BREXIT

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Since the UK referendum to withdraw from the EU, family lawyers not only in the UK but in Europe in particular have been anxious to understand its impact on the future practice of financial remedies on divorce. In this article, through the use of a practical case study and various scenarios, we explore the recognition and enforcement of maintenance orders made before and after Brexit under the 'old' and 'new' regimes.

Brexit and the transition period

The UK formally left the EU at 11pm on 31 January 2020, but there was then a transition period while remaining negotiations took place and during the transition period EU law continued to apply. The transition period ended at 11pm (GMT) on 31 December 2020. The end of the transition period is also known as implementation period (IP) completion day.

The Withdrawal Agreement is the agreement between the UK and EU made on 17 October 2019 and in force from 11pm on 31 January 2020. The Withdrawal Agreement is implemented in UK law by the European Union (Withdrawal Agreement) Act 2020 (which also amended the European Union (Withdrawal Agreement) Act 2018). Key aspects of the Withdrawal Agreement are:

- **Art 67(1)**: which provides that the jurisdiction provisions of:
    - Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels IIA or Brussels II bis); and
    - Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and co-operation in matters relating to maintenance obligations (the Maintenance Regulation),

  will apply in respect of legal proceedings (or related actions) instituted before the end of the transition period; and

- **Art 67(2)**: which provides that the provisions of Brussels II bis and the Maintenance Regulation as recognition and enforcement shall apply to judgments given in legal

proceedings instituted (and court settlements approved or concluded) before the end of the transition period.

Key regulations and international instruments

The Maintenance Regulation provides a comprehensive system of rules between EU member states relating to jurisdiction, recognition and enforcement (and cooperation) in relation to maintenance obligations. This was in force in the UK from 18 June 2011 to 31 December 2020 and thereafter only applies to cases where the terms of Art 67 of the Withdrawal Agreement (as noted above) apply.

Under the Maintenance Regulation, 'maintenance' means a needs-based claim. The jurisdiction rules include priority for the court seised first (ie a race to court where there is jurisdiction) to avoid parallel proceedings. The aim is for a maintenance creditor to obtain a decision in one member state and have it easily recognised and enforced in other member states. The maintenance 'creditor' is the recipient, the 'debtor' is the payer and the 'defendant' is the respondent to the action.

The 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (2007 Hague Convention) is intended to provide a simple, quick and efficient system for the reciprocal enforcement of child maintenance and other forms of family maintenance between contracting states. The UK was a member of the 2007 Hague Convention by virtue of its EU membership, but from 1 January 2021 the UK is a member in its own right. The 2007 Hague Convention now governs the issue of recognition and enforcement of maintenance orders between the UK and EU (in place of the Maintenance Regulation). The terminology is similar, ie creditor/debtor/respondent.

Key definitions

When considering issues of jurisdiction, regard should be had to the application or otherwise of the following:

- **Indirect jurisdiction rules**: this is when the basis of jurisdiction used when the order was made must be checked at the stage of recognition and enforcement, rather than at the time of the proceedings giving rise to the order being issued (see Art 20, 2007 Hague Convention).
- ***Forum (non) conveniens***: an English common law doctrine whereby a court may stay proceedings on the basis that there is another forum which is clearly more convenient or appropriate.
- ***Lis pendens***: the rules which regulate the situation where the same action between the same parties is pending in two different states. The court first seised has priority and the court second seised must stay its proceedings (see Art 12, Maintenance Regulation and Art 27, 2007 Lugano Convention). This is linked with the 'related actions' rules, where there is a discretion for the court second seised to stay its proceedings where the actions are related, ie so closely connected that they may result in irreconcilable decisions (see Art 13, Maintenance Regulation and Art 28, 2007 Lugano Convention).

Case study

George, a British citizen, and Lina, a Belgian national, married in London where they lived for seven years until their separation. They reached an agreement about the resolution of their finances post-divorce which was set out in an English consent order. They have two children, Alexandre and Marie, who have remained in their mother's care since separation but spend time regularly with their father. George pays Lina global maintenance of £5,000 per month on a joint lives' basis.

Lina is a private school teacher. A few years following the separation, she decides to return to Brussels with the children to be close to her parents, who are unwell. Lina is able to transfer to a job with equivalent pay and the children start new schools in Brussels.

George is employed by a bank in London. Due to continued losses sustained by the bank, George is required to take a temporary 15% reduction of earnings. The bank then offers George a promotion to a role in Frankfurt with the prospect of further promotion and increased earnings. George accepts the promotion and moves to Frankfurt. However, he soon finds it unpalatable and he returns to England and is re-engaged in his previous post in London. The bank has not fared well and his pay remains at the lower level from the previous reduction.

Lina has taken up a new post at a private school in Brussels, where Alexandre has won a scholarship. Her pay is 10% higher than in her previous post. George has informed Lina that he can no longer afford maintenance at £5,000 per month and has unilaterally reduced this to £2,500 per month. Lina's pay increase cannot cover the difference and she seeks advice about enforcement and potential variation.

This case study will be applied in a number of different scenarios, with different timelines as to the issue of proceedings and consequently differing applicable regimes, as detailed below.

Proceedings instituted before the end of the transition period

In this scenario, George and Lina had their consent order approved on their divorce on 23 June 2016, the day before the Brexit referendum. George reduces payments while Lina is living in Brussels and he is back in London, so Lina issues enforcement proceedings in London on 15 December 2020 as George's salary is paid into an English bank account. George issues variation proceedings in Brussels on 15 January 2021, since this is where Lina, as the 'creditor' and defendant (respondent) to his application, is habitually resident.

Using the Maintenance Regulation

Under Art 67(2), Withdrawal Agreement, Lina can use the Maintenance Regulation to enforce the maintenance order against George in London because the order arises out of proceedings instituted before the end of the transition period. It does not matter when the final consent order was made, and Lina does not need to have commenced the enforcement action before the end of the transition period.

The *lis pendens* rules

Under Art 67(1), Withdrawal Agreement, George will be bound by the jurisdiction and forum provisions of the Maintenance Regulation because proceedings in a related matter were already ongoing in England and had started before the end of the transition period. Therefore the Withdrawal Agreement is engaged and accordingly the *lis pendens* provisions of the Maintenance Regulation apply. While Lina's enforcement and George's variation proceedings are not the 'same cause of action', they are 'related', which could result in inconsistent judgments. Consequently, as the court in Brussels is seised second in time, it has a discretion to stay the variation application (see Art 13, Maintenance Regulation). If the parties' actions were the same, ie both applied for variation in each country, then Art 12, Maintenance Regulation would apply and the court second seised *must* (rather than *may*) stay its proceedings.

'Instituting proceedings'

George and Lina separated in London during 2020. Lina issued her divorce petition in December 2020, ticking the prayer at the end for financial relief but not issuing an application in Form A until January 2021.

There is currently uncertainty in this scenario because 'instituting' proceedings is not defined in the Withdrawal Agreement. It is not clear if either:

- the divorce prayer before the end of the transition period on 31 December 2020 is sufficient to institute maintenance proceedings; or
- issuing Form A before 11pm on 31 December 2020 is required for proceedings to be instituted,

so that the Withdrawal Agreement applies to allow Lina to use the Maintenance Regulation for enforcement of the resulting order.

A decision on this issue will no doubt be made at some point, but in the meantime practitioners should be alert to the uncertainty.

Proceedings instituted after the end of the transition period

In this scenario, George and Lina separated in London during 2021 and their divorce and financial proceedings start (and finish) in London in 2021. Lina has moved to Brussels and

George to Frankfurt. Lina wants more maintenance but George wants to reduce his obligations and stops paying at the level under the current order. Lina issues a fresh application in London on 1 May 2023 to vary upwards the original order but George synchronises his own application to vary downwards in Brussels on the same day, as that is the place where Lina is now living.

Jurisdiction

The Maintenance Regulation continues to apply in Belgium but not in London, which will apply its own domestic law to determine jurisdiction. The terms of the Withdrawal Agreement and therefore the Maintenance Regulation are not applicable, as the proceedings are commenced in 2023, well after the end of the transition period.

There are no jurisdiction grounds specified in s31, Matrimonial Causes Act 1973 (MCA 1973), so this is an issue that will need to be clarified as case law develops. This is in contrast to, for example:

- ss27 (financial provision in cases of neglect to maintain) or 35 (alteration of agreements by court during the lives of the parties), MCA 1973;
- Sch 1, Children Act 1989, which has been amended to set out new rules of jurisdiction at para 14; and
- Pt III, Matrimonial and Family Proceedings Act 1984 (MFPA 1984), which also contains jurisdiction rules in s15, MFPA 1984.

As she is the creditor, and Belgium is her habitual residence, Lina could have applied in Brussels (as George has done) or indeed in Frankfurt where George is habitually resident, but she feels she can achieve a better outcome in London and wants to try that option. She therefore brings her application to vary in London on the basis it made the original order (but no representations are made as to whether or not this is in fact a proper or valid basis of variation jurisdiction).

Although there will be no international convention with *direct* rules of jurisdiction working in the same way as the Maintenance Regulation regime, the 2007 Hague Convention will apply in both the UK and Belgium. Article 18, 2007 Hague Convention is the only provision that directly affects jurisdiction and it limits the ability to bring variation applications in another state when the creditor remains habitually resident in the state that made the original order. However, that does not apply in this scenario as Lina has moved from England to Belgium since the consent order was made.

Competing proceedings

George wants to argue that the variation case should be dealt with in Belgium. He applies to the English court for a stay of the English proceedings. The London court determines this issue on the basis of *forum non conveniens* as it is no longer bound by the jurisdiction and forum regime of the Maintenance Regulation.

The Brussels court is still bound by the Maintenance Regulation. In light of the Court of Justice of the European Union decision in *R v P* [2019] (see especially paras 42-44), it is unclear whether the court in Brussels will have the power to stay its proceedings in favour of a third state, ie England and Wales, even if it felt that England and Wales is better placed to hear the dispute. If *R v P* is limited to regulating matters between EU member

states, it will instead be a matter of Belgium's private international law rules as to whether or not it can (and if so, should) stay the case there so that it can be heard in England. In some EU countries, timing will still be very important, ie being first to court. The parties must take legal advice from Belgian lawyers to understand the law there to inform their decisions in the English litigation.

What if the court in England and Wales was to issue a *Hemain* injunction (per *Hemain v Hemain* [1988]) against George to stop him litigating in Brussels about the variation? It is a serious issue for George to consider if he is living in London, but if he is living elsewhere, he might wonder how it would be enforced.

Enforcement and 'indirect' rules of jurisdiction

The 2007 Hague Convention will apply as between England and Wales and EU member states for new cases and orders arising after the end of the transition period. If Lina achieves a variation in England in 2023, could she then use the 2007 Hague Convention to enforce her new English varied order against George in Frankfurt where his salary is paid?

There are indirect jurisdiction rules set out in Art 20, 2007 Hague Convention which must be considered on enforcement. This means that the basis of jurisdiction used when the order was made must be checked at the stage of recognition and enforcement (rather than at the time of the proceedings giving rise to the order being issued). Art 20(1) provides:

> *A decision made in one Contracting State ('the State of origin') shall be recognised and enforced in other Contracting States if –*
>
> > *a) the respondent was habitually resident in the State of origin at the time proceedings were instituted;*
> > *b) the respondent has submitted to the jurisdiction either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity;*
> > *c) the creditor was habitually resident in the State of origin at the time proceedings were instituted;*
> > *d) the child for whom maintenance was ordered was habitually resident in the State of origin at the time proceedings were instituted, provided that the respondent has lived with the child in that State or has resided in that State and provided support for the child there;*
> > *e) except in disputes relating to maintenance obligations in respect of children, there has been agreement to the jurisdiction in writing by the parties; or*
> > *f) the decision was made by an authority exercising jurisdiction on a matter of personal status or parental responsibility, unless that jurisdiction was based solely on the nationality of one of the parties.*

If the order being enforced had been made by a court where both parties were, or at least the maintenance creditor was, habitually resident at the time, Art 20, 2007 Hague Convention is easily satisfied. However in this scenario, where Lina applied to vary in England (where neither of them was living and did not formally agree to the jurisdiction), it is arguable that none of the jurisdiction provisions of Art 20 can be satisfied. Lina could

perhaps rely on Art 20(1)(b) if George had engaged in the English proceedings without contesting jurisdiction, but otherwise, she may fail.

Another example of future enforcement problems which could arise would be if the maintenance order Lina was enforcing had been based on an original divorce made in London in reliance upon George's sole domicile in England. This might have been the case if the whole family had moved to Frankfurt before the parties separated and Lina had then petitioned in England using George's sole domicile (in the new regime post-Brexit, 'sole domicile' is now promoted to a main basis of jurisdiction under the amended jurisdiction provisions for divorce, see s5, Domicile and Matrimonial Proceedings Act 1973; it is no longer a 'residual' jurisdiction as it was under Brussels II bis).

Article 20(1)(f), 2007 Hague Convention rules out 'sole *nationality*' as a jurisdictional basis for a maintenance order when connected to divorce proceedings. There is no provision in the 2007 Hague Convention as there was in the Maintenance Regulation/Brussels II bis to read 'domicile' in place of 'nationality'. It is not known if the Frankfurt court would consider the 'sole domicile' jurisdiction ground to be equivalently unacceptable. If it did, would it use the public policy discretionary ground in Art 22(a), 2007 Hague Convention to refuse recognition and enforcement? (See also below.)

Grounds to refuse to recognise and enforce

At the recognition and enforcement stage, the court also has further grounds to refuse to recognise and enforce a decision on a discretionary basis as set out in Art 22, 2007 Hague Convention. Art 22 provides:

> *Recognition and enforcement of a decision may be refused if –*
>
> > *a) recognition and enforcement of the decision is manifestly incompatible with the public policy ('ordre public') of the State addressed;*
> > *b) the decision was obtained by fraud in connection with a matter of procedure;*
> > *c) proceedings between the same parties and having the same purpose are pending before an authority of the State addressed and those proceedings were the first to be instituted;*
> > *d) the decision is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that this latter decision fulfils the conditions necessary for its recognition and enforcement in the State addressed;*
> > *e) in a case where the respondent has neither appeared nor was represented in proceedings in the State of origin –*
> > > *i) when the law of the State of origin provides for notice of proceedings, the respondent did not have proper notice of the proceedings and an opportunity to be heard; or*
> > > *ii) when the law of the State of origin does not provide for notice of the proceedings, the respondent did not have proper notice of the decision and an opportunity to challenge or appeal it on fact and law; or*
> > *f) the decision was made in violation of Article 18.*

If the Belgian court decides *not* to stay George's variation proceedings and continues in parallel to Lina's variation application in London, Lina may face additional difficulties when enforcing her new English varied order in Frankfurt later in competition with a new varied order from Belgium obtained by George. Article 22(d), 2007 Hague Convention would mean that if the decision was reached in Belgium first with the same purpose between the same parties, which would have fulfilled the conditions for recognition and enforcement in Frankfurt, then the Frankfurt court could choose not to recognise and enforce the English order. So it might not only be a race to bring proceedings (if timing still matters under the private international law rules of the individual EU member states), but a race to a decision.

Therefore, before embarking on any application where jurisdiction is questionable, even though there is no universally applicable instrument about jurisdiction and forum anymore (as there was with the Maintenance Regulation), it is vital to consider these issues at the outset due to the 'indirect' jurisdiction rules which apply if enforcement abroad in a 2007 Hague Convention country is likely to be required. Failure to do so risks Lina using up valuable time and money fighting for an order she may then struggle to enforce.

Note on the 2007 Lugano Convention

The UK was party to the 2007 Lugano Convention by virtue of its prior EU membership. It no longer applies in the UK since the end of the transition period. The UK applied to become a member of the 2007 Lugano Convention in its own right on 8 April 2020, but that application is still to be determined at the time of writing. The 2007 Lugano Convention is similar to the position under Brussels I (the forerunner to the Maintenance Regulation) and covers jurisdiction, forum, recognition and enforcement but with no central authorities. It only applies to defendants (respondents) 'domiciled' in a convention country (currently the EU, Switzerland, Iceland and Norway). Note should be made of the very particular definition of 'domicile' previously per s41A, Civil Jurisdiction and Judgments Act 1982. The 2007 Lugano Convention has specific additional rules for jurisdiction in maintenance cases. Practitioners should be alive to whether, and if so when, the 2007 Lugano Convention were to come into force in the UK as it will represent another sea-change in the approach to issues of jurisdiction, forum and recognition and enforcement in maintenance cases. A further article will follow if that situation does arise.

Conclusion

In this article, we have highlighted the uncertainties and challenges we face in recognising and enforcing maintenance awards made before and after the Withdrawal Agreement. A careful, early and ongoing evaluation of what is achievable in competing jurisdictions will be crucial in ensuring we best advise our clients.

Cases Referenced

- Hemain v Hemain [1988] 2 FLR 388
- R v P [2019] EUECJ C-468/18

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