



Association of **Lawyers for Children**

Promoting justice for children and young people

Joint Resolution and Association of Lawyers for Children Note to children lawyers in England and Wales ahead of the end of the Brexit transition period

November 2020

Overview

The UK left the EU on 31 January 2020. At the time of writing, the UK is in an ‘implementation period’ or ‘transition period’ which is due to end at 11pm on 31 December 2020. During this period, EU law has continued to apply to all family law matters, but that will change for new cases when the transition period comes to an end.

Our organisations have identified some key points for children practitioners in England and Wales to consider now, before 31 December 2020, and from 1 January 2021. We will look at cases already underway as well as longer-term practical points in cross-border children cases. It should be noted that this document reflects the [Withdrawal Agreement entered into force on 1 February 2020](#), after having been agreed on 17 October 2019, and supersedes previous versions (which were based on the earlier position, in respect of which different arrangements were proposed for the post-transition period).

This note is not legal advice, opinion or guidance, nor represents policy. It cannot cover every situation or eventuality. Practitioners should consider the relevant international laws and national statutory instruments and, where applicable, take local legal advice on the likely position in relevant EU member state/s. Practitioners should also refer to the Government’s published [advice](#) on Brexit and family law, and [guidance](#) produced by the EU.

Introduction

Pursuant to the [European Union \(Withdrawal Agreement\) Act 2020](#), the transition period is due to end at **11pm on 31 December 2020**. EU law has applied in its entirety during the transition period.

The 2020 Act gives effect to the [Withdrawal Agreement](#) reached between the EU and UK in October 2019. Article 67 of the Withdrawal Agreement, in summary, provides that the jurisdiction, recognition and enforcement provisions of [Brussels IIa](#) will apply to proceedings instituted before the end of the transition period and the cooperation provisions will apply to applications received by central authorities by that date. From 1 January 2021 onwards, Brussels IIa will no longer apply to new cases in the UK. Practitioners should therefore consider whether they need to take steps urgently to

issue proceedings before the end of the transition period so that Brussels IIA applies vis-à-vis jurisdiction and recognition and enforcement the other side of the transition period.

There is no definition of what ‘instituted’ means but it is assumed that a case should be issued to be sure that the case can be considered to have been ‘instituted’. **Please do not leave it until mid/late December 2020 to issue cases if this is required before the end of the transition period.**

Matters Concerning Parental Responsibility and Child Protection

Brussels IIA applies to all EU member states other than Denmark. Brussels IIA takes priority over the [1996 Hague Convention](#) in relation to matters governed by Brussels IIA, where a child is habitually resident in an EU member state (Brussels IIA Article 61(a); Article 62(1)). This may mean that the jurisdictional provisions of the 1996 Hague Convention are used relatively infrequently by some at present. However, for cases issued after the end of the transition period, the 1996 Hague Convention will apply to cases between the UK and the EU member states (as well as all Contracting States outside of the EU).

Jurisdiction

For proceedings issued before the end of the transition period which are based on a jurisdictional ground in Brussels IIA, those proceedings will continue to be governed by the jurisdictional provisions in Brussels IIA after the end of the transition period (Withdrawal Agreement Article 67(1)).

The EU [has confirmed](#) that this addresses situations where proceedings involving the same cause of action and between the same parties are instituted in the courts of an EU member state and the United Kingdom (“*lis pendens*”) before and after the end of the transition period respectively (or *vice versa*).

Proceedings concerning children instituted after the end of the transition period will be governed by the 1996 Hague Convention.

It should be noted that there are some differences between the jurisdictional provisions of Brussels IIA and the 1996 Hague Convention, in particular:

- a) 1996 Hague Convention Article 5 states that jurisdiction can be founded on the basis of a child’s habitual residence. However, unlike Brussels IIA Article 8, this is not based on the principle of *perpetuatio fori*. This means that a court can lose jurisdiction on the basis of Article 5 1996 Hague Convention if a child changes their habitual residence during the course of court proceedings (other than in cases of wrongful removal/retention) (See [Re NH \(1996 Child Protection Convention: Habitual Residence\)](#) [2015] EWHC 2299 (Fam); [2015] Fam. Law 1342). Do bear in mind though that pursuant to Article 13(1) of the 1996 Convention, a court is required to refrain from exercising jurisdiction that it may have under Articles 5-10 if corresponding measures have already been requested from another contracting state which is still considering them.

- b) The absence of a 3-month continuing jurisdiction in relation to contact in the state of the child's former habitual residence after a lawful move (Brussels IIa Article 9) in the 1996 Hague Convention.
- c) Prorogation of jurisdiction under the 1996 Hague Convention Article 10 is only available where there are divorce proceedings in the relevant Contracting State, and the circumstances in which this is possible are more limited. There is no 'free standing' power to prorogue jurisdiction in relation to children matters (contrast with Brussels IIa Article 12(3)).
- d) There is a more comprehensive scheme for the taking of provisional measures in relation to a child who is present but not habitually resident in a Contracting State under the 1996 Hague Convention (Articles 11 and 12) than comparable provisions of Brussels IIa (Article 20) and measures taken under Article 11 have extra-territorial effect (not those under Article 12), whereas measures under Article 20 of Brussels IIa do not (until Brussels IIa is Recast in 2022).

Practitioners should also familiarise themselves with the applicable law provisions in Articles 15-22 of the 1996 Hague Convention.

Transfers of Jurisdiction

Currently, it is possible to transfer jurisdiction from one EU member state to another under Brussels IIa Article 15.

It appears that it will still be possible to do this after the end of the transition period, provided that proceedings were issued before the end of the transition period.

For proceedings issued after the end of the transition period, there is a mechanism for a transfer of jurisdiction under the 1996 Hague Convention.

Practitioners should be aware that there is a potential conflict between Brussels IIa and the 1996 Hague Convention which may impact incoming transfers of jurisdiction from the EU in cases issued after the end of the transition period. Brussels IIa takes priority over the 1996 Hague Convention in relation to children habitually resident in the territory of an EU member state in matters governed by Brussels IIa (Article 61(b) and Article 62). Article 15 of Brussels IIa only provides for transfers of jurisdiction between EU member states rather than between EU member states and 1996 Hague Convention Contracting States (Article 15(1)). Accordingly, it may be argued that it is not possible within these legal frameworks for jurisdiction to be transferred from an EU member state (applying Brussels IIa) and the UK (which is a third state for the purposes of Brussels IIa).

This is a particular problem in cases where children are moved from the UK to other EU member states to evade child protection interventions. At the moment, jurisdiction is often transferred back to the UK in these cases. This specific problem will, it appears, be resolved in [Brussels IIa Recast](#), which includes an amendment to Brussels IIa permitting transfers of jurisdiction from EU member states to Contracting States.

However, Brussels IIa Recast will not apply to the participating member states until August 2022 (see Article 105 of Brussels IIa Recast).

Recognition and Enforcement

The Withdrawal Agreement confirms that the recognition and enforcement provisions of Brussels IIa will apply to judgments given in legal proceedings issued before the end of the transition period, and to documents formally drawn up or registered as authentic instruments, and agreements concluded before the end of the transition period (Withdrawal Agreement Article 67(2)).

The relevant point in time for this provision of the Withdrawal Agreement is the date when proceedings were instituted (i.e. was it before or after the end of the transition period?), rather than the date that any order was made.

This means that Brussels IIa can be used to recognise/enforce an order in the EU member states provided that the proceedings in which the order was made were instituted before the end of the transition period, even if that recognition/enforcement action needs to take place a long time after 1 January 2021.

[Guidance from the EU](#) states that this provision works both ways – i.e. if an order is made in a participating EU member state in proceedings issued before the end of the transition period, that order can be recognised and enforced in the UK using Brussels IIa after the end of the transition period.

If the proceedings were issued after the end of the transition period, the 1996 Hague Convention will govern the recognition and enforcement of any orders between the UK and the EU member states (and any Contracting States outside of the EU). There are subtle differences between the recognition and enforcement provisions of Brussels IIa and the 1996 Hague Convention (Article 23 in both) for example mandatory versus discretionary rules respectively to refuse recognition and enforcement. Also, enforcement takes place in accordance with the law of the place of enforcement but under Article 28 of the 1996 Hague Convention, there is an extra consideration that the best interests of the child are to be taken into account.

Practitioners should note that whilst legal aid is available on a means tested basis for recognition and enforcement (and appeals against the same) under Brussels IIa (LASPO 2012 Sch. 1, para. 17(1)(c)), legal aid is not available for the same type of cases involving applications for recognition and enforcement (or related appeals) under the 1996 Hague Convention (other than via an application under the Exceptional Case Funding scheme which has no guarantee of success).

Practitioners should also note the following differences between the recognition and enforcement provisions of Brussels IIa and the 1996 Hague Convention:

- a) Brussels IIa uses certificates (Annex II, III and IV) to assist with recognition and enforcement of orders. There is no system of certificates under the 1996 Hague Convention.

- b) Brussels IIa contains provisions for the direct enforcement of contact/access orders, and orders for the return of a child made pursuant to Brussels IIa Article 11 (6) – (8) following a wrongful removal/retention. There is no provision for the direct enforcement of orders under the 1996 Hague Convention.

Cross-Border Co-Operation

Chapter IV Brussels IIa contains provisions for cross-border co-operation between member states through Central Authorities in matters relating to parental responsibility.

The Withdrawal Agreement states that the cooperation provisions of Brussels IIa shall apply to requests and applications received by the central authority or other competent authority of the requested State before the end of the transition period (Withdrawal Agreement Article 67(3)).

Therefore, requests for co-operation made after the end of the transition period must be made using the co-operation provisions under the 1996 Hague Convention.

This would appear to be the case even if the proceedings in question were issued before the end of the transition period on the basis of Brussels IIa.

Assessments in EU member states

The existing rules about the ability of professionals to work in the EU member states on the basis of qualifications gained in their home state is affected by Brexit. There is therefore an even greater need for social workers and other professionals who propose to undertake assessments in an EU member state to ensure that they will not be contravening law within that state. This is in addition to ascertaining, in the first instance, whether assessments can be procured through cross border co-operation with professionals in the relevant state, in consultation with the Central Authority designated by the 1996 Hague Convention.

Placement of Children Overseas

Provisions concerning the placement of children in the EU member states/contracting States are set out within the co-operation provisions of Brussels IIa and the 1996 Hague Convention.

The 1996 Hague Convention contains similar provisions to Brussels IIa for the placement of a child in institutional care or with a foster family/kinship placement in another Contracting State. The relevant provisions are Brussels IIa Article 56 and 1996 Hague Convention Article 33.

Under both provisions, where an overseas placement of a child is contemplated, it is necessary to obtain consent in advance to the placement from the relevant competent authority in a member state/Contracting State. The requirements of the 1996 Hague Convention are more detailed than Brussels IIa because, when seeking the appropriate consents, a report on the child must be transmitted together with the reasons for the

proposed placement. In any case, consent from the relevant competent authority is vital as a failure to obtain consent could be a ground for non-recognition of an order placing a child overseas.

Where a co-operation request relating to an overseas placement is made before the end of the transition period, Brussels IIa will govern that request. Where it is made after the end of the transition period, the 1996 Hague Convention will apply (irrespective of when the proceedings were issued).

Child Abduction

The provisions of Brussels IIa relating to child abduction take precedence over the [1980 Hague Convention](#). Article 11 of Brussels IIa enhances the provisions of the 1980 Hague Convention but after the end of the transition period the following enhancements will be lost:

- a) The requirement under Article 11(3) Brussels IIa for 1980 Hague Convention cases to be heard expeditiously and requiring courts to issue judgment no later than 6 weeks after the application is lodged (albeit there is provision for expedition and a six week expectation within the 1980 Convention itself, Article 11).
- b) Articles 11(6)–11(8) Brussels IIa, which provide an unsuccessful applicant the opportunity to make submissions within 3 months of a non-return order pursuant to Article 13 of the 1980 Convention to the court in the member state where the child was habitually resident immediately before the wrongful removal or retention, so that that court can examine the question of the custody of the child. If it wishes, it can make a return order which is then enforceable under Brussels IIa (the so-called ‘second bite of the cherry’).
- c) The provision in Article 11(4) Brussels IIa, which provides that a court cannot refuse to return a child on the basis of Article 13(b) 1980 Hague Convention if it is established that adequate arrangements (protective measures) have been made to secure the protection of the child after his or her return. Practitioners should note that under the Article 11 1996 Hague Convention, the court can make protective measures which, as noted above, have extra territorial effect and are binding in other Contracting States. A potential issue is that the EU member states may take a different approach when dealing with cases involving the UK as the Article 11(4) Brussels IIa obligation will no longer apply and they may not use Article 11 1996 Hague Convention to make binding protective measures for children returning to this jurisdiction.
- d) The requirement under Article 11(2) Brussels to ensure that a child is given the opportunity be heard during 1980 Hague Convention proceedings unless this appears inappropriate having regard to the child’s age or degree of maturity. The requirement to hear the voice of a child in 1980 Hague Convention cases is not a feature of the 1996 Hague Convention. This obligation is drawn from Article 12 of the [UN Convention on the Rights of the Child](#) and the [EU Charter of Fundamental Rights](#). The UN Convention on the

Rights of the Child is not incorporated into domestic law in England but it is widely applied by English judges in abduction cases.

Other Child Protection Measures

For child protection measures which do not currently fall within the scope of Brussels IIa, practitioners will be aware of the [EU Regulation on mutual recognition of protection measures in civil matters 2013](#), which provides for mutual recognition of such protection measures across the EU member states. Protection measures made before the end of the transition period will continue to be governed by the provisions of that regulation but only if the relevant certificate has been issued (see Article 67(3)).

However, the UK has decided to continue the application of the Protection Measures Regulation for incoming orders going forwards (not something agreed on a reciprocal basis by the EU). From the end of the transition period, the [Mutual Recognition of Protection Measures in Civil Matters \(Amendment\) \(EU Exit\) Regulations 2019](#) provide that an incoming civil protection measure from a participating EU member state shall be recognised without any special procedure being required, and enforceable in the UK without the requirement for a declaration of enforceability. Outgoing UK civil protection measures will not benefit from reciprocity unless such measures are otherwise enforceable under 1996 Hague Convention. The 1996 Hague Convention provides protection for children and there is no corresponding provision for adults. Local advice should always be taken because, if it is not possible to use the 1996 Convention, then the person with the benefit of a UK protection measure may have to apply abroad for an order there.

[Please refer to the separate note prepared by Resolution and the Law Society in relation to matters of divorce, finance and maintenance, and domestic violence.](#)

This note has been prepared by Maria Wright (mw3140@bristol.ac.uk) of Resolution's Brexit Working Party and Resolution International Committee members, Nina Hansen (nh@freemanssolicitors.net), Amy Rowe (A.Rowe@bindmans.com) and Michael Wells-Greco (michael.wells-greco@crsblaw.com). It is endorsed by the Association of Lawyers for Children.