

Brussels II, Brexit and beyond

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This article assesses whether, in light of the UK's decision to leave the EU, matrimonial practitioners will see a rise in forum conveniens disputes and applications for financial remedies pursuant to Part III of the Matrimonial and Family Proceedings Act 1984 (MFPA 1984) (Part III). On 23 June 2016, the UK, by a majority of 51.9%, voted to leave the EU. Since then, debate has been rife as to the social, political and economic consequences of the decision. However, it is fair to say that the impact of Brexit on divorce with an international element and the resulting financial applications was unlikely to be at the forefront of the average voter's mind when deciding which box to cross at the polling booth.

The current regime

At present, the UK remains a full member of the EU and therefore continues to be bound by Council Regulation 2201/2003 (Brussels II Revised – 'BIIR') concerning jurisdiction and the recognition and enforcement of matrimonial judgments and parental responsibility matters. It applies to all members of the EU, save for Denmark, which elected not to sign the treaty. Pursuant to s 5(2) of the Domicile and Family Proceedings Act 1973 (DMPA 1973) the courts of England and Wales will have jurisdiction over divorce applications, pursuant to Art 3 of BIIR, or, no when

other state that has opted in to BIIR has jurisdiction and at least one of the parties is domiciled in England/Wales when the proceedings are initiated. The salient provisions to establish English jurisdiction pursuant to BIIR can be found in Art 3 and is summarised as follows:

- 1) The spouses are habitually resident in England and Wales.
- 2) The spouses were habitually resident, and one of them continues to reside in England and Wales.
- 3) The respondent is habitually resident.
- 4) If a joint application is made, either of the spouses must be habitually resident.
- 5) The applicant is habitually resident, provided they have resided there for at least one year immediately prior to the petitioning.
- 6) The applicant is habitually resident if they resided in England and Wales for at least six months prior to the petitioning and their domicile is also England and Wales.
- 7) Both spouses are domiciled in England and Wales (for the purposes of BIIR, this applies only to the UK and Ireland. For other contracting states, the principle of nationality is applicable).

The well-versed practitioner will know that the principles of domicile and habitual residency have been subject to extensive scrutiny by the judges of the Family Division, see *Marinos v Marinos* [2007] EWHC 2047 (Fam), [2007] 2 FLR 1018; *Chai v Peng (Estoppel: Foreign Judgment) (No 1)* [2014] EWHC 3519 (Fam), [2015] 2 FLR 412; and *Tan v Choy* [2014] EWCA Civ 251, [2015] 1 FLR 492.

Where it is established that the courts of England and Wales have jurisdiction to deal with a divorce but another contracting state may also have competing jurisdiction, the

race to lodge a petition ensues pursuant to Art 16 of BIIR, as considered by Abbott J in the Irish case of *MH v MH* [2015] IEHC 771. If your client loses the race, they may face litigating the division of marital assets in a less favorable jurisdiction. Article 19 of BIIR stipulates that where there are competing petitions in differing contracting states, the courts of the country second to apply must stay their proceedings until it is established that the country first seized lack jurisdiction.

Whether this current regime will continue post-Brexit, into the two-year transition period and beyond will depend largely on the negotiations currently afoot between Downing Street and Brussels. If, however, BIIR ceases to bind the courts of England and Wales, where will that leave spouses wanting to bring their divorce and financial remedy proceedings to our jurisdiction with its objectively favourable regime of matrimonial law?

Forum conveniens

Should the UK's exit deal provide for the cessation of BIIR, spouses will have to establish England and Wales as the forum conveniens in which to bring proceedings. To determine this, lawyers will have to consider the Sch 1 provisions of the DMPA 1973, particularly as there are competing obligations placed upon the court as to when a stay on proceedings is mandatory or discretionary. Where a petition for divorce has been presented to the courts of Scotland, Northern Ireland, Jersey, Guernsey or the Isle of Man, and the parties resided together in the jurisdiction where the petition is presented and either party was habitually resident there throughout the year, ending with the date on which they last resided together before the date when proceedings began, the courts of England and Wales *must* stay proceedings pending the proceedings being determined in the related jurisdiction pursuant to para 8, Sch 1.

On the other hand, if proceedings are continuing in 'another jurisdiction' (any country outside of England and Wales save for those that are signatories of BIIR), then

the court *may*, if it thinks fit to do so having regard to the balance of fairness and convenience to the parties, order a stay on the proceedings in England and Wales. To determine the 'balance of fairness and convenience', the court shall have regard to all relevant factors, including the convenience of witnesses and any delay or expense resulting from the proceedings being stayed. Matters such as the location of the assets, the enforceability of an order or the likelihood of a foreign decision conflicting with English principles of justice are likely to carry weight when a judge decides whether to stay English proceedings.

How does this tie in to what matrimonial law and practice will look like post-Brexit? Unless Parliament amends Sch 1, para 3(2) of DMPA 1973 to include those EU countries that remain signatories to BIIR in the list of 'related jurisdictions', it could be that forum conveniens arguments, and the costs they entail, will become the order of the day when dealing with competing proceedings between England and Wales and states contracting into BIIR.

Where does Part III fit into this?

In 1980, the Law Commission published Working Paper No.77 on 'Financial Relief after Foreign Divorce'. This paper recommended law reform so that financial provision could be made following a foreign divorce. This came after a string of cases recognised overseas divorces initiated by husbands where the wife was unable to claim financial relief – see *Turczak v Turczak* [1970] P 198 (Poland); *Torok v Torok* [1973] 1 WLR 1066 (Hungary); and *Quazi v Quazi* [1980] AC 744 (Pakistan). These decisions flew in the face of the concepts of English justice and led to calls from the judiciary to enact legislation permitting financial provision following an overseas divorce – *Karsten* (1970) 33 MLR 205 and *Pearl* [1974] CLJ 77. The result was MFPA 1984 and, within it, Part III.

What does Part III permit?

Pursuant to s 12, where there has been an overseas divorce, annulment or legal separation entitled to be recognised as valid

in England and Wales, either party may apply to the English court for financial relief. The court imposes, by virtue of s 13, a number of hurdles to overcome before making such an application such as stipulating that leave of the court must be obtained prior to pursuing a Part III claim. Crucially for a post-Brexit BIIR matrimonial regime in England and Wales, the granting of leave will not be automatically precluded notwithstanding that an order for payment or the transfers of property may have been made by a foreign court.

Jurisdiction for bringing a Part III claim

It is important to recognise that Part III was not enacted as a tool for spouses who feel cheated by a lack of financial provision made in a foreign court: there must be a jurisdictional basis for bringing such a claim as provided for in s 15. The party seeking to bring a claim will have to demonstrate that either party were domiciled in England or Wales on the date that leave is sought or was so domiciled on the date of the divorce, or that either party was habitually resident for one year ending with the date of the application for leave or the date the divorce was concluded. If an applicant is unable to satisfy either of those tests, they may yet be permitted to pursue an application for leave if they can demonstrate that, as of the date of their application, they had a beneficial interest in a former matrimonial home (FMH) in England or Wales. This is a less advantageous ground because it limits the financial provision available.

A 'substantial ground'

In deciding whether to grant leave pursuant to s 13(1), the court must ask itself whether England and Wales is the appropriate jurisdiction to hear such an application. Section 16(2) sets out a list of factors that the court should consider. These include the connection the parties have with England and Wales and any other country, the financial award the applicant may receive abroad, the availability of property in England and Wales, enforceability prospects, and the amount of time that has passed since the divorce and the application for

leave. In considering these statutory tests, it is essential to consider the principles set out in the Supreme Court decision of *Agbaje v Agbaje* [2010] UKSC 13, [2010] 1 FLR 1813.

Agbaje

In this decision, the Supreme Court had to determine the correct approach to be adopted by courts when considering applications for Part III. The parties were a Nigerian couple who moved to the UK in the 1960s and duly acquired British citizenship. During their 38-year marriage they had children and, upon passing the Bar, the husband returned to Nigeria to practise and the wife followed. A property was purchased in London in the husband's sole name for the children to live with a nanny during their education. Upon separation, the wife returned to this property. The husband petitioned for divorce in Nigeria and the resulting financial claim provided the wife with a life interest in a Nigerian property and a lump sum of approximately £21,000. The overall assets were understood to be in the region of £1m.

The wife issued Part III and was granted leave, Munby J (as he then was) holding that the Nigerian award had been very modest following such a long marriage. The husband applied to set aside this decision on the basis that the wife had not demonstrated exceptional circumstances. Munby J rejected this argument, stating that exceptional circumstances were not necessary and holding that the Nigerian award created such disparity between the parties that it would cause the wife 'real hardship'. A financial award was subsequently made in the wife's favour. The husband successfully appealed.

The Court of Appeal held that the correct test was whether the foreign order provided an unjust result, and whilst the disparity would be an obvious factor in deciding this, it would be incorrect for it to be the overwhelming factor given London's reputation as the divorce capital of the world. It held that Coleridge J had been wrong to award any financial provision and

that the parties had a more significant attachment to Nigeria than England and therefore Nigeria was the appropriate jurisdiction. The focus should have then been whether substantial injustice was done abroad and whether the foreign court was the more appropriate forum for granting the divorce *and* dealing with the finances. In short, the court held that s 16 imports a statutory test of forum conveniens into the granting of leave applications. On the wife's appeal, the Supreme Court had to determine:

- 1) Does s 16 provide for a statutory test of forum conveniens for the purposes of granting leave to bring a Part III claim?
- 2) Does an applicant have to demonstrate exceptional circumstances or injustice before an order for financial provision in this jurisdiction should be made?
- 3) If making an award for financial provision, should the court provide for the absolute minimum that is required to vitiate the perceived injustice of an overseas award?

In allowing the wife's appeal, the Supreme Court held:

- 1) Section 16 does not amount to a statutory test of forum conveniens. Part III was enacted specifically because it may be more appropriate for a divorce to take place in one jurisdiction but for the finances to be resolved elsewhere. The judge's task in considering leave applications is to have regard to all the facts of the case, 'in particular', those in s 16(2) and to decide whether it would be appropriate for an order to be made.
- 2) Disparity between spouses following an overseas award is of itself insufficient to commence a Part III application. However, where it is established, it may be a relevant factor for a judge considering whether it would be appropriate for an award by an English or Welsh court.
- 3) The award made in England and Wales will depend on the circumstances of every case. There is no requirement for it to be only the minimum to avoid injustice, but likewise Part III should not

been seen as a second bite of the cherry. Three principles should apply when making an award:

- a. the primary consideration is the welfare of the children;
- b. an award cannot exceed what the applicant would have received in the other jurisdiction; and
- c. the reasonable needs of each spouse should be met.

To infinity and beyond?

Leaving the EU will be one of the biggest changes to our way of life in generations. Whilst BIIR may not be the top of Downing Street's list of priorities, the ramifications of it ceasing to apply may be huge. If BIIR is no longer applicable, and those countries bound by it do not become 'related jurisdictions', will family law practitioners see an upwards surge in forum disputes seeking discretionary stays under DMPA 1973? Without the safeguard of the first past the post regime as currently provided for in BIIR, will the remaining 25 contracting states now compete to establish their forum conveniens when faced with a jurisdiction claim from the courts of England and Wales? As the relationship between the UK and those countries has been one of ever increasing proximity since the UK acceded to EU membership, forum conveniens may well be harder to establish.

Let us assume you are acting for an English wife who wants to divorce her Spanish husband after a 15-year marriage which produced no children. The mortgage-free family home is in England and worth c£500,000. The husband owns three Spanish properties in his sole name, each worth €1m. He is the director of a valuable family business in Spain, owning the shares with his three siblings who live in Spain and do not speak English. The husband asserts that although the properties are in his sole name, they are actually held beneficially for his siblings. The nature of the husband's work means that during the marriage he spent substantial periods in Spain. The parties entered marital difficulty a year ago and the husband returned to Spain where he has been ever since. The wife remains in the

family home in England, where she is domiciled and has lived for the last year.

In this scenario, the wife would currently be able to apply to the English court for a divorce on the basis she is domiciled in the UK and has been habitually resident here for at least six months prior to presenting her petition. Provided this was lodged prior to the husband lodging a petition in Spain, the wife could be confident that she had secured jurisdiction. However, if BIIR no longer applies but the wife still lodges her petition before the husband's in Spain, a costly and protracted battle could ensue in the English court as to whether the court should exercise its discretionary powers pursuant to the DMPA 1973 to stay the wife's petition in favour of proceedings taking place in Spain, even though the Spanish proceedings may be second in time. The fact that, in Spain, there are more substantial assets – which is also the base of the husband's income – and potential witnesses that do not speak any English, and that over the course of the marriage the husband spent protracted periods of time there may weigh in favour of the *forum conveniens* being the Spanish courts.

Assuming the English court grants the husband a stay on the wife's petition and the award she ultimately receives from Spanish proceedings is considered inadequate, Part III could come to her aid

provided she can satisfy the requisite tests. Whilst this may provide the wife with some relief, the reality is that it could trigger yet another round of expensive and time-consuming litigation. Of course, a principle consideration for the court when assessing whether to grant leave may revolve around its enforceability. If the UK's withdrawal from the EU creates a vacuum as regards the ability to enforce overseas judgments in Spain (particularly regarding the Maintenance Regulation) then Part III may be of little use.

The above scenario is a dramatic example but the fundamental principles could apply in any case where the competing jurisdiction is a signatory of BIIR. What approach will the courts of England and Wales take where the *forum conveniens* may not be as clear cut as in this example? And how will that impact upon financial awards? The decision to abandon the supremacy of EU law could well mean that *forum conveniens* arguments extend to include those jurisdictions where the sole concern for most practitioners has, hitherto, involved rushing to the local court to petition in order to be first in time. Of course, this is pure conjecture. We simply cannot crystal ball gaze as to how the landscape of matrimonial law will unfold post-Brexit, but we can be sure that Brexit will have profound consequences for matrimonial practitioners and divorcing spouses both here and in the remaining states bound by BIIR.