

BREXIT The consequences for Family Law: jurisdiction and enforcement in cross-border disputes – an English perspective

A paper by

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Annual FBL S Colloquium 2018 – Brexit: the practical and legal consequences for the constituent parts of the UK and France, including the devolved administrations (Friday 28th September 2018, Scottish Parliament, Edinburgh)

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Whatever the ultimate outcome of the ongoing BREXIT negotiations (about which, I emphasise, I know nothing beyond what is in the public domain, the key question for family lawyers must be the effect of BREXIT on *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, repealing Regulation (EC) No 1347/2000*, which I shall refer to as BIIR.

BIIR is central to the daily functioning of English family courts at all levels. Unless its reciprocally operating provisions can be preserved, whether (which seems unlikely) in its present form or (as one would hope in that event) in the form of some reciprocally enforceable substitute negotiated between the UK and the EU, the consequences for English family law, and indeed for the family law of all the member states of the EU in their dealings with England and Wales, are potentially significant.

Until very recently the Government's thinking on the issue was a mystery. However, on 13 September 2018 the Government published *Guidance: Handling civil legal cases that involve EU countries if there's no Brexit deal*, which, despite its title, deals also with family cases. The *Guidance* provides much illumination, though some things remain obscure.

Before proceeding any further, it may be helpful to set out the 'big picture', as I see it.

In recent years, and due in large measure to the tireless work of Sir Mathew Thorpe, English family lawyers have become all too aware of what I have called "the sins of insularity": see *In re E (A Child) (Care Proceedings: European Dimension) Practice Note* [2014] EWHC 6 (Fam), [2014] 1 WLR 2670, paras 17, 20, where I said this:

"17 The English family justice system is now part of a much wider system of international family justice exemplified by such instruments as the various Hague Conventions and, in the purely European context, by BIIR. Looking no further afield, we are part of the European family of nations. We share common values. In particular in this context we share the values enshrined in BIIR.

20 Perhaps I may be permitted in this context to repeat what I said in an address at the International Hague Network of Judges Conference at Windsor on 17 July 2013:

“Over the last few decades inter-disciplinarity has become embedded in our whole approach to family law and practice. And international co-operation at every level has become a vital component not merely in the day-to-day practice of family law but in our thinking about family law and where it should go ...

For the jobbing advocate or judge the greatest changes down the years have been driven first by the Hague Convention (now the Hague Conventions) and more recently, in the European context, by the Regulation commonly known as BIR. They have exposed us, often if only in translation, to what our judicial colleagues in other jurisdictions are doing in a wide range of family cases. They have taught us the sins of insularity. They have taught us that there are other equally effective ways of doing things which once upon a time we assumed could only be done as we were accustomed to doing them. They have taught us that, beneath all the apparent differences in language and legal system, family judges around the world are daily engaged on very much the same task, using very much the same tools and applying the same insights and approaches as those we are familiar with. Most important of all they have taught that we can, as we must, both respect and trust our judicial colleagues abroad.

It is so deeply engrained in us that the child’s welfare is paramount, and that we have a personal responsibility for the child, that we sometimes find it hard to accept that we must demit that responsibility to another judge, sitting perhaps in a far away country with a very different legal system. But we must, and we do. International comity, international judicial comity, is not some empty phrase; it is the daily reality of our courts. And be in no doubt: it is immensely to the benefit of children generally that it should be.”“

In fact, this approach goes back a long way.

In 1881 our Court of Appeal had to consider the status of a foreign child, legitimated by the subsequent marriage of her parents at a time when that doctrine was not part of English domestic law, though it was in Scots law: *In re Goodman’s Trust* (1881) 17 ChD 266. The judgment of James LJ (pages 296-297) is a ringing declaration, couched in high Victorian judicial rhetoric, of the imperative demands of international judicial comity:

“What is the rule which the English law adopts and applies to a non-English child? This is a question of international comity and international law. According to that law as recognised, and that comity as practised, in all other civilized communities, the status of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of the country of his origin—the law under which he was born. It appears to me that it would require a great force of argument derived from legal principles, or great weight of authority clear and distinct, to justify us in holding that our country stands in this respect aloof in barbarous insularity from the rest of the civilized

world. On principle, it appears to me that every consideration goes strongly to shew, at least, that we ought not so to stand. The family relation is at the foundation of all society, and it would appear almost an axiom that the family relation, once duly constituted by the law of any civilized country, should be respected and acknowledged by every other member of the great community of nations. England has been for centuries a country of hospitality and commerce. It has opened its shores to thousands of political refugees and religious exiles, fleeing from their enemies and persecutors. It has opened its ports to merchants of the whole world, and has by wise laws induced and encouraged them to settle in our marts. But would it not be shocking if such a man, seeking a home in this country, with his family of legitimated children, should find that the English hospitality was as bad as the worst form of the persecution from which he had escaped, by destroying his family ties, by declaring that the relation of father and child no longer existed, that his rights and duties and powers as a father had ceased, that the child of his parental affection and fond pride, whom he had taught to love, honour, and obey him, for whom he had toiled and saved, was to be thenceforth, in contemplation of the law of his new country, a fatherless bastard? ... Can it be possible that a Dutch father, stepping on board a steamer at Rotterdam with his dear and lawful child, should on his arrival at the port of London find that the child had become a stranger in blood and in law, and a bastard, *filius nullius*?

It may be suggested that that would not apply to a mere transient visit or a temporary commorancy, during which the foreign character of the visitor and his family would be recognised, with all its incidents and consequences, but that it would only apply to a man electing to have a permanent English domicil. But what could, in that view, be more shocking than that a man, having such a family residing with him, perhaps for years, in this country as his lawful family, recognised as such by every Court in the kingdom, being minded at last to make this country his permanent domicil, should thereby bastardize his children; and that he could re-legitimate them by another change of domicil from London to Edinburgh? And why should we on principle think it right to lay down a rule leading to such results? I protest that I can see no principle, no reason, no ground for this, except an insular vanity, inducing us to think that our law is so good and so right, and every other system of law is naught, that we should reject every recognition of it as an unclean thing."

Two things in recent years have driven us to a better appreciation of just what this means in terms of our daily practice in the family courts.

One is an increasing exposure and commitment to various international instruments. In addition to the Hague Conventions and BIIR, I have in mind, of course, the European Convention for the Protection of Human Rights and Fundamental Freedoms, domesticated into our law by the Human Rights Act 1998, and the United Nations Convention on the Rights of the Child, still not properly domesticated into our law.

We have been, I should like to think, loyal to the demands which our international obligations place upon us. Let me give just two examples.

From the earliest days of our domestic jurisprudence in relation to Article 13 of the 1980 Hague Convention on the Civil Aspects of Child Abduction, the English courts have set their face against arguments that the child if returned will be placed in an intolerable situation because of what are said to be shortcomings in the foreign state's legal or welfare systems: see for example, *Re M (Abduction: Undertakings)* [1995] 1 FLR 1021, pages 1026-7, where Butler-Sloss LJ said that "Israel has, as we would expect, a developed policy of State benefits, and it is not for this court to suggest that they would be inadequate, nor to delve unnecessarily into the details"; she went on to say that "this court must trust the Israeli judge, who will soon be dealing with this case, to do what is right for these children so that they would not be harmed by the return to Israel."

The other example relates to Article 23(a) of BIIR (Grounds of non-recognition for judgments relating to parental responsibility) where we have been astute not to refuse recognition to the foreign court's order merely because it is not an order an English judge would have made in the circumstances: see *Re L (Brussels II Revised: Appeal)* [2012] EWCA Civ 1157, [2013] 1 FLR 430, paras 46-53. Article 23(a), we said, "contains a very narrow exception and ... sets the bar very high."

In recent years we have become much more alert to, and, dare I say it, much more enthusiastic about exploiting, the full potential of BIIR, especially in cases involving children.

Thus, Article 15 of BIIR now features regularly in our daily practice. The family court, even if the parties do not raise the issue, is now expected to consider Article 15 in every case where there is an EU aspect: see *In re E (A Child) (Care Proceedings: European Dimension) Practice Note* [2014] EWHC 6 (Fam), [2014] 1 WLR 2670, para 31, where I said this:

"Assuming that the court does have jurisdiction, the judge in every care case with a European dimension will need to consider whether to exercise the court's powers under article 15 to request the court of another member state to assume jurisdiction ... A recent example of a care case where the courts of England and Wales were invited by the courts of the Republic of Ireland to accept jurisdiction is to be found in *In re M (A Child) (Foreign Care Proceedings: Transfer)* [2013] EWHC 646 (Fam), [2013] Fam 308. A very recent example of the process working the other way round in a care case is *In re D (A Child) (Transfer of Proceedings)* [2013] EWHC 4078 (Fam); [2014] Fam Law 280 where Mostyn J, on a mother's application, invited the courts of the Czech Republic to assume jurisdiction."

I made no secret of my thinking (paras 13, 15):

"13 ... there is a wider context that cannot be ignored. It is one of frequently voiced complaints that the courts of England and Wales are exorbitant in their exercise of the care jurisdiction over children from other European countries. There are specific complaints that the courts of England and Wales do not pay adequate heed to BIIR ...

15 It would be idle to ignore the fact that these concerns are only exacerbated by the fact that the United Kingdom is unusual in Europe in permitting the total severance of family ties without parental consent ... Thus the outcome of care proceedings in England and Wales may be that a child who is a national of another European country is adopted by an English family notwithstanding the vigorous protests of the child's non-English parents. No doubt, from our perspective that is in the best interests of the child – indeed, unless a judge is satisfied that it really is in the child's best interests no such order can be made. But we need to recognise that the judicial and other state authorities in some countries that are members of the European Union and parties to the BIIR regime may take a very different view and may indeed look askance at our whole approach to such cases.”

In a sense, the underlying point is encapsulated in the famous exhortation in the American Declaration of Independence to have “a decent respect to the opinions of mankind.”

I should add – and in a post-BREXIT context this may prove to be very important, as I shall suggest below – that in recent years family judges in England have been increasingly alert to the need to have regard to, and wherever appropriate follow, international norms and foreign jurisprudence even when there is no formal domestic legal imperative to do so. Two examples. English judges were already taking in to account, indeed, adopting and applying, the jurisprudence of the Strasbourg court well before the obligation to do so was imposed by section 2(1) of the Human Rights Act 1998. And family judges are increasingly applying the principles set out in the United Nations Convention on the Rights of the Child even in contexts where, because it has not yet been incorporated in our domestic law, there is no obligation to do so.

The background to all this, and the second preliminary point I need to make, is that changing family norms, the ever increasing movement of people around the world and within the EU, and the fact that the cost of travel is now so modest – it is cheaper to fly from one end of Europe to the other than to travel by train from London to Edinburgh – have vastly increased the number of cases coming before our family courts that have an international or European element. Judges at every level of the English family justice system are now familiar in their daily experience with cases where, although the parties may be habitually resident in this country in the technical BIIR sense, their family connections and emotional roots remain somewhere else.

If I seem to belabour some of these points, it is because, whatever the outcome of BREXIT, we are where we are. There can be no turning back the clock, no simple reversion to the *status quo ante* BIIR. A whole generation of family judges and family lawyers is now firmly acculturated not merely to the world of Hague but to the world of BIIR. They will not, I think, want to throw all this away. On the contrary, they will surely wish to ensure, so far as is possible, that BREXIT does not put the entire BIIR structure and approach at risk.

I turn, therefore, to consider to what extent this is going to be feasible in the light of the Government's recently published *Guidance*. My focus is on cases involving children, where at present BIIR has a dominating impact, rather than cases involving divorce or financial

remedies following divorce, where many of the most intractable cases with an international element because of the location of the parties, fall, in many of their aspects, outside the ambit of BIIR.

The Government's basic approach is set out as follows:

"We are a contracting state in our own right to a number of Hague Conventions on family law, which cover many of the same areas as the Brussels IIa and Maintenance Regulations. Where this is the case, we would repeal the existing EU rules and switch to the relevant Hague Conventions ... While there are some differences between the EU and Hague rules in these areas, the Hague Conventions provide an effective alternative to the EU rules."

For present purposes the most significant of the Hague Conventions is the 1996 *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*.

The *Guidance* continues by considering the situation where there are no corresponding Hague Conventions. The discussion focuses on divorce and related matters and says nothing about children. So, in relation to children, the Government's approach is, in essence, to substitute BIIR with the 1996 Hague Convention, on the basis that the latter provides "an effective alternative."

Is this assertion justified?

In considering this, it is important to recognise that the jurisprudence, both domestic, foreign and international, in relation to BIIR is more extensive and developed than in relation to the 1996 Hague Convention. So, an important question we will have to grapple with is the extent to which we should apply, in this new context, the familiar jurisprudence under BIIR.

My own view is that, wherever possible, and unless there is good reason to the contrary – either the imperative language of the 1996 Hague Convention or the established jurisprudence, where it exists – we should strive to interpret and apply the 1996 Hague Convention *mutatis mutandis* in a way which accords with the established jurisprudence in relation to BIIR.

Put shortly: our task, as I see it, is to apply the BIIR approach as best we can even if we are no longer formally subject to it and even if, formally, what we are doing is to apply the 1996 Hague Convention.

There are, it seems to me, two reasons why this is the right way forward. In the first place, it is the right thing to do: every experience shows that, fundamentally, BIIR works, for the benefit of families and children across the EU, including, of course, for the benefit of families and children in this country. We should not imperil all this unless and to the extent it is, or, as time passes, becomes, clear that the 1996 Hague Convention is better. Secondly, pragmatism marches side by side with principle: at present, within the EU the governing instrument, where it applies, is BIIR, not the 1996 Hague Convention (BIIR, Article 61), so if

we wish our colleagues in the EU to go on giving effect to our orders in the way that BIIR currently requires and with which they are accordingly familiar – and how can that not be what the interests of our families and children require? – then we are surely most likely to achieve that if we, for our part, give effect to judgments in other countries as best we can in the way in which, at present, BIIR requires us to do.

You would not, I think, thank me if I were now to embark upon a close comparative analysis of the provisions of BIIR as contrasted with the corresponding provisions of the 1996 Hague Convention. Can I illustrate my basic contention by making just three points?

Jurisdiction under Article 3 of BIIR, as under Article 5 of the 1996 Hague Convention, is essentially determined by habitual residence. That is an expression undefined in each instrument, but there is a well-defined ECJ and domestic jurisprudence as to what it means for the purpose of BIIR. For the purposes of BIIR it is recognised as having an autonomous meaning which, in important respects, differs from the meaning ascribed to it by our courts in a purely domestic context. Surely, when it comes to applying the 1996 Hague Convention we should apply the well-established BIIR meaning, rather than seeking some different autonomous meaning, let alone applying our old domestic meaning. Surely, we should also reflect from time to time the developing jurisprudence under BIIR. And, if this means from time to time having regard to and, where appropriate, applying future decisions of the ECJ, then so be it.

Forum: Article 15 of BIIR is in large part replicated in Article 8 of the 1996 Hague Convention. It is plain that we should be as alert to the need to invoke the one as the other and that the practical application and implementation of Article 8 should as far as possible mirror that under Article 15. Again, we should not shy away from applying in the context of Article 8 both the existing and any future jurisprudence relating to Article 15.

Recognition and enforcement of judgments: Article 23 of BIIR finds its reflection in Article 23 of the 1996 Hague Convention. It is essential that our approach to the one is every bit as rigorous as our established approach to the other.

In a sense, a key question for the judges is going to be the extent to which, absent plain differences in the corresponding texts of the two instruments or differences recognised in the established jurisprudence, they should be willing to allow every legal issue which has been litigated in the context of BIIR to be re-litigated in the context of the 1996 Hague Convention, merely because, it submitted, authorities in relation to the one do not or should not apply to the other and because there has, as yet, been no clear decision on some provision of the 1996 Hague Convention.

I venture to suggest that we need to take a robust approach from the outset. There is an old saw which has it that every important piece of legislation generates at least 10 years' work for the lawyers. We cannot allow that to happen here. We should surely do our best to resist the siren calls of skilled and persuasive advocates if, in effect, their invitation is that we throw all the established BIIR learning back into the melting pot and start again.

In this context, we will make the best of BREXIT if we ensure, as best we can, that the transition from BIR to the 1996 Hague Convention, if that is indeed the route we end up going down, is as smooth and seamless as possible.