

Cross border couples looking to divorce need to act now

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At 11 pm on 31 December 2020, the Brexit transition period will come to an end, and with it, the legislation which currently governs jurisdiction, recognition and enforcement in children and divorce cases in UK.

This article will explore the implications of the UK's exit on those in the midst of a divorce or dispute over arrangements for their children, and how these potential difficulties may be tackled.

Currently the recognition and enforcement of a divorce, consequent financial arrangements, and child arrangements orders are automatically recognised in other EU countries pursuant to Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (otherwise known as 'Brussels IIA').

Currently, a wife living in England, with the benefit of a maintenance order against her ex-husband, who now lives in Germany, has the security of being able to automatically enforce such an order in Germany pursuant to the EU Maintenance Regulations (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')) should he stop or refuse to pay her. The position after 31st December, in the event of a 'no deal', will be far less certain.

Under current EU rules where a husband and wife are citizens of one EU member state but are living in another member state, the issue as to which country is to determine their divorce is governed by the Brussels IIA regulations. 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.

Recognition of divorces will likely be determined pursuant to the 1970 Hague Convention on the Recognition of Divorces and Legal Separations. The problem is that not all EU countries are signatories to this Convention, and the legislation does not provide for recognition where jurisdiction for the divorce is based on sole domicile of a party to the marriage. In these circumstances the recognition of, for example, a UK divorce in Germany will depend on German law.

In respect of maintenance, the 2007 Hague Convention on International Recovery of Child Support and Other forms of Family Maintenance will provide litigants with a potential means of enforcement of an English order in an EU country. However, this legislation contains provision which allows for the recognition and enforcement of maintenance order to be denied. Issues may become more streamlined and akin to the existing EU Maintenance Regulations if the UK becomes a signatory to the Lugano Convention but currently it is not.

In respect of Child Arrangement order and their enforceability in other EU states parents can look to the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, which already applies to the enforcement of orders between, for example the UK and USA or Australia. Litigants will need to ensure orders are registered in the jurisdiction where they seek to enforce prior to any application for enforcement.

There is, however, something litigants seeking to avoid this uncertainty can do, but they will need to act quickly! It is understood that in the event an application or petition is issued before the end of the transition period then the terms of Brussels IIa and the Maintenance Regulations will continue to apply even if a final order is not made until long after the UK leaves the EU. Therefore, litigants may be well advised to make their applications in good time before the 31 December if they want to ensure that the existing arrangements are going to apply to their case. It looks quite likely the courts may well be swamped with applications in the run up to the end of the year!