

Deal or No Deal ... Divorce Tourism set to stop?



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In the recent Supreme Court case of *Villiers v Villiers* where a Scottish husband had lodged a writ for divorce in Scotland but his wife, now habitually resident in England, issued a financial claim against him in England and Wales was able to pursue her claim, being so permitted under the current EU law, was described by Lord Wilson (who gave dissenting judgment) to provide:

‘...untrammelled licence given to a wife to go forum shopping, in other words put her husband at an initial disadvantage unrelated to the merits of the case’.

The European Union (Withdrawal) Act 2018 repealed the 1972 European Communities Act, the legislation which enabled the UK to become a member of the EU. The EU legislation of interest to family lawyers are: (i) Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility ('Brussels IIA'); and (ii) Council Regulation (EC) No 4/2009 on jurisdiction applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ('The EU maintenance regulation').

Until 11 pm on 31st December 2020 the European Law directly applicable to the UK has been retained. With no deal in sight what will happen after this is currently anyone's guess.....

Under current EU rules where a husband and wife are citizens of one EU member state but living in another member state the issue as to which country is to determine their divorce is governed by Brussels IIA. For example, if a divorce petition is issued in England and Wales then that is where the divorce will proceed. However, if a divorce petition is issued first, for example, in France, then the divorce will take place there. If one party to the divorce issues their divorce petition in a different EU country after the first divorce petition then under current EU law, save for in particular circumstances, they would not be able to proceed with their application, and the party who was 'first in time' will have the advantage. In some cases, individuals will fly to London and file for divorce hours before their spouse attempts to start the process in a less favourable jurisdiction.

After 31 December this may no longer be the case, and there is a risk that there may be decisions given by different courts from different countries both asserting that they are the appropriate court to hear the divorce. All this is likely to result in lengthy and expensive legal argument as to which country has jurisdiction based on the parties' connection to that country, the location of their assets, the availability of witnesses and other matters concerning convenience. This will inevitably leave litigants bewildered as to how to avoid this. This is also likely to lead many contemplating marriage and seeking to enter into a prenuptial agreement to think very carefully about where they should agree their future divorce is going to take place.

It would appear that there is general agreement with the EU that in the event of a no deal then existing cases that have already been commenced will continue under the current rules, but those that are brought after the end of the transition period will not. This may present litigants currently on the cusp of bringing court proceedings with an incentive to act promptly.

The other important aspect of divorce proceedings is enforcement. It is all very well and good getting a good divorce deal but getting someone to pay up is a different matter. Currently, an English divorce is recognised in any EU country by virtue of the EU Maintenance Regulation. It is currently a relatively simple process to enforce an order, for example, made by the courts in the UK in France by obtaining a certificate of recognition.

Come January however this will no longer be the case, and whilst some EU countries like the UK are signatories to The Hague convention, which will likely allow for recognition, not all EU countries are signatories to these conventions.

The EU has indicated that in circumstances where proceedings for a maintenance order have started before the end of the transition period then any order made will still be enforceable in accordance with the EU Maintenance Regulation, however, for those orders made after the end of the transition period the position is very uncertain.

This uncertainty brought about by Brexit is likely to cause many litigants caught up in the jurisdictional wrangle much anxiety, delay and expense. From a practitioner's perspective it is important to give advice as soon as possible as to range of possible future outcomes, encourage efforts to seek to resolve jurisdictional issues by agreement and advise clients of the cost implications of fighting jurisdictional arguments.

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