

Brexit: the implications for family law

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Children

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Divorce, Finances and Maintenance

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Family law and the EU

Divorce and Finances

- How does EU law effect family law?
- What was the law pre 31.12.2020 and when does it still apply?
- What is the law now, post 1 January 2021?
- What do I need to know?
- How does it work in practise – a case study

Children



Law as at 22 March 2021

Divorce and Finances: How does EU law effect family law?

- Divorce jurisdiction
- Divorce forum
- Divorce recognition
- Maintenance (needs-based provision) jurisdiction
- Maintenance forum
- Maintenance recognition and enforcement
- Choice of law agreements
- Related areas e.g. Sch 1 CA and Part III MFPA

Key dates

1 January 1973	UK joins the EU
1 March 2001	Brussels I
1 March 2005	Brussels II bis
1 January 2010	Lugano 2007
18 June 2011	Maintenance Regulation
10 January 2015	Brussels I bis
11 January 2015	Mutual recognition of protection measures in civil matters Regulation 606/2013
23 June 2016	EU referendum
16 March 2017	EU (Notification of Withdrawal) Act 2017
19 October 2019	Withdrawal Agreement 2019
12 December 2019	General election
23 January 2020	EU (Withdrawal Agreement) Act 2020
31 January 2020	UK leaves the EU at 11 PM
31 December 2020	End of implementation period at 11PM; EU laws cease to have effect
1 January 2021	UK member of 1996 and 2007 Hague Conventions in our own right

Divorce and Finances:

How does EU law effect family law?

Regulations (directly applicable but also contained in SIs):

BrIR

- Jurisdiction for divorce (heterosexual couples only)
- Recognition of divorce

EU Maintenance Reg

- Jurisdiction for 'maintenance' (on divorce, s.27, Sch 1 and Part III)
- Recognition and enforcement of 'maintenance' decisions

Divorce and Finances:

How does EU law effect family law?

Case Law

- Habitual Residence for divorce: the Marinos conundrum and lack of CJEU guidance
- Maintenance for children should/must be determined by the court dealing with contact CJEU: **A v B**

Consider EU Regulations may have changed intra UK law.

Also consider the effect EU Regulations have had on the application of our law when dealing with non EU countries. (The inability to make orders relating to 'maintenance' if the jurisdiction is sole domicile).

Divorce and Finances: Old law (pre 31.12.2020)

	Jurisdiction
Divorce	Jurisdiction: Art 3 BrIR plus sole domicile Forum: first to issue
Finances on divorce/ dissolution	Jurisdiction: Art 3 BIR plus sole domicile plus EU Main Regs on maintenance if additional jurisdiction to divorce Forum: First to issue NB: re: child maintenance - ECJ decisions of A v B (C 184/14) and R v P (C 468/18)
s.27 MCA '73	EU Main Reg First to issue
Schedule 1	EU Maintenance Reg (MR) Forum: First to issue NB ECJ decisions of A v B (C 184/14) and R v P (C 468/18)
Part III	Sole domicile and/or 12 months habitual residence and/or restricted powers if interest in a marital home plus EU Main Reg
Pensions	Art 7 EU Main Reg, forum of necessity

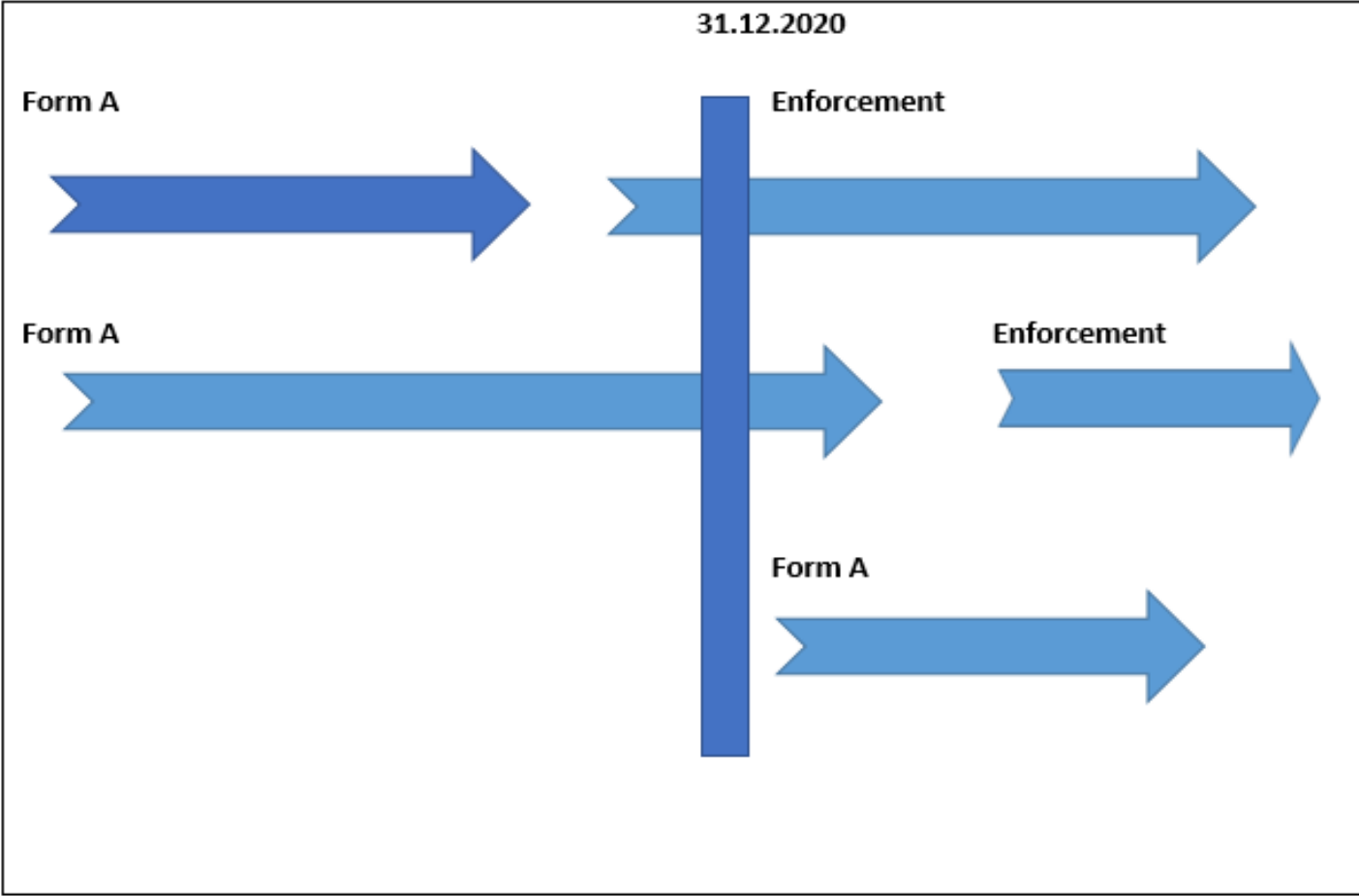
Divorce and Finances: Old law (pre 31.12.2020)

	Recognition and enforcement
Divorce	BrIIR
'Maintenance'	EU Main Regs
Nuptial agreements	EU Main Regs, Art 4

Divorce and Finances: Transitional provisions

- Found in 2019 Withdrawal Agreement, Arts 67-69
- EU laws continue until the end of the implementation period, 11 PM New Year's Eve, 31 December, 2020
- Provided proceedings were *instituted* by then, jurisdiction and priority of forum secured for divorce and maintenance proceedings.
- Recognition and enforcement pursuant to EU laws will also then continue
- Choice of law agreements binding provided executed by 31 Dec 2020
- Requirement is the *institution* of proceedings.
- When relying on direct intergovernmental assistance, requests must have been received by 11 PM 31 December 2020

Divorce and Finances: Transitional provisions



Divorce and Finances: New law post 1.1.2021

	Jurisdiction, forum, recognition and enforcement
Divorce/Finances on divorce/ dissolution	<p>New divorce jurisdiction, follows Art 3 BIIIR with sole domicile as equal basis (7 options in total)</p> <p>Divorce forum decided on the basis of common-law test of closest connection, <i>forum non conveniens</i></p> <p>Divorce recognition : 1970 Hague Convention/national law</p> <p>Maintenance recognition and enforcement under 2007 Hague Convention</p>
s.27 MCA '73	<p>See SI 519 of 2019</p> <p>Maintenance recognition and enforcement - under 2007 Hague Convention.</p>

Divorce and Finances: New law post 1.1.2021

	Jurisdiction, forum, recognition and enforcement
Schedule 1	<p>SI 836 (amending SI 519)</p> <p>Jurisdiction against parents if <i>any</i> of the following persons are habitually resident or domiciled in England and Wales at the date of the application namely a parent, guardian or special guardian, a person who is named in a child arrangements order as a person with whom the child is to live or the child. Where the application is in respect of a child over 18, the jurisdiction is if the applicant or a parent against whom the order is sought are habitually resident or domiciled in England and Wales on the date of the application.</p> <p>Maintenance recognition and enforcement - under 2007 Hague Convention.</p>
Part III	Main Reg jurisdiction removed
Pensions	NO jurisdiction unless under restricted basis of Part III

Divorce and Finances: New law post 1.1.2021

	Jurisdiction, forum, recognition and enforcement
Nuptial agreements	<p>SI 519, Pt4, s.8(b). Choice of court agreements made before 1.1.2021 pursuant to Art 4 shall still apply and give jurisdiction to bring 'maintenance' claim in the chosen court</p> <p>HOWEVER please note the EU's Guidance on the WA, para 3.3 regarding <i>recognition and enforcement</i> of a judgment given by a court in the UK designated in a COCA <i>after</i> the end of the IP. Namely EU rules will no longer apply</p> <p>The UK's position in contrast seems to be that EU rules <i>will</i> continue to apply.</p>

Divorce and Finances: Private International Law

	FR/England & Wales		England & Wales/CH		CH/FR
	Pre 31.12.2020	2021 onwards	Pre 31.12.2020	2021 onwards	
EU Regs:					
BrIIR	Y	N (save existing proceedings)	N	N	N
EU Main Reg	Y	N (save existing proceedings)	N	N	N
Hague:					
Hague 2007	Y	Y	N	N	N
Hague 1970 (divorce)	N	N	Y	Y	N
Hague 1973 Maintenance	Y but EU Main Reg trumped	Y	Y	Y	Y
Lugano 2007	Y	N (until UK may rejoin)	Y	N (until UK may rejoin, save existing proceedings)	Y

Divorce and Finances:

What do I need to know?

- Familiarise yourself with the new rules on jurisdiction
- Intra UK cases – consider with care. For example see Rachael Kelsey's article:

<https://www.scottishlegal.com/article/rachael-kelsey-jurisdiction-in-the-uk-in-divorce-and-cohabitation-cases-post-brexit>

- Take advice from foreign lawyers early on all matters not just the likely financial order. Recognition and enforcement of an order, are key to it being worth fighting for in the first place
- Act quickly. Whilst first to issue may not longer determine the outcome it remains an important (even crucial) consideration.
- Consider mirror agreements/orders particularly in a 'sharing' case or 'sole domicile' divorce
- EU perception v UK perception/interpretation. CJEU case law is still going to be important to know.
- Familiarise yourself with the HC 2007 now.
- Monitor for updates – eg Lugano

Divorce and Finances: Case Study

Case study	Questions
<p>Part A - FR/E&W</p> <p>H is French W is English</p> <p>W moves to France in 2009 Parties meet in 2010 and marry in 2014 in France. In 2018 they move to London, buy a home and have 2 children They separate in January 2021</p> <p>W plans to remain in London with the children. H returns to France</p>	<ol style="list-style-type: none">1. Where may they divorce?2. Will the divorce be recognised in other countries?3. Where may the finances on divorce be heard?4. Can you enforce the financial order in England, France and Switzerland?

Divorce and Finances:

Appendix: EU Departure Laws

- 🌐 EU Withdrawal Agreement 2018: [Click here](#)
- 🌐 UK EU Withdrawal Agreement 2019: [Click here](#)
- 🌐 EU (Withdrawal) Act 2018: [Click here](#)
- 🌐 EU (Withdrawal) Act 2020: [Click here](#)
- 🌐 Private International (Implementation of Agreements) Act 2020

- 🌐 The International Recovery of Maintenance (Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance 2007) (EU Exit) Regulations 2018 1125 of 2018: [Click here](#)

Divorce and Finances:

Appendix: EU Departure Laws

- The Jurisdiction and Judgements (Family) (Amendment etc) (EU Exit) Regulations 2019 519 of 2019: [Click here](#)
- The Jurisdiction and Judgements (Family) (Amendment) (EU Exit) (No 2) Regulations 2019, 836 of 2019: [Click here](#)
- The Mutual Recognition of Protection Measures in Civil Matters (Amendment) (EU Exit) Regulations 2019, No 493 of 2019: [Click here](#)
- Civil Jurisdiction and Judgements (Amendment) (EU Exit) Regulations 2019 479 of 2019: [Click here](#)
- The Civil Jurisdiction and Judgements (Civil and Family) (Amendment) (EU Exit) Regulations 2020: [Click here](#)

Divorce and Finances:

Appendix: other resources

- 🌐 EU Commission: Notice to stakeholders withdrawal of the united kingdom and EU rules in the field of civil justice and private international law, 27 August 2020 REV2
- 🌐 Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance
- 🌐 Explanatory Report on the 2007 HCCH Child Support and Other Forms of Family Maintenance Convention
- 🌐 Practical Handbook for Competent Authorities: The 2007 Hague Child Support Convention, the 2007 Hague Protocol on Applicable Law (Maintenance) and the 2009 European Union Maintenance Regulation
- 🌐 The effect of Brexit on getting divorced (20 January 2021)
<https://commonslibrary.parliament.uk/research-briefings/cbp-8671/>

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