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Articles

Breaking up is hard to do

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Family lawyers are used to dealing with divorce so we should all be really well placed to deal with the Brexit split. The reality though is rather different, as lawyers in the UK have no more idea as to the future than anyone else! To be clear this article is not written from a political point of view but only from a legal perspective by a lawyer qualified in England and Wales, and a Spanish lawyer experienced in dealing with cross-border litigation between the two jurisdictions. For convenience, references to England should be to England and Wales which forms one territorial legal jurisdiction within the UK. Northern Ireland and Scotland have their own systems of legislation and whilst also members of the EU, the impact of their own domestic law may produce slightly different results.

In terms of family law between Spain and England and Wales, the main EU instruments are Brussels II Revised (BIIR) and the Maintenance Regulation (MR). Both of these instruments deal with jurisdiction in relation to where particular types of family proceedings should be brought. BIIR deals with jurisdiction in relation to divorce (Art 3) and also in relation to children (Art 8). The MR deals with jurisdiction in relation to claims for maintenance (Art 3).

Children

BIIR has always been popular with English lawyers in relation to the basic provisions for jurisdiction on children. These provisions mirror both UK domestic law for jurisdiction in dealing with children issues contained in the Family Law Act 1986 and also other international instruments such as the Hague 1980 and 1996 Conventions which are all based upon a child's habitual residence. It would seem therefore very unlikely that there will be any material change to this general basis of jurisdiction.

However, whether all of the exceptions to this jurisdictional basis (those contained in Arts 9–15 BIIR) survive Brexit is not so clear. It is no doubt the case that, along with many of their Spanish colleagues, many English lawyers are not very keen on the 'trumping' provisions at Art 11(8) providing that where a non-return order is made after a child abduction, the court of the Member State where the child had been habitually resident can nevertheless insist that the child returns to live there. Article 15 providing for the transfer of jurisdiction for children cases has also caused a lot of difficulties in England so possibly this may also not survive in an unamended form.

It should not be overlooked though that there is another residual jurisdiction in the UK for children.

This jurisdiction is based upon the child's nationality – 'parens patriae'. Historically this basis for jurisdiction has only been used in very exceptional cases, precisely because it does indeed cut across the basis for jurisdiction contained in all EU and international instruments, namely habitual residence. A recent example of a case where the issue was again considered is the case of *Re B* [2016] UKSC 4 in the Supreme Court. In this case the Law Lords made it clear that:

> '59. … It is not in doubt that the restrictions on the use of the inherent or parens patriae jurisdiction of the High Court in the Family Law Act 1986 do not exclude its use so as to order the return of a British child to this country: this court so held in *A v A (Children: Habitual Residence)*' ([2013] UKSC 60, [2014] AC 1.)

The Court of Appeal devoted a large proportion of their judgment to this aspect of the case. Their approach is summed up in para [45]:

> 'Various words have been used down the years to describe the kind of circumstances in which it may be appropriate to make an order – "only under extraordinary circumstances", "the rarest possible thing", "very unusual", "really exceptional", "dire and exceptional" "at the very extreme end of the spectrum". The jurisdiction, it has been said must be exercised "sparingly", with great "caution" … and with "extreme circumspection". We quote these words not because they or any of them are definitive – they are not – but because, taken together, they indicate very clearly just how limited the occasions will be when there can properly be recourse to the jurisdiction.
>
> 60. The basis of the jurisdiction, as was pointed out by Pearson LJ in *In re P (GE) (An Infant)* [1965] Ch 568, at 587, is that "an infant of British nationality, whether he is in or outside this country, owes a duty of allegiance to the Sovereign and so is entitled to protection"…61. There is strong reason to approach the exercise of the jurisdiction with great caution, because the very nature of the subject involves international problems for which there is an international legal framework (or frameworks) to which this country has subscribed. Exercising a nationality based inherent jurisdiction may run counter to the concept of comity … .'

From a Spanish perspective, clearly as regards disputes between England and Spain, they have been regulated by BIIR. It is of note that the term 'habitual residence' has also been interpreted in a very similar way to case-law here – namely as a matter of fact. An example is that the fact of a person's illegality in the country would not mean that the child could not be habitually resident there. Equally evidence would be collated as to utility use, flights, days in the country etc in order to prove habitual residence – it did not boil down to a legal issue as to where a person had declared themselves to be resident to another authority as is the case in many jurisdictions.

In relation to how the Spanish courts would approach a non-Brussels II Revised case, the starting point is that all Brussels instruments are 'erga omnes', ie applicable to everybody, independently of the nationality of the parties. In relation to divorce jurisdiction they would therefore also apply to non-EU nationals as long as they fulfil one of the Art 3 jurisdictional bases, so nothing would change in this regard. In any event the new Art 22 quater of the Judiciary Act 1985 (Ley de Poder Judicial 1985) would apply, although it plays a residual role.

Jurisdiction in international cases is regulated by Arts 21 et seq of Art 22 above. Article 22 quater almost provides exactly the same jurisdictional bases as BIIR in matters of filiation and paternal-filial relations, protection of minors and parental responsibility. Therefore, the Spanish courts would accept jurisdiction if the applicant or the child has his habitual residence in Spain at the time of the filing of the claim or the applicant is Spanish or resides habitually in Spain or, in any case, resides in Spain for at least 6 months before the presentation of the claim.

Spain is of course also a member of the Hague 1996 Convention which is also founded on the habitual residence of the child (Art 3) and therefore in relation to the exceptional bases of jurisdiction, these will apply to cases involving the UK. These exceptions of course include transfer

(Art 8], ongoing divorce proceedings elsewhere (Art 10) and urgent or provisional matters (Arts 11 and 12).

It would appear therefore that if BIIR is no longer in force as between Spain and England, in children matters, it will generally be business as usual.

Divorce

In our view, though, it is in relation to jurisdiction on divorce that matters may become much more complicated between England and Spain. As a matter of law the jurisdictional criteria contained at Art 3 BIIR have in fact been legislated into English law and it is very unlikely that there would be any change to these jurisdictional criteria. However, what is unknown is how the courts will resolve any dispute where there are divorce proceedings properly issued in more than one jurisdiction. At the moment in England we already have three separate mechanisms of dealing with such jurisdictional disputes depending on the identity of the other jurisdiction:

(1) The EU aside from Denmark – Brussels II Revised at Art 3 combined with Art 19 provides for a first-come, first-served rule, on the basis that one of the Art 3 criteria is fulfilled. The Art 3 criteria encompass a mixture of habitual residence and nationality/domicile conditions.

(2) The rest of the world – This is governed by paragraph 9 of Sch 1 to the Domicile and Matrimonial Proceedings Act 1973, ie 'forum conveniens' – which means in effect that the English court would choose the best-placed court if there was a dispute between two sets of court proceedings. This is again not dependent on which set of proceedings is issued first but rather takes into account a whole list of factors including the availability of witnesses, delay and expense, the connection that the parties have to each competing jurisdiction, the place of marriage, nationality, location of the assets etc. This was of course the rule which existed between England and Spain prior to Brussels II coming into force.

(3) Within the UK this is governed by the Domicile and Matrimonial Proceedings Act 1973, Sch 1 at paragraph 8. There are in fact separate jurisdictional criteria for deciding on disputes between England and Wales, Scotland and Northern Ireland as well as Jersey, Guernsey and the Isle of Mann. It is vital to note that the criteria do not rely on who issues first but rather on where the parties were last living together:

> '(1) Where before the beginning of the trial or first trial in any proceedings for divorce which are continuing in the court it appears to the court on the application of a party to the marriage –
>
> (a) that in respect of the same marriage proceedings for divorce or nullity of marriage are continuing in a related jurisdiction; and
>
> (b) that the parties to the marriage have resided together after its celebration; and
>
> (c) that the place where they resided together when the proceedings in the court were begun or, if they did not then reside together, where they last resided together before those proceedings were begun, is in that jurisdiction; and
>
> (d) that either of the said parties was habitually resident in that jurisdiction throughout the year ending with the date on which they last resided together before the date on which the proceedings in the court were begun,
>
> it shall be the duty of the court, subject to paragraph 10(2) below, to order that the proceedings in the court be stayed.'

What English family lawyers desperately need to know is whether if England decides to retain a 'first come, first served' rule in relation to Spain – albeit not as a member of the EU – whether this would be reciprocated. Presumably if Spain would not reciprocate in relation to this issue, then England would have to revert to the 'forum conveniens' rule instead.

The ‘forum conveniens’ mechanism, however, does not fit in the Spanish system; this would violate legal certainty in Spain, access to jurisdiction and the legal predetermination of international jurisdiction. Pursuant to Spanish law, if the Spanish courts have jurisdiction, they must indeed hear the case. Prestigious academics specialising in Spanish private international law consider that, if the law attributes jurisdiction to Spanish judges in certain cases that do not present a ‘real link’ with Spain, they should in fact be limited in seizing jurisdiction – in other words a watered down version of ‘forum conveniens’. It is worth noting that in practice, the first petition in time on a non-BIIR case does not always win the day though in Spain. Spanish judges can also take a free hand in interpreting the law!

Whether Spain will in fact formally reciprocate regarding the ‘first come, first served’ rule or not, cannot be foretold, but, as a general rule Spain, when dealing with divorces with a foreign element, will wish to apply BIIR as a consequence of interpreting the international instrument as being applicable to everyone regardless of nationality and on the basis of Spanish international jurisdiction.

So, on the assumption that England is no longer a member of BIIR, if a petition is first issued in England by an English domiciled spouse while residing in Spain, then it is a matter of lis pendens. This is further emphasised by Art 39 of the new Spanish Law 29/2015, of 30 July, on Legal International Cooperation Law in Civil Matters. This article provides:

> ‘International lis pendens:
>
> 1. Where there are pending proceedings with the same object and cause of action, between the same parties, before the courts of a foreign State at the time an action is brought before a Spanish court, the Spanish court may stay the proceedings, at the request of a party and prior report of the Public Prosecutor, provided that the following requirements are met:
>
> A) The jurisdiction of the foreign court is due to a reasonable connection with the dispute. The existence of a reasonable connection shall be presumed where the foreign court has based its international jurisdiction on criteria equivalent to those laid down in Spanish law in that particular case.
>
> B) That it is foreseeable that the foreign court issues an order capable of being recognized in Spain.
>
> C) and that the Spanish court considers it necessary to stay the proceedings in order to ensure the proper administration of justice.’

The result would be that in a case in which there are no children the Spanish courts are likely to continue to treat English divorce petitions on a first-come, first-served basis regardless of membership of BIIR.

Whilst Brussels IIR has provided clarity as to whether it will be England or Spain which will deal with the divorce, it has come in for some criticism amongst family lawyers – particularly Spanish lawyers. The reason for this criticism is that the English system allows for divorce petitions to be issued so fast. In Spain all of the claims are dealt with together, namely the divorce, the financial remedies, all children matters and non-molestation proceedings. There are also no forms and so the claims need to be drafted rather like old-style affidavits. Clearly this is going to be a far more onerous task which generally results in the English divorce petition ‘winning the day’ in any race to issue.

The difficulty though is that a forum conveniens approach in England is much more expensive as it involves a full court hearing for the parties rather than a quick examination of the dates on competing petitions. At the moment there is no indication as to whether the UK is likely to continue with the BIIR jurisdictional provisions or not. The UK government has, however, stated that it is participating formally in the consultation in relation to the amended Brussels II Revised Regulation

as its citizens may be affected by this to the extent that they are living in another BIIR state.

It is worth noting that of course the reason that many clients are concerned as to whether the divorce will be dealt with in England or Spain is due to the very different financial outcomes rather than in relation to the divorce procedure itself. Whilst English family lawyers look enviously at the Spanish system for divorce with its no-fault applications, the reality is that anyone can get divorced easily in England. Although the Matrimonial Causes Act 1973 at s 1 states that one of the grounds for divorce (and the most common in practice) is that a party has to prove 'unreasonable behaviour', the practical reality is that anything will do, from leaving a toilet seat up, to having no sense of humour. Spanish lawyers should also not overlook the fact that even if the divorce and therefore financial proceedings are dealt with in Spain, the UK has had the power to make further orders for financial relief after an overseas divorce pursuant to the Matrimonial and Family Proceedings Act 1984.

This is obviously in addition to the fact that under the current Maintenance Regulation, when the creditor moves to another jurisdiction, there is of course the potential for a variation.

In terms of the Maintenance Regulation, this has come in for a considerable amount of criticism from specialist English family lawyers as it has been very difficult to use in practice and has generated a large amount of litigation as a result. This may of course have been as much a result of the supporting procedural rules produced in England as the Regulation itself. In addition, there are similar criticisms made about the first-come, first-served jurisdictional criteria which again do not allow for any consideration of fairness in a particular case. England is well known for being very generous in relation to the financial provision for children which includes a power to provide for capital or the provision of property as well as monthly maintenance.

Applicable law

As to the EU instruments on applicable law in family cases, the UK had never opted in to any of these instruments in any event so Brexit will produce no change there. Any cases dealt with in England will be subject to English law, regardless of the nationality of the parties. Importantly this will obviously include any consideration of 'matrimonial regimes' which do not exist in England and Wales and are very unlikely to be given any weight at all in an English court.

However, Spain is a part of EU Regulation 1259/2010, known as Rome III, which of course will continue to be the case regardless of what the UK may do. What is interesting is that given that the jurisdictional basis for this is again habitual residence, this will include the English living in Spain. Article 4 of Rome III provides that the law designated in the regulation shall apply even if it is not that of a participating Member State. Spain will therefore be able to continue to apply English law to divorcing English couples living over there in certain specified circumstances such as the division of assets, until 29 January 2019 when the new Council Regulation 1103/2016 will come into force in Spain. It should not be overlooked that unusually at Art 5 of Rome III the spouses can in fact agree to designate the law applicable to their divorce and failing to do so, Art 8 will be applicable following the habitual residence criteria.

Enforcement

It is also unknown exactly how enforcement issues will be dealt with – England has however experienced a huge difficulty in having its decisions enforced within the EU as the MR only dealt with maintenance in any event. Given that the English courts have a wide remit and frequently make orders for the transfer of overseas properties, this has always been a problem for English lawyers as none of the EU instruments assisted with this, albeit that Spanish domestic law was always very helpful in relation to property transfers.

No doubt the greatest practical problem for lawyers arises at the time of the recognition and enforcement of overseas orders. If the UK is no longer to be treated as a member of BIIR, then the

recognition and effectiveness of its orders in Spain will be subject to compliance with a series of procedural requirements currently regulated by the new Spanish Law 29/2015, of 30 July, on Legal International Cooperation Law in Civil Matters. This act modifies the former system of recognition of foreign judgments, such that the Spanish courts may now also enforce orders which could not be made by the Spanish courts themselves. Article 46 of the Law sets out seven criteria for non-recognition of an overseas judgment, including when the foreign judgement is deemed to be against public policy. This law replaces the former 'exequatur'.

Nevertheless, it is very unlikely that an English order would be against the Spanish rules of public policy and as such English orders should remain relatively straightforward to enforce in Spain.

Immigration

Finally, what will be particularly difficult for the courts to deal with will be the relocation of children caused by changes in the immigration status of their parents as a result of Brexit. To the extent that long-term residents in either Spain or England and Wales are not guaranteed the right to remain in each other's countries, there is a real issue as to the movement of children if parents separate and only one has the right to remain. Family courts in both jurisdictions may be faced with some very difficult issues. In the UK it is the European Convention on Human Rights, Art 8 'the right to family life' which has been used to provide a 'right' for a parent to remain where there are issues of the rights of children to have a relationship with both parents.

In Spain, if one member of the couple or the marriage is Spanish and the other is a non-EU citizen, they will have to use the family reunification system, pursuant to Directive 2003/86/EC of 22 September, on Family Reunification, Organic Law 4/2000 of 11 January, on the rights and freedoms of foreigners in Spain, together with the regulations approved by Royal Decree 557/2011 of 20 April.

Article 17 of Organic Law 4/2000, Family Reunification, provides:

> '1. The resident alien has the right to regroup with him in Spain the following family members:
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> A) The spouse of the resident, provided that it is not separated from de facto or de jure, and that the marriage was not celebrated in fraud of law. In no case may it be regrouped to more than one spouse even if the personal law of the foreigner admits this matrimonial modality. Resident alien who is married in second or subsequent nuptials for the dissolution of each of his previous marriages can only regroup with him to the new spouse if he/she believes that the dissolution has taken place after a legal procedure that establishes the situation of the previous spouse and of their common children in the use of the common house, the compensatory pension to said spouse and the support that correspond to the minor children, or majors in situation of dependency. In the dissolution by nullity, the economic rights of the spouse in good faith and of the common children must be fixed, as well as the compensation, as the case may be.
>
> B) The children of the resident and the spouse, including those adopted, provided they are under the age of eighteen or persons with disabilities who are not objectively able to provide for their own needs because of their state of health. In the case of children of only one of the spouses, it will be required, in addition, that he alone exercises parental authority or that he has been granted custody and are effectively dependent. In the case of adoptive children, it must be established that the decision by which the adoption was agreed has the necessary elements to produce an effect in Spain.

C) Persons under eighteen years of age and those over that age who are not objectively able to provide for their own needs, due to their state of health, when the foreign resident is their legal representative and the legal act from which the representative faculties arise is not contrary to the principles of Spanish law.

D) The first-degree ascendants of the sponsor and his spouse when they are in charge, are over sixty-five years and there are reasons to justify the need to authorize their residence in Spain. The conditions for the reunification of ascendants of long-term residents in another Member State of the European Union, of the workers holding the blue card of the U.E. And of the beneficiaries of the special regime of researchers. Exceptionally, when there are humanitarian reasons, it may be regrouped under the age of sixty-five years if the other conditions provided for in this Law are fulfilled'.

CONCLUSION

In the wise words of Aristotle:

"My best friend is the man who in wishing me well wishes it for my sake"

And long may the British Spanish friendship continue!