

Deal, what deal?



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A Family Lawyer's perspective on UK-EU "Trade and Cooperation Agreement"

Last January, I wrote an article entitled: **"No-deal Brexit would cut children adrift"**

A long tradition of cross-border co-operation and recognition of judgments is close to being abandoned"

In it I said, Cassandra like:

"As we approach the eve of Brexit, not even to have an agreement regarding reciprocal enforcements of orders and legislation in the relatively small world of private (and public) family law is profoundly worrying."

Of course since then the world has turned on its axis and The Great Pandemic has struck. This has added to the isolation of this country, as one reads of lorries queuing at Dover, Britain no longer being part of the European arrest warrant system and UK passport holders not being allowed to board planes go home to Spain, where they are resident. Britain's Covidity (is that a word? - it should be) has poured kerosene on the embers of Brexit to reignite the whole debate again-albeit too late. Yes there has been a deal struck but not on family law matters and the eleventh hour haggling and posturing, in any event would not have helped the process of careful contemplation on how to create a workable system of automatic recognition of judgments concerning families, who move from one country to or from UK. That was not a priority in the Brexit talks and it is a lost opportunity, which will cause much work for the mandarins in Whitehall and Brussels in the years to come.

The Brexit trade agreement was just that: focusing on trade but the issues that effect our day to day family lives: divorce cases and parental separation cases, where for example one party has an order in

a foreign country, after expensive litigation and wants to have it reflected here, were it seems put on the back burner. Interpretation of EU instruments that bind one country but not UK will not be referable to the CJEU under the 'PPU' procedure anymore, but perhaps the rare case will find itself before the newly coined "Partnership Council". Binding arbitration is not a foreign concept to Family Law (forgive the pun) but to leave issues of interpretation of sensitive family law cross-border disputes to a non-judicial body, which will deal mostly with esoteric points on trade, would probably result in what lawyers call 'perverse' decisions.

Increasing certainty of European legal principles over the last few decades, when one has been dealing with cross-border disputes involving children has been a bedrock of our legal system. Local authorities in public law matters have had a structure to liaise with their foreign EC counterparts, the procedure under the 1980 Hague Child Abduction Convention has been tightened, the codification for one country to transfer proceedings to another country within the EU, to name but three examples, have all led to swifter, more child-centric decisions. But now without instruments like EC Regulation 2201/2003 (BIIr) in place and with the EU moving on with a 'recast' model, while the UK has to fall back on older treaties, such as the 1970 (which only 12 EU countries have signed up to) and the 1996 Hague Conventions, the real fear is that adults and children involved in complex cross-border cases could suffer from slow decision making and the type of xenophobia that Britain's covidity has engendered in other EC countries.

Take the scenario of a separating parent wanting to move to France with his or her children, the system of automatic recognition in France of any English orders for contact (and financial maintenance) to (and from) the other parent has now been lost, the potential for re-litigation in France would be inescapable. This is how the Brexit talks have let our society down: by ignoring the children and adults who are the subject of cross-border litigation and acrimonious contact and financial disputes (of which there is a rising number) and not even putting in a holding system, while a suitable alternative (e.g. independently joining The 2007 Lugano Convention) is negotiated. The 'non-regression' clause (whereby the UK could move away from EU law as long as overall common standards are not undercut) could have expressly included private and public family law but, again, an opportunity has been missed.

Now that the concept of '*Lis pendens*' has been abolished, it will be replaced by another Latin phrase: "*forum conveniens*". In other words there will be arguments about the appropriate forum (i.e. which court in which country is best placed to make decisions) rather than the 'first past the post' principle and the process is likely to be much harder, costly and more time consuming.

The effluxion of time is no friend of children, who are growing up during complex cross border litigation, or of parties whose finances have been mummified in international red tape. It seems that the fate of children and separating adults has been sacrificed on the altar of sovereignty, at least in the short term.