Brexit and international family law: a pragmatic approach to divorce and maintenance

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Introduction

1. Following the outline, partial agreement in March between the United Kingdom and the 27 other EU Member States (EU27)[1], the focus of the Brexit negotiations has now, at last, switched from the 'withdrawal arrangements' to the 'future relationship'. On 12 July the Government published its post-Chequers White Paper *The future relationship between the United Kingdom and the European Union*[2] which sets out the Government's broad proposals for the future partnership over a wide range of policy areas.

2. The publication of the White Paper is thus an opportune moment to revisit the pressing issue of what the Government should aim to achieve in the area of international family law as we leave the EU[3].

3. The Government's approach to future cooperation in the fields of civil and family law is couched in the most general of terms in the White Paper:

> **1.7.7 Civil judicial cooperation**
> 145. Civil judicial cooperation is mutually beneficial to both the UK and the EU. Businesses benefit from legal certainty in the event of disputes and are more confident trading across borders. Consumers and employees benefit from protections for weaker parties. Cross-border families benefit from clear rules to resolve disputes in sensitive matters quickly and efficiently. The future relationship between the UK and the EU should protect these advantages.
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> 146. The EU has already shown that a deeper level of civil judicial cooperation with third countries is both legally viable and operationally achievable, including through the Lugano Convention, which provides for cooperation between EU and European Free Trade Association (EFTA) countries. Under this Convention, EU Member States and third countries apply the same rules on civil and commercial judicial cooperation, and commit to pay due regard to how each other's courts interpret those rules. This architecture provides a clear precedent for close cooperation between the EU and a third country.
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> 147. To ensure cooperation can continue in these areas at least, the UK will therefore seek to participate in the Lugano Convention after exit. However, while the UK values the Lugano Convention, some of its provisions have been overtaken, and it is limited in scope. In addition, the European Council's Guidelines have suggested the possibility of going beyond existing precedent.
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> 148. The UK is therefore keen to explore a new bilateral agreement with the EU, which would cover a coherent package of rules on jurisdiction, choice of jurisdiction, applicable law, and recognition and enforcement of judgments in civil, commercial, insolvency and family matters. This would seek to build on the principles established in the Lugano Convention and subsequent developments at EU level in civil judicial cooperation between the UK and Member States. This would also reflect the long history of cooperation in this field based on mutual trust in each other's legal systems. The Government will also continue to work closely with the devolved administrations to ensure that the future arrangements for cooperation with the EU take into account the separate and distinct legal systems in Scotland and Northern Ireland.

4. Parliamentary Committees of both Houses have examined this subject[4]. They recommend the retention of the existing EU legal framework as far as possible. We believe that this reflects a largely unchallenged and uncritical assumption among many Parliamentarians (shared by some practitioners) that EU family law is preferable to any other system. Moreover, there has been no formal consultation of their memberships on these issues by the main professional bodies, Resolution and the FLBA[5]. This is obviously regrettable.

5. We are concerned that there has been insufficiently detailed consideration of the merits of the existing non-EU international instruments, which in our view provide pragmatic and workable alternatives to the two main pieces of EU family legislation[6], while not suffering from their defects.

6. In an ideal world, as the White Paper contemplates, the UK and EU would reach a comprehensive agreement covering all areas of family law[7]. Realistically, that is unlikely to happen, certainly without a very long transition period which is unlikely to be politically acceptable. Notwithstanding its fundamental importance, family law seems to be low on the Government's list of Brexit priorities. Moreover, even if this were not so, the EU27 are unlikely to make concessions of the kind that we (and, we believe, many other practitioners) consider to be desirable, notably, the abolition of *lis pendens* in divorce and maintenance disputes, and amendments to the Maintenance Regulation in the field of jurisdiction[8].

7. This paper therefore argues that, accepting these and other realities, the Government should acknowledge that the key objective must be to achieve, to the fullest extent possible, continuation of the mutual recognition and enforcement of judgments and orders, in the area of divorce and maintenance. Anything else should be subsidiary to that overarching aim, although some of the existing non-EU international instruments go well beyond the issues of recognition and enforcement.

8. We argue that these core aims for the post-Brexit era can be met by existing international agreements, namely, two Hague Conventions[9] which provide for recognition and enforcement in the areas of divorce and maintenance. These Hague Conventions have demonstrated their fitness for purpose over time, are in daily use, and do not suffer from the drawbacks of the EU laws which they would replace. Using these Conventions instead of a complex and politically problematical bespoke UK/EU arrangement will have the added advantage of reducing the number of different legal instruments that apply. As any practitioner who practises in this field is

aware, the law is already unduly complex and unwieldy and there is an urgent need for simplification[10].

9. The Government acknowledges the availability of the Hague Conventions in its response to the House of Lords Europe Select Committee's 17th Report *Brexit: justice for families individuals and businesses*[11], in which it states, at para 26:

> In family law, the Hague Conventions cover much, although not all, of the same ground as the EU family law Regulations, including rules for jurisdiction and recognition and enforcement in children matters, and cooperation between Central Authorities. During negotiations, the Government will consider the coverage of the alternative international agreements when deciding how best to ensure ongoing reciprocity and mutual recognition.

10. A note about terminology. Some contributors to this debate have characterised EU legislation as "procedural" rather than "substantive"[12]. This is a serious misconception. Unquestionably, these laws, as rules of private international law, create and remove substantive rights: they create and remove grounds of jurisdiction; they impose *lis pendens* rules and abolish *forum conveniens*; and they (although not in the UK) determine which country's law should be applied to a particular dispute.

11. This paper assumes that judgments of the CJEU will cease to have binding authority at some point (save transitionally), either at the end of the 'transition' period or shortly afterwards. The Government has stated this to be a political red line. Plainly, it would be legally unacceptable for future judgments of a CJEU on which the United Kingdom is no longer represented to have binding force (as opposed to being simply persuasive) once the United Kingdom leaves the EU, other than for the minimum period necessary in the interests of legal certainty.

Lugano Convention

12. It is unclear from the White Paper whether the Government envisages that the Lugano Convention will continue to apply in maintenance cases. We consider that the Lugano Convention suffers from the same drawbacks as the Maintenance Regulation, considered below, and that if the UK becomes a party to the Convention in its own right[13] this would add an unnecessary layer of complexity in the area of maintenance. The 2007 Hague Convention framework is all that is needed. We have existing reciprocal enforcement arrangements with two of the three non-EU Lugano States, Norway[14] and Switzerland[15]. In cases involving Iceland, which are not numerous, we would fall back on national law. If the Government decides to sign up to the Lugano Convention it should so on the basis that maintenance is excluded from its scope.

The European Union (Withdrawal) Act

13. Having completed its tortuous course through Parliament, the Act received Royal Assent on 26 June. Its aims are laudable. By incorporating EU law into domestic law, it seeks to prevent a legal "cliff edge" on our departure from the EU. However, the authors of this paper agree with other commentators[16] that the current EU regime, which depends on reciprocity, cannot be maintained through the mechanism of the Act. Even if we apply the existing regime by transposing it into domestic law, there will be no legal obligation on EU27 to reciprocate. However, this problem would fall away if on Brexit day the Hague Conventions take effect immediately, subject of course to transitional provisions of the kind contained in article 63 of the March 2018 Draft Withdrawal Agreement.

An opportunity to return to *forum conveniens*

14. We consider that Brexit offers a welcome opportunity to jettison the *lis pendens* provisions of the Brussels IIA and Maintenance Regulations and revert to long-established and settled principles of *forum conveniens*. Our family courts are well used to deciding questions of discretion such as those which arise in forum disputes, namely, with which country a family has the closest connection and which court is best placed for trying their case. And of course our courts continue to apply *forum conveniens* principles in cases not involving the EU[17].

15. We accept that neither *forum conveniens* nor *lis pendens* is perfect[18]. *Forum conveniens* is said to be unpredictable in terms of outcome, compared to the certainty of *lis pendens*, and can lead to a race to judgment, as opposed to the race to court which *lis pendens* promotes. But we believe that *lis pendens* is the greater of the two evils and that the benefits of *forum conveniens* clearly outweigh the drawbacks.

16. We start from the premise that forum shopping (the purpose of which is invariably to achieve a more favourable financial outcome) is to be deprecated. Yet forum shopping is inherent in - if not in fact encouraged by - the Brussels legislation, as was pointed out in *Villiers v Villiers* [2018] EWCA Civ 1120 at [87]:

> … if, within the terms of the Regulation, a party is able to choose between two jurisdictions, then he or she is perfectly entitled to choose that which is more beneficial to him or her.[19]

17. And in *L-K v K (No 3)* [2006] EWHC 3281 (Fam), Singer J observed at [44] that 'the "first past the post regime" imposed by BIIR has the potential to be inherently unfair to one or the other, and it is arbitrary'.

18. *Lis pendens* directly encourages the race to court. It thereby discourages negotiation, mediation[20] and pre-litigation settlement. It is also discriminatory in that it favours the richer party (usually the husband), who can afford the specialist legal advice that is crucial in these cases.

19. By contrast, the *forum conveniens* principle discourages forum shopping. Take the example of a French couple who have lived all their long married life in England. Their children go to school here and all the assets are located here. Under *forum conveniens*, the English court would have little hesitation in finding that England is the proper forum. But the inflexibility of the *lis pendens* rules under the BIIA regime means that the French court, if first seised, will deal with the divorce and ancillary financial issues, very probably to the financial detriment of the other party, even though the connection with England is overwhelming.

20. It is ironic that, far from achieving legal certainty, BIIA and the Maintenance Regulation have spawned their very own litigation industry. Argument about obscure legal technicality has proliferated[21]. Moreover, the *lis pendens* rules have led to costly arguments about residence / habitual residence: the very kind of factual issue that 'first past the post' was designed to avoid. *Lis pendens* appears to be certain, but is less certain than appearances suggest. *Forum conveniens* appears to turn on a wide discretion, but in most cases the convenient jurisdiction is immediately apparent, especially to experienced judges and lawyers.

21. Of course, the reality is that, while English divorce courts remain a financially attractive forum, some applicant spouses, especially the wealthy, will, whether under the *lis pendens* or *forum conveniens* regimes, argue that their case be heard here, and respondent spouses will argue the contrary. But we contend that *forum conveniens* is the fairer system, being one that will enable our judges once more to filter out, on a discretionary basis, those cases which should be tried here from those that should not, rather than leaving the determination to be made according to rigid and arbitrary *lis pendens* rules.

Recognition of divorce and legal separation under the 1970 Hague Convention

22. To avoid conflicting divorce and legal separation judgments in the courts of different states, leading to 'limping marriages', it is obviously of crucial importance that judgments granted by a United Kingdom court be recognised in EU27, and vice versa[22].

23. We consider that the Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations (the 1970 Convention)[23], which the UK already applies, provides an acceptable alternative to the relevant provisions of BIIA, Chapter II, which apply between all Member States save Denmark. The 1970 Convention rules are given effect in the UK by Part II of the Family Law Act 1986, which currently regulates the recognition of divorces and legal separations granted in non-EU Member States.

24. There are no <u>direct</u> jurisdictional rules for divorce in the 1970 Convention. Thus each Contracting State is free to establish its own jurisdictional rules. In our view such rules are not necessary. Nor are there *lis pendens* rules. Decisions based on forum conveniens are permitted[24]. There are clear and proportionate rules of <u>indirect</u> jurisdiction, which require a minimum level of connection between the parties and the state where the divorce is granted (various combinations of habitual residence / domicile / nationality), as a pre-requisite to recognition in another state[25].

25. The bases on which recognition may be refused are very similar under both BIIA and the 1970 Convention (being, essentially: procedural unfairness; incompatibility with a previous judgment; public policy)[26]. Indeed, the similarity between the non-recognition rules in the BIIA and 1970 Convention regimes enabled Mostyn J to opine in a recent case that the court's approach to the FLA 1986, s 51 [viz. recognition in a non-EU case] should be informed by the judicial interpretation of BIIA, art 22[27].

26. The BIIA rules governing recognition of divorce have proved uncontroversial, as is evidenced by the very small number of reported cases in the 17 years since the first BII Regulation ((EC) No 1347/2000) came into force on 1 March 2001[28]. The pre-BIIA case law does not suggest any difficulty in the recognition of European divorce under the law in force at that time. Nor does the general case law involving the 1970 Convention cause any concern as to its continuing fitness for purpose.

27. Twelve EU States (in addition to the UK) are already bound by the 1970 Convention. They are: Cyprus, the Czech Republic, Denmark, Estonia, Finland, Italy, Luxembourg, Netherlands, Poland,

Portugal, Slovakia and Sweden. Seven other countries (Albania, Australia, Egypt, Moldova, Norway, Switzerland and China (in respect of Hong Kong) are also bound.

28. It is true that, by contrast with the position under the BIIA, nullity judgments do not come within the scope of the 1970 Hague Convention. However, the number of nullity decrees with a cross-border element must be very small[29].

29. We do not consider that the retention of the existing BIIA jurisdictional grounds is a reason for remaining within a BIIA-type framework after Brexit. It is questionable whether there was ever any justification for harmonisation of grounds of jurisdiction. But once we cease to be part of the EU legal order any such justification will cease.

30. That said, the BIIA grounds of jurisdiction have, with two exceptions, been uncontroversial and we see no reason not to reproduce most of them. The exception is the poorly drafted and ambiguous fifth indent of art 3(1)(a), which states that jurisdiction shall lie with the courts of a Member State in whose territory *"- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made*", a provision that Aikens LJ in *Tan v Choy* [2015] 1 FLR 492 observed, *obiter*, was capable of (at least) three possible constructions. This has given rise to unnecessary debate in a number of reported cases[30]. The sixth indent[31] suffers from the same ambiguity. It should therefore be made clear that habitual (and not mere) residence is required during the entire period stipulated. Nor we do need the fourth indent[32], as English law does not provide for a joint divorce petition. We also suggest that the domicile of one party should once more be a primary, rather than as at present merely a residual, ground of jurisdiction[33].

31. We therefore urge the Government to seek to persuade the EU27 to accede to the 1970 Convention, en bloc. If that is unsuccessful, then the fall-back position will be that recognition of divorce and other such 'status' judgments will be governed by the law of the individual state. Given the sophistication of the legal systems of EU27 it is not envisaged that the mutual recognition of UK and EU 27 judgments will present difficulties in practice.

The making, variation, recognition and enforcement of maintenance decisions under the 2007 Hague Maintenance Convention

32. It is clearly of fundamental importance that UK maintenance decisions continue to be recognised and enforced in EU27, and vice versa. At present this is achieved via the EU Maintenance Regulation, which, in a welcome innovation, introduced for the first time a Central Authority for the enforcement of maintenance decisions between EU States.

33. However, the Maintenance Regulation suffers from a number of defects[34]. First, it is poorly drafted and lacks clarity, as demonstrated by the lengthy but finally concluded debate as to whether a maintenance creditor may apply direct to the court of country B for enforcement of an order made in country A, or is obliged to apply through the Central Authority. This required a reference for a preliminary ruling to be made to be CJEU for clarification[35]. The position in relation to variation applications, however, remains unclear[36].

34. Secondly, in the area of enforcement of maintenance decisions there is currently a twin-track regime[37]. Maintenance orders originating in other EU states (apart from Denmark, whose orders must be registered here) are enforceable directly in the UK, without the need for a declaration of enforceability (i.e. registration). The respondent is unable to rely on public policy as a ground of challenge[38]. This lack of substantive filter can result in injustice. On the other hand, UK orders are subject to a declaration of enforceability in the country of enforcement as a prerequisite to enforcement. There is thus a two-level playing field[39].

35. Thirdly, a provision not found in the Regulation's predecessor, the Brussels I Regulation, applies the Regulation's jurisdictional rules even where the other state involved is not a EU Member State. The need for this global extension of the reach of EU law is baldly stated, without explanation or justification, in recital 15. As a result, the jurisdictional and *lis pendens* rules apply even where a non-EU state is first seised: *"The circumstance that the defendant is habitually resident in a third State should no longer entail the non-application of Community rules on jurisdiction, and there should no longer be any referral to national law. This Regulation should therefore determine the cases in which a court in a Member State may exercise subsidiary jurisdiction.".*

36. Fourthly, the 'sole domicile' rule[40] denies jurisdiction where a maintenance claim is ancillary to proceedings concerning status (e.g., divorce) "*based solely on the nationality [in the UK and Ireland, domicile] of one of the parties*"[41]. This prevents an application to the English court for maintenance by parties resident in non-EU countries, even where no other EU State is involved.

37. Fifthly, the Maintenance Regulation currently determines jurisdiction as between the three territorial units within the United Kingdom (England and Wales, Northern Ireland and Scotland) resulting in what can only be described as the absurd situation of divorce being dealt with in one part of the UK and maintenance claims in another[42].

38. This not the occasion for a detailed comparative analysis of the 2007 Hague Convention and the Maintenance Regulation. We maintain however that an overview of the scheme of the Convention demonstrates that it will meet the needs of international maintenance applicants and respondents post-Brexit.

39. The 2007 Convention was negotiated at the same time as the Maintenance Regulation and its broad scheme is similar. The UK is already bound by the Convention as it has been approved by EU (controversially[43]) on behalf of all Member States, apart from Denmark[44]. The UK will have to sign the Convention in its own right on Brexit, but that is a minor technicality.

40. Currently, the other Contracting States are Norway, Albania, Bosnia and Herzegovina, Ukraine, Montenegro, the United States of America, Turkey, Kazakhstan, Brazil and Belarus, thus 37 states in all. As at 31 July 2018 the other signatories are, Burkina Faso, Canada and Honduras. Other countries are expected to follow suit now that the Convention applies to the United States.

41. The core scope of the Convention is child maintenance, and recognition and / or enforcement of a spousal maintenance decision where accompanied by a claim for spousal support[45].

42. A claimant for free standing spousal support is not entitled as of right to invoke the Central Authority process[46]. Very importantly, however, the EU has declared[47] that it will extend the Central Authority process[48] provisions to all applications for spousal support (even where no child maintenance obligation is also involved).

43. It is important to note that, like the Maintenance Regulation, the Central Authority scheme applies equally to initial applications for maintenance claims and to variation applications[49].

44. Under the Convention, there are no direct rules of jurisdiction, save a 'negative' rule in relation to modification (i.e. variation) cases[50], in terms similar to article 8 of the Maintenance Regulation. We believe harmonisation of direct rules of jurisdiction to be unnecessary. Under the Convention, indirect rules of jurisdiction ensure that there is a sufficiently close connection between the

country where the maintenance order was made and the country where recognition and/or enforcement is sought[51]. That connection will in most cases be habitual residence[52].

45. There is a discretion – not a mandatory requirement - to refuse recognition and enforcement if the State of enforcement is already seised of proceedings between the parties[53]. The other grounds for refusal are similar to those under the Maintenance Regulation[54].

46. Like the Maintenance Regulation, the Hague Convention creates a Central Authority regime, for the registration and enforcement of decisions[55] (which include court settlements and agreements) and authentic instruments. The mechanics of the application for recognition and enforcement are very similar to the procedure under the Maintenance Regulation where a declaration of enforceability of a maintenance decision is required[56], that is, a registration process.

47. Moreover, in common with the EU, the Hague Conference on Private International Law operates an innovative iSupport scheme, whereby details of maintenance orders, payments and arrears are digitally transmitted between signatory countries, thereby speeding up proceedings, enforcement and thus, it is to be expected, recovery and payment[57].

48. As under the Maintenance Regulation, generous legal aid provision is available to applications made through Central Authorities[58]. In relation to applications for recognition and enforcement of child maintenance (i.e. persons under 21), the 'requested' Convention State is required to provide free legal assistance, save to the extent that the procedures of that State enable the applicant to make the case without the need for such assistance and its Central Authority provides the necessary services free of charge[59]. In non-child cases an applicant who in the State of origin has benefited from free legal assistance is entitled in any proceedings for recognition or enforcement to benefit, at least to the same extent, from free legal assistance as provided for by the law of the requested State under the same circumstances[60].

49. By signing the 2007 Convention the EU has itself signalled to the world that the provisions of the Convention are fit for its international relations in the field of maintenance. We agree entirely. Overall, on Brexit, we believe that claimants and respondents under the Convention will enjoy rights that are as extensive as those under the Maintenance Regulation. The Government should therefore abandon any attempt to extend the provisions of the Maintenance Regulation post Brexit, save transitionally.

Conclusion

50. There need be no 'cliff edge' in the event that we leave the EU without a bespoke deal. We have a ready-made set of laws on which to fall back, laws which are already in operation and work well for the benefit of international families, well beyond the EU. In some areas of family law there will be very little noticeable difference if we apply Hague law instead of EU law. In some areas there will be distinct improvements, by leaving behind EU laws which are directly prejudicial to mediation, negotiation, reconciliation and to the weaker financial party.

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3 August 2018

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[1] Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community highlighting the progress made (coloured version) in the negotiation round with the UK of 16-19 March 2018 (https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf), as updated by the 19 June 2018 Joint statement from the negotiators of the European Union and the United Kingdom Government (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/717697/Joint_Statement_-_19_June_2018.pdf).

[2] Cm 9593, July 2018.

[3] We do not in this paper consider the competing merits of, on the one hand, the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the 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, and, on the other, the Brussels IIA Regulation. We note, however, from the analysis carried out by one of the leading academics in this field, Professor Paul Beaumont, that there are good arguments for concluding that there are no material drawbacks (and indeed some advantages) in falling back on these Conventions in lieu of Brussels IIA: see http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11348 and https://www.abdn.ac.uk/law/documents/CPIL%20Working%20Paper%20No%202017_2.pdf

[4] House of Lords EU Committee, 17th Report of Session 2016-2017 (HL Paper 134, 20 March 2017) at https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/134/134.pdf; House of Commons Justice Committee *Implications of Brexit for the justice system*, Ninth Report of Session 2016–17 (HC 750, 22 March 2017) at https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/750/750.pdf. The House of Lords Committee has recently revisited the issue.

[5] For this reason the Law Society Family Law Committee has deliberately not adopted a position.

[6] I.e., Brussels IIA and the Maintenance Regulation.

[7] Which would go beyond current law and include reciprocal arrangements for the recognition and enforcement of non-maintenance financial orders, a serious lacuna at present. Such orders are excluded from the scope of the Maintenance Regulation (as they are not maintenance orders) and from the scope of the Recast Brussels I Regulation (Regulation (EU) No 1215/2012) and the Lugano Convention, as they are deemed by the CJEU to be 'rights in property arising out a matrimonial relationship': see *Van den Boogaard v Laumen* [1997] 2 FLR 399.

[8] Despite intensive lobbying, the UK legal profession failed to secure any divorce-related amendments to the Commission's proposal for a Brussels IIA Recast Regulation (COM (2016) 411 final, 30.6.16). The amendments proposed were the creation of the right to elect a jurisdiction for divorce; reduction of the impact of the lis pendens rule by establishing a jurisdictional hierarchy; and the introduction of a "transfer to a better placed court" provision for divorce cases, mirroring the existing article 15.

[9] Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations; Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.

[10] Curiously, it has been argued that applying the Hague Conventions and reverting to *forum conveniens* will require extensive training of lawyers and judges. This is patently not so. The Hague instruments are already in use. The *forum conveniens* regime remains in force for non-EU cases (see e.g. the recently reported *Mantegazza v Mantegazza* [2017] EWHC 3811 (Fam) (Moor J, 5 May 2017)) and does not in any event involve difficult concepts of law or practice. It is, rather, any new bespoke agreement with EU27 that is likely to necessitate significant professional education.

[11] Letter dated 1 December 2017 from the then Lord Chancellor David Lidington at https://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/JusticeforFamilies/justice-for-families-government-response.pdf.
[12] See the debate in the House of Lords on 5 March 2018 (https://hansard.parliament.uk/Lords/2018-03-05/debates/6031119A-F447-4BED-ABB2-1112621DD65F/EuropeanUnion(Withdrawal)Bill#contribution-B53539E6-BA64-4FDD-A030-4E38A7A17DB8), and the paper entitled *Brexit and Family Law* (October 2017) published by the FLBA, Resolution and IAFL at http://www.resolution.org.uk/site_content_files/files/brexit_and_family_law.pdf.
[13] It is currently a party via its membership of the EU (Council Decision 2009/430/EC).
[14] Via the 2007 Hague Convention.
[15] Via the 1958 and 1973 Hague Conventions, given effect in the UK by Part 1 of the Maintenance Orders (Reciprocal Enforcement) Act 1972.
[16] See e.g. the House of Lords EU Committee 17th Report at paras 97 and 98.
[17] See *Mittal* [2013] EWCA Civ 1255, [2014] 1 FLR 1514; and *Mantegazza*, above.
[18] As Thorpe LJ observed memorably in *Wermuth* [2003] 1 FLR at [34]: "A divorcing couple that has to litigate the consequences of the marital breakdown is not blessed. The couple that first litigates where to litigate might be said to be cursed."
[19] See observations in similar vein by Mostyn J in *CC v NC* [2014] EWHC 703 (Fam) at [14].
[20] The MIAM requirement does not apply where there is a 'significant risk that in the period necessary to schedule and attend a MIAM, proceedings relating to the dispute will be brought in another state in which a valid claim to jurisdiction may exist, such that a court in that other State would be seised of the dispute before a court in England and Wales': FPR 3.8(1)(c)(iii).
[21] By way of example only, and most recently, *E v E* [2015] EWHC 3742 (Fam); *S v S (Brussels II Revised: Art 19(1) and (3): reference to CJEU)* [2015] 2 FLR 364 (in which, moreover, a request had to be made to the CJEU for a preliminary ruling (*A v B (Case C-489/14*) [2016] 1 FLR 31); *Ville de Bauge v China* [2015] 2 FLR 873; *Villiers* (above).
[22] Recognition of same sex marriages and of civil partnerships is not currently regulated by EU legislation, nor is this likely given the position of a number of Eastern European EU Member States on same-sex issues. In the UK the applicable rules are contained in, respectively, the Marriage (Same Sex Couples) (Jurisdiction and Recognition of Judgments) Regulations 2014 and Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005.
[23] https://www.hcch.net/en/instruments/conventions/full-text/?cid=80
[24] Article 12.
[25] Article 2.
[26] There is a further Convention ground, not mirrored in BIIA: namely, that Contracting States may refuse to recognise a divorce when, at the time it was obtained, both the parties were nationals of States which did not provide for divorce and of no other State (article 20(1)(e)).
[27] *Liaw v Lee* [2015] EWHC 1462 (Fam), [2016] 1 FLR 533 at para 8.
[28] *Liaw v Lee* (above); *Yordanova v Iordanov* [2013] EWCA Civ 464; *Lachaux v Lachaux* [2017] EWHC 385, [2017] 2 FCR 678.
[29] In 2017 in England and Wales there were only 332 decrees absolute of nullity compared with 102, 883 decrees absolute of divorce (https://www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2017).
[30] *Marinos v Marinos* [2007] EWHC 2047 (Fam); *Munro v Munro* [2007] EWHC 3315 (Fam); *V v V (Divorce)* EWHC 1190 (Fam).
[31] "the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there;". It should be noted that in early 2017, a group of specialist family lawyers agreed upon proposals for a new set of jurisdictional criteria borrowing from but improving on the current EU bases (see *https://www.familylaw.co.uk/news_and_comment/divorce-jurisdiction-after-brexit#.W2QKb8GG_gB).* These proposals were well received within the profession and would also be suitable for adoption.
[32] Either party's habitual residence, in the event of a joint application.
[33] Domicile and Matrimonial Proceedings Act 1973, s5(2)(b).
[34] "*… some four years after the Regulation came into operation, it may be apt to contemplate whether the Regulation has done other than introduce technicality, complexity and uncertainty for individuals, legal practitioners and judges"* ([2015] IFL 252, R Bailey-Harris). We agree.
[35] *MS v PS (Case C-283/16)* [2017] 4 WLR 72, [2017] 1 FLR 1163, CJEU.
[36] *AB v JJB (EU Maintenance Regulation: modification application procedure)* [2015] EWHC 192 (Fam), a decision that has given rise to considerable debate (see, notably, [2015] International Family Law 252 and 258 and Family Law Week, 17 March 2015).
[37] As an unwelcome by-product of our decision not to opt in to the Hague Protocol which introduced "applicable law" rules (see Council Decision 2009/941/EC).
[38] See article 21 compared with article 24.
[39] This two-stage process for the enforcement of UK maintenance orders within the EU was the price that the UK had to pay for opting out of the Hague Protocol: see above.
[40] Article 3(c).

[41] As in *Baldwin v Baldwin* [2014] EWHC 4857 (Fam), where, however, the court was able to find that other bases of jurisdiction existed.
[42] See *Villiers v Villiers* [2018] EWCA Civ 1120.
[43] For a critique of the EU's controversial doctrine of exclusive competence see http://www.abdn.ac.uk/law/documents/Opinion_on_Child_Abduction_-_Judicial_Activism_by_the_CJEU_-_By_Beaumont.pdf
[44] Council Decision 2011/432/EU.
[45] Article 2(1)(a) and (b).
[46] Article 2(1)(c).
[47] See Council Decision EU 432/2011, Article 4 and Annex I.B (as permitted by article 2(3) of the Convention).
[48] Ie Chapters II and III.
[49] Article 10.
[50] Article 18.
[51] Article 20.
[52] A State may enter a reservation with regard to the creditor's habitual residence. Neither the EU nor the UK have done so.
[53] Article 22(c).
[54] Article 21 (with the addition of fraud and the situation where a decision is made in violation of article 18 (restriction of jurisdiction for variation applications).
[55] In England and Wales, this is the Lord Chancellor, acting through the REMO Unit of the Official Solicitor and Public Trustee's Department.
[56] Maintenance Regulation, Chapter IV sections 2 and 3.
[57] https://www.hcch.net/en/instruments/conventions/isupport1.
[58] Articles 14 to 17.
[59] Articles 15(1) and 14(3).
[60] Article 17(b).