



The Law  
Society



No-deal Brexit:  
family law

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## Introduction

This paper forms part of a series published by the Law Society. The aim of this paper is to highlight the changes that will occur should the UK leave the EU on 29 March 2019 without having concluded an agreement with the EU beforehand.

In such a scenario, the EU and UK will have failed to sign both a Withdrawal Agreement (governing the terms of the UK's departure from the EU) as well as an agreement governing the future relationship between the two parties.

This paper underlines the steps solicitors should consider in order to prepare their practice for such an eventuality.

This note does not replace legal advice or a consultation on an individual basis with the relevant regulators. We cannot accept any liability resulting from any action or lack thereof taken on the basis of the information contained in this note.

## Points for solicitors to consider under a no-deal Brexit

In the event of a no-deal Brexit, solicitors should consider the following points:

- In some areas of law, such as child abduction, the Hague Conventions will continue to apply between the UK and EU/EEA states.<sup>1</sup>
- National law rules will apply to this area in the UK and in EU/EEA member states (unless otherwise stated below), because all reciprocal elements of EU law will cease to exist. In the UK they will be repealed by the UK Government.
- In some cases, bilateral treaties and conventions pre-dating EU membership may exist between the UK and EU member states. To ascertain whether this is the case, you will need to consult the national law of the state concerned. You may also need to contact a local lawyer in that country.
- In the event of a no-deal Brexit, the status of ongoing cases is unclear. As the UK will leave the EU on 29 March 2019, the rules governing the enforceability of any case

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<sup>1</sup> For further information see the Hague Conference website <https://www.hcch.net/en/home>

decided after that point will cease to have effect. At this point, the risk of parallel cases taken in multiple jurisdictions is a distinct possibility.

Solicitors should also be aware of the following points:

- EU family law instruments based on the principle of mutual recognition will no longer apply cross-border between the UK and EU/EEA states. The Maintenance and Brussels II bis Regulations will not have effect.
- The Lugano Convention will not automatically apply in such a scenario. The UK will need to be invited to become a member and EU and EFTA states will have to ratify its accession. The UK will not be able to accede to the Lugano Convention before 29 March 2019. According to the UK Government, the UK would instead revert to existing domestic common law and statutory rules.<sup>2</sup>
- Many of the Hague Conventions on Private International Law will apply under a no-deal scenario. Solicitors dealing with cross-border family matters should consult these conventions. However, the UK has not yet ratified the 2007 Convention on International Recovery of Child Support and Other Forms of Family Maintenance and the Protocol on the Law Applicable to Maintenance Obligations.
- Under a no-deal scenario, the cross-border recognition of judgments in relation to divorce will be governed by national law, unless the states involved are parties to the Hague Convention on divorce (see below for states that are signatories). This may result in conflicts of jurisdiction and parallel proceedings in different countries.

## Current system

### 1. Brussels II bis

The Brussels II bis Regulation is a single legal instrument that aims to help international families to resolve disputes, involving more than one EU state, over divorce and the custody of children. It aims to:

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<sup>2</sup> <https://www.gov.uk/government/publications/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexiteal/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexiteal>

- provide rules to determine which court is responsible for dealing with matrimonial matters and parental responsibility in disputes involving more than one EU state
- simplify the recognition and enforcement of judgments (e.g. a court order) from one EU member state to another
- provide a procedure for situations in which a parent abducts a child and takes them to another EU state.

The present system does not deal with substantive family law, which remains in the scope of the national law.

Under the Regulation, EU courts automatically recognise judgments delivered in other EU states on matrimonial and parental responsibility matters. Recognition can be refused only in certain cases.

## **2. Maintenance Regulation**

The Maintenance Regulation provides for a series of measures aimed at facilitating the payment of maintenance claims in cross-border situations.

Other EU instruments in this field include:

- Regulation 606/2013 on the mutual recognition of protection orders which aims to help to enforce orders made to protect victims of domestic violence or harassment across borders. The Regulation sets up a mechanism allowing for the direct recognition of protection orders issued as a civil law measure between EU member states. This means that, at present, if you benefit from a civil law protection order issued in your state of residence, you can invoke it directly in other EU states by presenting a certificate to competent authorities certifying your rights.
- The European Enforcement Order provides for a streamlined procedure for enforcing uncontested claims, like out-of-court settlements.

## **3. Hague Conference on Private International Law**

The Hague Conference on Private International Law is an intergovernmental organisation that develops and administers international conventions, protocols and soft law in the area of

private international law. A number of conventions relevant to family law will continue to apply in the UK, including between the UK and EU states post-Brexit. This includes where there would be a no-deal or 'cliff-edge' Brexit. The Conventions that continue to apply are the following:

- *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance and the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*
  - Regulates the law applicable to maintenance obligations, access to legal aid and some rules on recognition, declaration of enforceability and enforcement.
  - UK is a signatory as a member of the European Union.
  
- *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*
  - Protects children from abduction and retention across international boundaries by providing a procedure to bring about their return.
  - All EU member states are signatories, including the UK, which has ratified the Convention in its own right. Elements of Brussels II *bis* are based on the Hague rules on returns.
  
- *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*
  - Provides a structure for the resolution of issues of custody and contact which may arise when parents are separated and living in different countries.
  - Sets out recognition and enforcement provisions that avoid the need for re-litigating custody and contact issues.
  - Ensures that decisions taken by the authorities of the country where the child has his or her habitual residence enjoy primacy.
  - All EU member states are signatories, including the UK, which has ratified the Convention in its own right.
  
- *1970 Hague Convention on Recognition of Divorce and Legal Separations*

- Deals with the recognition of divorces and legal separations, but not the enforcement proceeding, which is left to the state.
- The UK has ratified the Convention, but many EU states have not.
- The Convention has not been signed by France, Spain, Germany, Austria, Hungary, Lithuania, Latvia, Malta, Romania, Bulgaria, Belgium, Ireland, Croatia, Slovenia and Greece.
- It has, however, been signed by Cyprus, the Czech Republic, Denmark, Estonia and Finland.

#### **4. Lugano Convention**

The Lugano Convention, in addition to providing for the recognition and enforcement of judgments in civil and commercial matters, also regulates the recognition and enforcement of maintenance obligations among EFTA states and between EFTA states and EU member states. The UK will need to be invited to become a member, and EU and EFTA states will have to ratify its accession.

#### **No-deal scenario**

Should a no-deal scenario arise, the Hague Conventions will apply, with one exception. The UK will still need access to or to ratify the 2007 Convention on International Recovery of Child Support and Other Forms of Family Maintenance and the Protocol on the Law Applicable to Maintenance Obligations. The UK Government has indicated that it will do so.

In its technical note on a no-deal Brexit, the UK Government has committed to repealing the existing EU rules in this area and switching to the relevant Hague Conventions.<sup>3</sup>

Regarding Regulation 606/2013 on protective orders (see above), the Government has stated that all parts of the UK would unilaterally recognise incoming Civil Protection Measures from EU states. However, they will repeal the regulation that enables civil courts within the UK to issue CPM certificates as they would not necessarily be recognised by the EU post-Brexit. This is in keeping with the Government's overarching policy of repealing elements of EU law that depend on the principle of reciprocity. The Government has not expanded on what measures will be taken to ensure UK judgments are recognised in the EU

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<sup>3</sup> <https://www.gov.uk/government/publications/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexit-deal/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexit-deal>

post-Brexit. In the absence of such measures, solicitors should consult the national law of the state concerned and contact a local lawyer in the relevant jurisdiction who can advise whether such orders are enforceable.

The Hague Conventions largely cover the same ground as the EU regulations. There are some differences:

- **Divorce** – The Hague Conventions in this area are of limited assistance as their scope is narrower, they do not prescribe rules on jurisdiction, and they have been ratified only by a limited number of EU member states – see above.
- This means that under a no-deal scenario, the cross-border recognition of judgments pertaining to divorce will be governed by national law, unless the states involved are parties to the Hague Convention on divorce. This might result in conflicts of jurisdiction and parallel proceedings in different countries.
- The Government has indicated that it would repeal the Brussels IIa rules in England, Wales and Northern Ireland. The Scottish Government is currently considering its approach to divorce jurisdiction. The different bases for divorce jurisdiction set out in Article 3 of Brussels IIa (save for joint application which is not applicable) would be replicated in English, Welsh and Northern Irish domestic law so that these bases apply for all cases. The additional basis of sole domicile of either party would be available for all cases.
- **Custody, maintenance and parental abduction** – In relation to decisions on custody, maintenance and parental abduction, the Hague Conventions do provide for a network of rights and procedures that largely correspond to the EU instruments. Only the procedure is different. The Hague system is based on information exchanged and cooperation between Central Authorities rather than judicial authorities. In the EU system, the principle of the overriding interest of the child is coupled with the duty to hear the child.

It is important to note that, under a no-deal Brexit scenario, the existing EU regimes that apply at present in the UK will cease to take effect. Under such circumstances, the reciprocity on which these EU structures are based will no longer apply to the UK, and the UK will leave the jurisdiction of the CJEU. In the absence of a governing and applicable

international convention governing the area of law concerned, the rules of national law will apply. These can vary from jurisdiction to jurisdiction. The Law Society, together with the other UK Law Societies and Bars, is currently carrying out research on the applicable civil justice and family law rules in each member state. These rules will apply to UK judgments reached post-Brexit. The outcome of this research will be published before the end of 2018.

The EU regime will not apply to any case taken after 29 March 2019. Similarly, it is likely that the existing regime will no longer apply to cases pending before the courts on 29 March 2019, as the European rules on the recognition and enforcement of judgments will cease to exist in the UK, and will no longer apply between the UK and EU. Furthermore, it is not clear whether a case decided on or before 29 March 2019 under the current system can be recognised and enforced in another EU country after 29 March 2019 under a no-deal scenario, as the obligation to recognise and enforce judgments in the EU will cease to exist with regard to UK judgments. The Law Society is awaiting guidance from the EU Commission and UK Government on this matter.

### **Bilateral deals with EU member states**

The UK may be able to conclude bilateral or even “cluster” agreements with individual EU member states in the area of family law following a no-deal Brexit. Council Regulation No 664/2009 of 7 July 2009 sets out the procedure for negotiating and concluding agreements between member states and third countries in relation to jurisdiction, recognition and enforcement of judgments and decisions in the areas of matrimonial matters, matters of parental responsibility and maintenance obligations.

Under Article 1, a member state has the authority to negotiate a bilateral treaty agreement with a third country. Under Article 4, the member state must obtain authorisation from the Commission before it is able to establish such a treaty. This means that once the UK has left the EU, the UK could form a bilateral treaty agreement with an EU member state in relation to family law matters, as long as the member state in question obtains authorisation from the Commission.

In addition, in its White Paper on the future UK-EU relationship the UK Government signalled its intention to re-join the Lugano Convention and to negotiate a treaty with the EU on matters relating to civil justice and cooperation in family law. The Law Society will continue to encourage the Government to pursue this aim, even in a case where a no-deal Brexit arises.



## **Additional resources**

UK Government Technical Note - [Handling civil legal cases that involve EU countries if there's no Brexit deal](#)

European Commission – [Notice to stakeholders: Withdrawal of the United Kingdom and EU rules in the field of civil justice and private international law](#)

Hague Conference website: <https://www.hcch.net/en/home>

[PDF Attachment: Brexit and Family Law – EU Case Scenarios]