Most crucially this is without the imposed wide jurisdiction rules and jurisdiction criteria of the race to court. It is these elements which have brought the criticism of this EU law. BII is not needed if the intention is only to have the recognition of foreign family court orders, as the House of Commons strongly recommended should prevail.

The UK government is invited to give serious consideration to this international legislation as one way forward in the negotiations for the benefit of international families

**Deciding Forum**

Where two or more countries could deal with proceedings, a decision has to be taken as to which country will do so. The EU introduced in March 2001 in Brussels II a forum test which was at best experimental and is not used by any other group of countries around the world. It is simply who is first to commence proceedings, technically lis pendens. This created the race to court. In the opinion of some lawyers, it has been an appalling law creating much unfairness\(^\text{[24]}\). In contrast to government promotion of mediation, it is a direct discouragement to mediation and settling cases before commencement of proceedings\(^\text{[25]}\). It is a direct discouragement to reconciliation and attempting to save savable marriages\(^\text{[26]}\), also contrary to government policy. It accelerates the breakdown of a marriage. It favours the wealthy spouse able to engage in forum shopping and therefore issue the proceedings in the most financially advantageous country. My firm has been involved in countless cases of racing to court. We have won many of them for the advantage of our clients because we are
specialist and geared up to make sure we can act very quickly. But these have not been cases necessarily where the proceedings have been in the country with the closest connection to the family. It has simply been racing and winning.

The House of Commons Justice Committee Report rightly refers to this controversy with Brussels II. It referred to many witnesses, oral and written, criticising the frequent race to issue. It referred to the FLBA saying that the more legally astute spouse, often the financially stronger spouse, can arrange to win the race in the favoured jurisdiction. Many practising lawyers and judges have condemned this law as very unfavourable on the financially weaker spouse, and being very arbitrary and unfair. Resolution said that it prevents opportunities for families to mediate and reconcile. The report states that the FLBA agreed absolutely with my firm’s claim in our written submissions that Brussels II discourages mediation and can accelerate the breakdown of savable marriages. The Report did not mince its words in its criticisms of this forum criteria adopted by the EU and the very adverse consequences of Brussels II.

So I and others have argued strongly over many years for it to be removed. Indeed, lately, the EU acknowledged its disadvantages and invited discussion of a hierarchy of jurisdiction. But then when the proposed amendments to the Brussels Regulation were published in June 2016, there was no change.

With the rest of the world, our country adopts a forum criteria\[27\] of which country has the closest connection with the family. We are presently in a cleft position of having one forum test with the EU which involves racing to court and another forum test with the rest of the world of closest connection where tactical manoeuvring of racing to issue is deprecated. Closest connection is in English statute law with significant case law in the civil jurisdiction is

Putting EU divorce law put into national law without reciprocity will not produce any answer to forum criteria. Unless there is reciprocity, the forum criteria will not apply between the UK and the EU, even if there was any support for the continuance of racing to court. There is no point in domesticating this forum law into national law. There is no gap or vacuum to be filled as the closest connection forum test is already there and presently used with non-EU cases. The UK should have one forum criteria law for all proceedings involving any other country around the world, namely the traditional common law approach of which country has the closest connection. This meets a fairness and understanding of ordinary people and is well developed in case law. It is the same law as many other countries with which we have international family connections. So the EU divorce forum criteria should not be put into national law and is not needed for our national law

David Hodson OBE

The International Family Law Group LLP
[2] In preparation for our discussions I prepared a note on divorce jurisdiction in a number of common law countries so that in the now global family law tradition, we could all usefully borrow what everyone else was doing! A copy is available from dh@davidhodson.com

[3] Although this conflicts with the government Great Repeal Bill White Paper

[4] See article: “What is jurisdiction for divorce in the EU?” by David Hodson at (2014) IFL 170


[8] Art 1

[9] Art 1

[10] Art 2

It has been judicially criticised in England as arbitrary and unfair.

The risk is that in proposing mediation or other attempts to settle a case before proceedings, the other party immediately goes to their favoured jurisdiction and issues first and thereby gains forum.

On a similar basis to the above footnote, if a party tells the other spouse of unhappiness in the marriage but wanting to save the marriage, the risk is the other spouse immediately issues proceedings in the more favourable jurisdiction and thereby most definitely ensures the marriage would not be saved.
Para 9 Sch 1 DMPA 1973.

Source URL (modified on 23/06/2017 - 9:51am): https://www.iflg.uk.com/guidance/divorce-jurisdiction-and-forum-after-brex