INTERNATIONAL FAMILY LAW IN THE UNITED KINGDOM BEYOND BREXIT

FOCUS ON MATRIMONIAL MATTERS AND HABITUAL RESIDENCE OF THE CHILD

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I. Introduction

The consequences of Brexit for international family law in the United Kingdom ("the UK") have been significant: from the loss of Regulation No 2201/2003[1] to potential dilemmas over the interpretation of key private international law concepts that had been expounded by the CJEU for the purposes of the EU private international law Regulations over the past decades and embedded in the UK domestic law.[2] The loss of the EU private international law regime will be felt more in some

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[1] Full quote *supra* Abbreviations, p. IX.

[2] More generally, see *e.g.* R. LAMONT, Not a European Family: Implications of "Brexit" for International Family Law, *Child & Family L. Q.* 2017, 29, p. 267 *et seq*; P. BEAUMONT, Private International Law Concerning Children in the UK after Brexit: Comparing Hague Treaty Law with EU Regulations, *Child & Family Law Quarterly L. Q.* 2017, 29; A. CRITCHLEY , Brexit and Family Law: the Fog Begins to Clear, *Scottish Private*

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areas than in others, with the sphere of matrimonial matters being perhaps most substantially affected. Another issue that merits thorough analysis is the likely interpretation of the concept of habitual residence of a child by the UK courts post-Brexit, for the purposes of parental responsibility and parental child abduction cases. Accordingly, the core of this article is divided into two parts – the first part addresses the legal landscape in the UK post-Brexit applicable to jurisdiction and recognition and enforcement in matrimonial matters, and the second part assesses the likelihood of diverging jurisprudence post-Brexit through the lens of habitual residence of the child. This is followed by a concluding section that brings together the key points made throughout the analysis.

II. Matrimonial Matters

A. Abandoning the *lis pendens* Rule and Reverting to *forum non conveniens*

Prior to the entry into force of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters[3] in the UK, the courts of England and Wales stayed divorce applications relying on "the inherent power of the High Court to govern its own proceedings" and utilising the *forum non conveniens* doctrine to decide whether an alternative, more appropriate forum should hear the claim.[4]

Although the concept of *forum non conveniens* featured in the negotiations, it was finally not inserted either in the Brussels Convention, or subsequently in the Regulation No 2201/2003, primarily due to the lack of a corresponding concept in major EU jurisdictions and the Benelux countries.[5] Instead, the default tool to

Client L. Rev. 2021, 74; M.C. MARTINEZ, Brexit and Private International Law: Looking Forward from the UK but Actually Going Backward, *Spanish Yearbook of Int'l L.* 2020/*24,* p. 73 *et seq.*; and D. HODSON, *Family Law Leaves the EU - A Summary Guide for Practitioners*, London 2020.

[3] Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, (*OJ* L 299, 31.12.1972, pp. 32-42) ("Brussels Convention"). The Brussels Covnention was agreed on 27 September 1968 by the (then) six Member States of the European Economic Community. Effect was given to the Convention in the UK by the Civil Jurisdiction and Judgments Act 1982, which came fully into force on 1 January 1987.

[4] P. BEAUMONT, Conflicts of Jurisdiction in Divorce Cases: Forum Non Conveniens, *I.C.L.Q.* 1987, 36(1), p. 117, L. COLLINS/ J. HARRIS *et al.*, *Dicey and Morris on the Conflict of Laws*, 15th ed., London 2018, at 11-075; P. TORREMANS/ U. GRUŠIĆ *et al.*, *Cheshire, North & Fawcett; Private International Law*, 15th ed., London 2017, 392, 977. The "inherent power" to stay proceedings has been put in statutory footing under section 49(3) Senior Courts Act 1981.

[5] *Ibidem*; P. BEAUMONT, Forum non Conveniens and the EU rules on Conflicts of Jurisdiction: A Possible Global Solution, *Centre for Priv. Int'l L. Working Paper No. 2018/4*, p. 3. Available at https://www.abdn.ac.uk/law/research/working-papers-455.php on 10.5.2021.

determine jurisdiction became the *lis alibi pendens* rule, according to which the court second seised must stay proceedings until the court first seised has decided upon its own jurisdiction.[6] Understandably, *lis pendens* was a significant departure from the common law doctrine of *forum non conveniens* – a disparity that was amplified by the reflexive application of the Regulation No 2201/2003.[7] For many years, the *lis pendens* rule sat uncomfortably with the UK courts,[8] until *forum non conveniens* was severely curtailed in *Owusu v Jackson*, when the CJEU passed down its landmark ruling that the Member States are to adhere to lis pendens even in "outward cases" involving a third state.[9] At the dawn of Brexit, commentators strongly advised the UK government to abandon *lis pendens* and to revert to *forum non conveniens*.[10]

Lis pendens has been praised for its predictability and is considered a pillar in establishing a pan-European scheme for determining jurisdiction in an efficient manner, while avoiding parallel proceedings.[11] At the same time, the rule has been criticised, especially in common law systems. A prominent disadvantage of *lis pendens* is that by default it encourages a "race to the court" for parties will prefer to initiate litigation in their forum of preference, often producing "arbitrary" jurisdictions – assigning claims to forums with little connection to the case.[12] The problem is "exacerbated by the fact that Art 3(1) provides seven different possibilities for jurisdiction without a hierarchy", resulting in the possibility of multiple alternative jurisdictions and uncertainty which will deal with the divorce.[13] A real-life illustration of the "race to the court" implications are the so-called "Eurostar

[6] Regulation No 2201/2003, Article 19.

[7] M. Ní SHÚILLEABHÁIN, *Cross-border Divorce Law Brussels II bis*, New York 2010, p. 217.

[8] *In re Harrods (Buenos Aires) Ltd.* [1992] Ch 72 per DILLON LJ, at [96]-[98], affirmed in *Anton Durbeck GmbH v. Den Norske Bank ASA* [2003] EWCA 147.

[9] [2005] Q.B. 801; EU:C:2005:120. See L. COLLINS/ J. HARRIS *et al.* (note 3), at 11-028; P. TORREMANS/ U. GRUŠIĆ *et al.* (note 3), p. 974 *et seq.*; and G. CUNIBERTI, Forum Non Conveniens and the Brussels Convention *I.C.L.Q.* 2005, 54(1), pp. 973, 980.

[10] See *e.g.* M. Ní SHÚILLEABHÁIN, Ten Years of European Family Law: Retrospective Reflections From a Common Law Perspective *I.C.L.Q.* 2010, 59(4), p. 1021; G. SMITH/ D. HODSON *et al.,* Brexit and international family law: a pragmatic approach to divorce and maintenance, *Fam Law* 1554, 2018 at [49]. Available at https://www.familylaw.co.uk/docs/pdf-files/Brexit_and_International_Family_Law.pdf on 30.3.2021; P. BEAUMONT (note 1), p. 56; "(…) it would be wise to deviate from the preclusive model of the forum non conveniens doctrine (..)" J. HAM, (Br)Exit Strategy: The Future of the Forum Non Conveniens Doctrine in the United Kingdom after "Brexit" *Cornell Int'l L. J.* 2020, 52(4), p. 742 *et seq*.

[11] A. BORRÁS, Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters *OJ C 221*, p. 45.

[12] *L-K v K (No 3)* [2006] EWHC 3281 (Fam), per SINGER J at [44]; J. REDDIN, An Unhappy Marriage: The EU and the Divorce Jurisdiction System under Brussels II Bis, *Un. College Dublin L. Rev.* 2020, 20, p. 46.; M. Ní SHÚILLEABHÁIN (note 9), p. 1028.; G. CUNIBERTI (note 8), p. 978.

[13] J. REDDIN (note 11), p. 46.

divorces" of Anglo-French couples.[14] In a "Eurostar divorce", the financially weaker party rushed to the courts of England and Wales where the system provides for open-ended maintenance to the detriment of the financially stronger party.[15] In contrast, the latter rushed to the French courts where maintenance is approached as a means for the financially weaker party to gain financial standing in the short term, to avoid the financial obligation.[16] Due to the involvement of litigation, and accordingly, cost, *lis pendens* "favour[ed] the richer party, who can afford the specialist legal advice that is crucial in these cases."[17] By operation of *lis pendens*, in "Eurostar divorces" and other cases, the statutory requirement or encouragement of parties to utilise conciliation or mediation prior to divorce proceedings came to be either abandoned or doomed.[18] While mediation is willingly underutilised in commercial cases, it plays a crucial role in family matters, where contentious proceedings can prove detrimental. States have consistently attempted to incentivise the use of non-contentious processes; an objective that *lis pendens* has frustrated.[19]

With the revocation of the Regulation No 2201/2003 in the UK,[20] the *lis pendens* rule was abrogated, resulting in a "shift back" to domestic jurisdictional rules. Post-Brexit, matrimonial proceedings may be instituted in the UK upon proof that one of the expanded bases under the Domicile and Matrimonial Proceedings Act 1973 exists.[21] If actions have been raised in another jurisdiction parallel to the domestic action under an alternative jurisdictional base, the UK courts would now apply the "balance of convenience and fairness" test outlined in Schedule 3 of the 1973 Act, which places the doctrine of *forum non conveniens* on a statutory footing. The burden would be on the petitioner to prove to the court's satisfaction that it is the appropriate forum as compared to any alternative jurisdiction. Accordingly, *forum non conveniens* is highly likely to become increasingly relevant in international family law cases.

Considering the significant lapse of time since the curtailment of the concept of *forum non conveniens* in *Owusu v Jackson*, it is worth exploring the doctrine's latest developments and assess the extent to which modernisation might be necessary. The concept was originally developed in Scotland[22] and accepted in

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[14] *Ibidem.*

[15] *Ibidem.*

[16] *Ibidem.*

[17] G. SMITH/ D. HODSON *et al.* (note 10), at [18].

[18] See M.M. CASALS, Divorce Mediation in Europe: An Introductory Outline, *Electronic J. of Comp. L.* 2005, 9(2).

[19] *Ibidem*. See also M. NÍ SHÚILLEABHÁIN (note 9), p. 217.

[20] The Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019, Regulation 3.

[21] Section 5(2) Domicile and Matrimonial Proceedings Act 1973 as amended by the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019. These jurisdictional grounds are based on the applicable Regulation No 2201/2003 rules, with sole domicile as a ground of jurisdiction having been added.

[22] *Sim v Robinow* (1892) 19 R 665. See A. ARZANDEH, The origins of the Scottish forum non conveniens doctrine *J. of Priv. Int'l L.* 2017, 13(1), p. 132 *et seq.*

England and Wales in the *Spiliada*[23] case, resulting in the "English discretion to stay now [being] indistinguishable from the Scottish doctrine."[24] The core principle is that the court will grant a stay on the basis of forum non conveniens where the court is convinced that an alternative jurisdiction is "the appropriate forum;" it is better suited to hear the action in question.[25] The doctrine, as expressed in *Spiliada*, was transposed to "non-domestic matrimonial applications" in *De Dampierre v de Dampierre*, where the court laid out several indicators of forum appropriateness.[26] The bases considered by the court were the conventional connecting factors that are widely recognised as such – nationality and the place of residence – and less widespread factors such as the cultural heritage of the parties and family ties.[27] It was recognised that factors such as the location of assets were of importance. In *W v W*, the court noted the significance of unity of proceedings in assessing convenience and found that it was "inconceivable" that property issues would be dealt separately to capital issues.[28] In *S v S*, Wilson J suggested that the mere fact that another court has been seised with the claim would not prevent the domestic proceedings, because "it would be unfortunate to encourage litigants to think that they can win advantage by racing," albeit it would be a relevant consideration in light of practicability.[29] In *O v O (Appeal against Stay: Divorce Petition)*, on similar grounds of practicability, Thorpe LJ, when assessing forum conveniens, highlighted the "convenience of witnesses, delay and expense" in participating in proceedings.[30]

In its search for the appropriate forum, UK courts have presented a plethora of factors to be considered. The flexible application of the doctrine is its comparative advantage; it is a formidable tool in identifying the most appropriate forum because it morphs on a case-by-case basis. However, in the doctrine's flexibility lies also its greatest pitfall; its discretionary nature comes hand-in-hand with each judge's idiosyncrasy on what constitutes undefined and arguably personal concepts such as culture and family ties. In a modern world, and especially a highly multicultural jurisdiction such as the UK, it is perhaps unfortunate to decide on forum appropriateness on the basis of factors such as cultural heritage or family ties. Technological advances come to challenge the practicability grounds proposed in *W v W* and *S v S*. Especially during the past year, the rise of telecommunications has shed light on online dispute resolution becoming the default, allowing for witnesses located anywhere to participate effortlessly. Further, the practicability ground regarding the location of assets is likely to be less relevant today, at least

[23] *Spiliada Maritime Corp v Cansulex Ltd* [1986] UKHL 10.

[24] P. TORREMANS/ U. GRUŠIĆ (note 3), p. 393.

[25] *Spiliada* [1987] A.C. 460 at 476.

[26] [1988] 1 AC 92 (HL) per LORD GOFF at [108]. See P. TORREMANS/ U. GRUŠIĆ (note 3), p. 973 *et seq*.

[27] *Ibidem*, per LORD TEMPLEMAN at [96] and [103].

[28] *W v W (Financial Relief: Appropriate Forum)* [1997] 2 FCR 659.

[29] *S v S (Matrimonial Proceedings: Appropriate Forum)* [1997 1 WLR 1200 per WILSON J at [1212].

[30] [2002] EWCA Civ 949, per THORPE LJ at [63].

with regards to assets other than immoveable property; digital banking, asset fluidity and blockchain mean that persons are able to both transfer assets between States instantaneously and maintain assets at an a-national cloud, making any declarations with regards to location vain. Against this background, it becomes evident that the cherished doctrine of *forum non conveniens* might not be so apt for the contemporary world, which adds to the existing unpredictability of this flexible concept.[31]

B. Recognition of Divorce, Nullity, and Legal Separation

Recognition of foreign divorces involving the UK and EU Member States is an area where the loss of the Regulation No 2201/2003 will be felt. The post-Brexit regulatory framework consists of the 1970 Hague Convention on the Recognition of Divorces and Legal Separations ("the 1970 Convention"),[32] existing Bilateral Treaties between the UK and EU Member States and individual State private international rules. The hurdle of recognition will inevitably vary from State to State and the set of rules applicable in each case.

1. The 1970 Hague Convention on the Recognition of Divorces and Legal Separations

The scope of the 1970 Convention is limited to divorces and legal separations which follow judicial or other proceedings officially recognised in that state and which are legally effective.[33] Accordingly, the annulment of marriages, findings of fault or ancillary orders, including orders for pecuniary obligations, are excluded.[34] Notably, the 1970 Convention does not include any direct rules on jurisdiction, which is a "considerable flexibility" compared to the Regulation No 2201/2003.[35] The 1970 Convention is considerate of the different levels of conservatism of States towards the notion of matrimony and divorce by providing a mechanism for

[31] See *e.g.* J. HAM (note 9) for suggestions how the doctrine of *forum non conveniens* could be adapted.

[32] 1970 Hague Convention on the Recognition of Divorces and Legal Separations ("the 1970 Convention").

[33] 1970 Convention, Article 1. See P. BELLET/ B. GOLDMAN, Explanatory Report to the Convention on the Recognition of Divorces and Legal Separations ("BELLET-GOLDMAN Report"), at 12-18. The Explanatory Report, p. 3, adds that as "divorce is often followed by re-marriage […] it is consequently as much a matter of facilitating recognition of the validity of the second marriage as of recognising the validity of the divorce."

[34] *Ibidem*, at 6.

[35] M. Ní SHÚILLEABHÁIN (note 6), p. 16.

States to broaden or narrow their grounds for recognition.[36] The majority of Contracting Parties have a reservation, declaration, or notification in place.[37]

For a divorce to be recognised under the 1970 Convention, the parties must satisfy specific connecting factors centred around habitual residence and nationality.[38] Interestingly, Article 3 proclaims that where relevant, the concept of habitual residence includes that of domicile. In the Explanatory Report it is understood that the aim of Article 3 is to "make recognition subject to the general jurisdiction of the State of origin, without concerning itself with where, within that State, the authority from which the decision emanates is situated" and essentially transposes "domicile" to Article 2(1) and (2), *mutandis mutandis* "habitual residence."[39] For the UK, Article 3 translates to a positive change from the Regulation No 2201/2003 regime, where it was possible that courts of different intra-UK domiciliary territories would hear different family law issues. Refraining from determining a specific domestic court, especially in multi-territorial states such as the UK, avoids unnecessary complexity and intra-state intervention that does not exist in States consisting of a single domiciliary territory.

The 1970 Convention prescribes narrow grounds for the non-recognition of divorces in Articles 8-10.[40] Under Article 8, divorce may not be recognised if the applicant has not taken adequate steps to notify the respondent. Under Article 9, recognition may be refused if there is a previous relevant decision that has been recognised or is capable of recognition in the state recognition is sought. Under Article 10, a court may refuse recognition if the divorce is "manifestly incompatible with [the state's] public policy." Public policy in the Hague Conventions has been the source of significant scholarly debate; however, there is no specific added criticism concerning its expression in the 1970 Convention.

The 1970 Convention has been acknowledged to be fit for purpose, not posing significant interpretational challenges and achieving "a reasonably high level of harmonisation, without encroaching unduly on national interests."[41] Although there is no evidence that the 1970 Convention would be incompatible with either civil or common law systems, it has been ratified by only two common law jurisdictions - Australia and the UK.[42] The most significant lacuna of the 1970 Convention lies in its restricted application as only twelve EU Member States are

[36] 1970 Convention, Articles 17, 19 and 20.

[37] Only 6 of the 20 Contracting Parties have acceded to the Convention *in toto*. See also BELLET-GOLDMAN Report (note 31), at 4.

[38] 1970 Convention, Article 2. See D. HODSON/ G. SMITH & V. LE GRICE, Brexit and international family law: a pragmatic approach to divorce and maintenance, *Fam Law*, 2018, 1554; and BELLET-GOLDMAN Report (note 31), at 24-31.

[39] BELLET-GOLDMAN Report (note 31), at 10.

[40] *Ibidem, at* 46-50.

[41] M. NÍ SHÚILLEABHÁIN (note 6), p. 15.

[42] *Ibidem.* See the status table of the Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations at https://www.hcch.net/en/instruments/conventions/status-table/?cid=80 on 10.4.2021.

Contracting Parties.[43] Accordingly, the 1970 Convention's usage rate and success as a reliable international instrument post-Brexit will heavily depend on whether the EU will accede *en bloc* to maintain a degree of coherence with the UK. There is, however, faint evidence of such a scenario coming to fruition; as far back as 1997, it was reported that two key EU States, France, and Germany, were negatively predisposed to the 1970 Convention.[44] Although the post-Brexit political *status quo* might ignite a reassessment of options, it is questionable whether EU states, individually or collectively, would yield towards ratification for the sole purpose of maintaining coherence with the UK. From the outset, the French and German rejections of the Convention were based on a desire "to have a European solution to questions of jurisdiction and recognition in matrimonial matters," and a reluctance "to give up the rights of […] citizens to have recourse to [national] courts" except in the context of reciprocity of the EU. Considering the dynamics of the European politics, the fact that two pillar Member States have rejected the 1970 Convention, and most other EU Member States have been indifferent, indicate that an *en bloc* accession by the EU is an unlikely event.

At present, the 1970 Convention could be inviting an added layer of abuse by acting as a "doorway" to recognising divorces in Europe. For instance, if a divorce decree issued by UK courts is recognised in any of the Convention's Contracting States that are also EU Member States, the applicant may tactically seek to enforce that Contracting State's judicial decision on the recognition of the divorce decree in the other Member States more efficiently. The Explanatory Report to the Convention leaves this possibility unanswered, perhaps because such situations could not have reasonably been envisaged at the time the Convention was drafted.

2. Foreign Divorce Recognition in the UK under the Family Law Act 1986

Part II of the Family Law Act 1986 lays out the framework for the recognition of divorces, annulments, and legal separations.[45] Mirroring Article 2 of the 1970 Convention to a considerable extent,[46] Section 46(1) provides that an overseas divorce, annulment or legal separation, "obtained by means of proceedings" will be recognised if either party was habitually resident, domiciled, or a national of the granting state and the decree is legally effective there.[47] Similarly to the 1970 Convention, foreign decisions refusing the granting of a divorce, annulment or legal

[43] The contracting parties do not include France or Germany. In this context, M. Ní SHÚILLEABHÁIN, (note 6), p. 16, rightly notes that "[f]rom the point of view of English law, German and French ratification would have been a preferable solution.".

[44] *Ibidem*. See HOUSE OF LORDS SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, Brussels II: The Draft Convention on Jurisdiction, Recognition and Enforcement of Judgements in Matrimonial Matters, *House of Lords Select Committee Reports* 1997-98/5, at [9], [56].

[45] Family Law Act 1986, Sections 44-54.

[46] Interpreted in conjunction with Article 3 of the 1970 Convention.

[47] Family Law Act 1986, Section 4(1)(b)(i)-(iii).

separation are excluded from the scope of the recognition sections under the 1986 Act; should a party that has failed to obtain a granting decree overseas wish to start fresh proceedings in the UK, it is permitted to do so, subject to satisfying the relevant jurisdictional grounds. Under Section 46(1), the concept of "domicile" refers either to the common law concept or the concept envisaged under the granting state's national law.[48] According to Ni Shuilleabhan, the rule sanctions "the recognition of decrees of 'divorce mills'", *i.e.* states where a party may acquire domicile following brief residence and therefore become entitled to a divorce decree.[49]

Previously, there had been intense discussion surrounding religious divorce such as *talaqs*, and whether they qualified as "proceedings" under Section 46(2) of the 1986 Act.[50] This question is important considering the significantly wider bases for recognition under Section 46(1) when compared to Section 46(2).[51] The issue is now definitively settled, and there is a strong line of precedent including them in the interpretation of section 46(1).[52] A similar debate had concerned the negotiating parties of the 1970 Convention, which reached the same interpretation – *i.e. talaqs* are to be included in the scope of Article 1.[53]

Under Section 46(1), a potential pain point is the requirement of legal effectiveness in the state of origin. There is no clear corresponding rule under the Regulation No 2201/2003 although there are *a fortiori* indications of such a requirement under other Articles of the Regulation.[54] Therefore, it is probable that future recognition cases will include an enquiry into legal effectiveness, which did not exist previously. The added requirement of Section 46(1) is not necessarily negative; arguably, under Regulation No 2201/2003, it was possible for decrees that were considered void in their state of origin to enjoy automatic recognition.[55] Still, there is a scope for irreconcilable interpretations under the 1986 Act and common law, and in particular, the extent to which the interpretation of the 1986

[48] Family Law Act 1986, Section 46(5).

[49] *Messina (formerly Smith orde Vervaeke) v Smith* [1971] P 322 (P) 339. See also M. Ní SHÚILLEABHÁIN (note 6), p. 232; P. TORREMANS/ U. GRUŠIĆ *et al*. (note 3), p. 1025.

[50] Section 46(2) of the Family Law Act 1986 regulates the recognition of "the validity of an overseas divorce, annulment or legal separation obtained otherwise than by means of proceedings […]." M. Ní SHÚILLEABHÁIN (note 6), p. 234.

[51] Under Section 46(2) of the Family Law Act 1986, it is possible that a divorce, nullity or legal separation be recognised if not acquired through judicial proceedings, however, the bases for recognition are significantly narrower. P. TORREMANS/ U. GRUŠIĆ *et al.* (note 3), p. 1021.

[52] *El Fadl v El Fadl* [2000] 1 FLR 175 (F); *Quazi v Quazi* [1980] A.C. 744.

[53] BELLET-GOLDMAN Report (note 31), at 13; P. TORREMANS/ U. GRUŠIĆ *et al*. (note 3), p. 1017.

[54] *E.g.* Article 46 of the Regulation No 2201/2003 requires the concerned private agreements to be enforceable in their state of origin. M. Ní SHÚILLEABHÁIN (note 6), p. 241.

[55] *Ibidem,* p. 242.

Act departs from established precedent.[56] Before codifying the rules on recognition, the common law approach appeared to permit the recognition of decrees that contained defects; only decrees declared ineffective in their state of origin would be denied recognition. In *Pemberton v Huges*, where the recognition of a defective divorce decree granted in Florida was sought, the court was unequivocal that "an English court cannot go behind the final decree of a foreign court upon the ground that the foreign court made a slip in its own procedure," nor would it be possible to examine the matter on its merits.[57] The commentary in the Explanatory Report to the 1970 Convention provides an aligned explanation of the corresponding requirement under Article 1 and limits the types of decrees that are not "legally effective" to "divorces which are not effective in the state in which they were obtained," and therefore, necessarily to decrees that have already undergone or are undergoing an appeal procedure with a negating effect.[58] The more recent case law suggests a mixed treatment of the above approach. For instance, in *D v D*, a divorce decree granted by the Ghanaian Customary Arbitration Tribunal was not recognised, *inter alia*, because of the possibility for the decree to be set aside in judicial review proceedings.[59]

Recognition under the 1986 Act is further subject to Section 51, which provides three exclusive and narrow grounds for refusal of recognition. Firstly, a decree will not be recognisable if there is *res judicata* between the parties, determining the same matter.[60] Under Section 51(2), recognition may be refused if the divorce was "obtained at a time when, according to […] [English law], there was no subsisting marriage between the parties."[61] Notably, annulments are excluded from the scope of the *proviso* to take into account cases where the marriage was void *ab initio* and no judicial decision of annulment exists.[62] The third ground for non-recognition is a failure to take steps to notify a party of proceedings or if a party was not given an adequate opportunity to be heard.[63] The standard upon which the requirement is to be determined is the "English standards," interpreted to refer to "European standards applicable in the UK."[64] There is no evidence of a shift away from this approach. Courts have applied the rule flexibly and consider "all circumstances" of a case.[65] It is established that courts should be "very slow"

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[56] *Ibidem,* p. 235; P. TORREMANS/ U. GRUŠIĆ *et al.* (note 3), p. 999.

[57] *Pemberton v Hughes* [1889] 1 Ch 781 (CA).

[58] BELLET-GOLDMAN Report (note 31), at 14.

[59] *D v D (Recognition of Foreign Divorce)* [1994] 1 FLR 38.

[60] Family Law Act 1986, Section 51(1).

[61] Family Law Act 1986, Section 51(2). See P. TORREMANS/ U. GRUŠIĆ *et al.* (note 3), p. 1026.

[62] *Ibidem.*

[63] Family Law Act 1986, Section 51(3)(a).

[64] *Liaw v Lee* [2015] EWHC 1462 (Fam), [2016] 1 FLR 533, per MR JUSTICE MOSTYN at [8].

[65] *Duhur Johnson v Duhur Johnson* [2005] 2 FLR 1042. See P. TORREMANS/ U. GRUŠIĆ et. al. (note 3), p. 1027. In *Law v Gustin* [1976] Fam 155, it was acceptable that

to exercise their discretion under the grounds of Section 51.[66] Public policy as a ground for non-recognition is contained in Section 51(3)(c). This is a discretionary power of the courts, however in *Golubovich v Golubovich* it was submitted that, if recognition is found to be manifestly contrary to public policy, the courts' residual power in such cases necessarily commands a refusal.[67] The courts are highly likely to seek guidance from established precedent, even though common law does not offer a separate public policy ground for refusal to Section 51(3)(c).[68]

Despite the uncertainty around decrees which are capable of being set aside or quashed in their state of origin, commentators agree that other aspects of Part II of the 1986 Act are "reasonably clear" and recognition of divorces is "almost automatic."[69] The grounds for non-recognition were modelled after the 1970 Convention and were narrow prior to the Regulation No 2201/2003 coming into force, indicating that they will likely continue being so after Brexit. Evidence suggests that courts will continue to have regard to the interpretation of corresponding concepts of the 1986 Act in the Regulation No 2201/2003 as passed down by the CJEU. For instance, in *Liaw v Lee,* Mr Justice Mostyn observed the benefits of utilising harmonised international rules and submitted that the interpretation of Section 51(3) of the 1986 Act "must be informed by the judicial interpretation of Article 22(b)" because "it would be bizarre if totally different rules" applied to petitions from an EU Member state and third states.[70] While it is expected that direct parallelisms with the Regulation No 2201/2003 might end, it is envisaged that the courts will continue to "have regard" to the CJEU and other EU judicial interpretations of core concepts such as procedural fairness, as a result of efforts to maintain desirable coherence.

Notwithstanding, in practical terms, parties wishing to have their divorce, annulment, or legal separation recognised in the UK, will be disadvantaged by the loss of the EU-exclusive automatic recognition feature post-Brexit.[71] Previously, recognition of the relevant decrees was automatic across all EU Member States. Under the post-Brexit regime, parties will have to apply for a status declaration under Section 55(1)(d) of the 1986 Act to have the divorce decree recognised. The procedure encompasses a potentially hefty burden on the applicant to convince the

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five days of notice were given to the other party, whilst in *Mitford v Mitford* [1923] P 130 an annulment decree was recognised despite one party being absent from the proceedings due to war.

[66] *Olafisoye v Olafisoye* [2010] EWHC 3540 (Fam) at [35]. See P. TORREMANS/ U. GRUŠIĆ *et al.* (note 3), p. 1028.

[67] *Golubovich v Golubovich* [2010] EWCA Civ 810 per THORPE J at [69] *cf. Ibidem*, p. 1030.

[68] *Ibidem*, p. 1048 *cf Chaudhary v Chaudhary* [1085] Fam 19 per WOOD J at [29].

[69] M. Ní SHÚILLEABHÁIN (note 6), p. 236; D. HODSON, Brexit: England and Wales as a global family law leader or EU-emasculated?, *Family Law Journal* 2016*,* p. 574.; M. Ní SHÚILLEABHÁIN (note 9), p. 1021.

[70] [2015] EWHC 1462 (Fam), [2016] 1 FLR 533, per MR JUSTICE MOSTYN at [8].

[71] Article 21(1) of the Regulation No 2201/2003 permits the automatic recognition of decrees without requiring a court hearing.

court of "the truth of the proposition to be declared" to the court's satisfaction.[72] The related proceedings are contentious, encompassing the matrimonial parties as petitioner and respondent, which can be a combative and consuming process.[73] Accordingly, post-Brexit, the substantive grounds for refusal of recognition might not be felt in practice, as both systems provide for a *laissez-faire* approach. The impact of Brexit might be felt more in the de-harmonised procedure for enforcement, which will be significant in the UK.

III. Habitual Residence of the Child

It is impossible to pinpoint with certainty the approach of the UK courts towards retained EU case law and the extent of divergence occurring in the future.[74] Nevertheless, it is worth analysing whether, and if so, to what extent, UK courts are empowered to deviate from retained EU case law. Assessing potential post-Brexit approaches of the Supreme Court through the lens of a "Europeanised" concept such as the habitual residence of children offers grounds for fruitful discussion.

A. The European Union (Withdrawal) Act 2018 and UK Courts

The European Union (Withdrawal) Act 2018 ("the Withdrawal Act") embodies core legal changes applicable post-Brexit, *inter alia,* the newly found power of certain UK courts to deviate from retained EU case law.[75] Per Sections 2-4 of the Withdrawal Act, "retained EU Law" includes retained EU-derived law in the UK by statute or statutory instrument that implemented EU law when it was binding in the UK, retained EU direct law, which was applicable in the UK without the need of national legislation, and other rights, and obligations derived from Section 2(1) of the European Communities Act 1972 not falling in one of the two previous categories. "Direct EU legislation" expressly includes decisions of the CJEU as they had effect immediately before the exit day. Under Section 6(2) of the Withdrawal Act, UK courts "may have regard" to future CJEU decisions and decisions of "another EU entity or the EU so far as relevant to any matter before the court or tribunal." The word "may" may lead to the interpretation that UK courts are under no obligation to follow future EU decisions or consider them to any specific extent.

[72] Family Law Act 1986, Section 58(1).

[73] M. Ní SHÚILLEABHÁIN (note 6), p. 243.

[74] See also K. TRIMMINGS, International Family Law in the UK beyond Brexit: Focus on Parental Child Abduction, *Int'l Family Law*, 2021, pp. 121-124.

[75] European Union (Withdrawal) Act 2018. Available at https://www.legislation.gov.uk/ukpga/2018/16/contents/enacted on 30.03.2021.

The Supreme Court, the High Court of Justiciary (in criminal matters) and a number of appeal courts may depart from retained EU case law.[76] When deciding whether to depart, the Supreme Court and the High Court of Justiciary "must apply the same test as it would apply in deciding whether to depart from its own case law," while the relevant lower courts must apply the same test.[77] The referred test is laid out in the Practice Statement of the UK Supreme Court and is primarily based on the court's discretion; the court will regard precedent "as normally binding, [but] depart from a previous decision when it appears right to do so".[78] *A fortiori*, retained EU case law will remain "normally binding" but the qualifying UK courts will depart if "it appear[s] right to do so."[79] The test was applied recently *in Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd (Northern Ireland)*, where Lord Wilson, quoting Lord Bingham in *Horton v Sadler*,[80] found that the Supreme Court will only depart from earlier decisions "rarely and sparingly" and "with a high degree of caution" because a "sudden change in the law is likely to destabilise it".[81] Considering Lord Wilson's *dicta*, it is expected that the Supreme Court will be setting a high threshold to depart from retained EU case law. The relevant test of the Inner Temple of Scottish Justiciary is centred around the court's discretion, albeit phrased differently, to allow departure from precedent "when the interests of justice require it."[82]

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[76] Section 6(4) makes note of the Supreme Court and High Court of Justiciary only, however, Section 3(a)-(g) of The European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 adds the following courts to the courts that may depart from retained EU case law: (a) the Court Marial Appeal Court, (b) the Court of Appeal in England and Wales, (c) the Inner House of the Court of Session, (d) the High Court of Justiciary when sitting as a court of appeal in relation to a compatibility issue (within the meaning given by section 288ZA(2) of the Criminal Procedure (Scotland) Act 1995(3)) or a devolution issue (within the meaning given by paragraph 1 of Schedule 6 to the Scotland Act 1998(4)), (e) the court for hearing appeals under section 57(1)(b) of the Representation of the People Act 1983(5), (f) the Lands Valuation Appeal Court, and (g) the Court of Appeal in Northern Ireland.

[77] European Union (Withdrawal) Act 2018, Section 6(5).

[78] The test was laid out in Practice Statement (Judicial Precedent) 1966: [1966] 1 W.L.R. 1234. This has been confirmed to apply to the Supreme Court in subsequent case law: *Austin v Mayor and Burgess of the Borough of Southwark* [2010] UKSC 28 per LORD HOPE at [24]; THE SUPREME COURT OF THE UNITED KINGDOM, Practice Direction 4, *UKSC Practice Direction 4, at 4.2.4*. Available at https://www.supremecourt.uk/procedures/practice-direction-04.html on 30.03.2021; "The Supreme Court and Europe" (UK Supreme Court, 2021) Available at https://www.supremecourt.uk/about/the-supreme-court-and-europe.html on. 16.3.2021.

[79] *Ibidem.*

[80] *Horton v Sadler* [2007] 1 AC 307.

[81] *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd (Northern Ireland)* [2020] UKSC 36 per LORD WILSON at [49].

[82] Consultation; Retained EU Case Law consultation on the Departure from retained EU case law by UK courts and tribunals, *UK Ministry of Justice 2020*, p. 21. Available at https://www.gov.uk/government/consultations/departure-from-retained-eu-case-law-by-uk-courts-and-tribunals on 30.03.2021.

The Supreme Court test was introduced as a safety valve against uncertainty but effecting desirable incoherence in a timely manner and avoiding the "fossilisation" of UK law.[83] It was initially thought that only the Supreme Court should have the power to depart from retained case law; a proposition that was later expanded to include an array of courts, despite the majority of responses to the relevant consultation paper having indicated support for the first.[84] The seemingly straightforward test, contemplated in its newly found context, hides several lacunas, the initial being of conceptual nature. Understandably, the test was not designed to be utilised by courts other than the Supreme Court, even if they hold an appellate function. Each court in the UK judicial order that has been empowered under the Withdrawal Act has established, well-defined and narrow grounds upon which departure from its own precedent is permitted, while the discretionary test remains reserved for the Supreme Court. The arrangement is not merely reflective of the longstanding hierarchy of the courts; the test exists to allow the Supreme Court to correct injustices and synchronise the law with modernity. The innate uncertainty and discretionary phrasing of the test are necessary and justified by the Supreme Court's role as an apex court. Contrastingly, with a partial exemption of the High Court of Justiciary, decisions of the relevant courts under the Withdrawal Act are subject to judicial review or may be appealed, thus not requiring a test to revise own precedent. The vertical expansion of the application of the test is not reflective of either the UK judicial order or the specific roles of the courts. It is uncertain how the test will develop in the context of Brexit; however, it is probable that the empowered courts will continue to follow retained EU case law that has been confirmed in Supreme Court cases, out of respect to the judicial hierarchy, which is rooted in centuries of tradition.

B. Discerning a Possible Post-Brexit Approach of the Supreme Court towards the Concept of Habitual Residence of the Child

It is well-established that UK family law has been influenced to a considerable extent by EU law. According to Lamont, "the emphasis [of the EU] on legal certainty and mutual trust was a significant shift away from for English approach to international family law based on discretion and *forum conveniens*."[85] The UK legal order has shifted significantly to align with the EU rule of law, and the lapse of decades of the pre-Brexit *status quo* has blurred the distinctions between EU and UK legal concepts. Due to the blending of laws, the invariable consequences of Brexit do not necessarily encompass a stark "shift back" to purely domestic concepts, especially considering a portion of adapting retained EU law has been entrusted to the judiciary, resulting in necessarily gradual, case-by-case change.

[83] Consultation response; Response to the consultation on the departure from retained EU case law by UK courts and tribunals, *UK Ministry of Justice 2020*, p. 16. Available at https://www.gov.uk/government/consultations/departure-from-retained-eu-case-law-by-uk-courts-and-tribunals on 16.03.2021.

[84] *Ibidem.*

[85] R. LAMONT (note 1), p. 272.

Although it is impossible to define the extent of divergence accurately from the Supreme Courts' approach in established precedent, it is discernible that, at least regarding habitual residence of children, the departure will be subtle and slow unless incoherence is manually accelerated via the introduction of a new law by the UK legislator. Discussing a possible post-Brexit approach of the Supreme Court in the context of habitual residence of children is of particular interest because the concept has been left systematically undefined, fact-based, and fragmented.[86] As such, judicial interpretation gains prominence and becomes the primary source of understanding of the concept.

To discern potential post-Brexit approach of the Supreme Court, the authors have examined two significant non intra-EU cases involving the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the 1980 (Hague) Convention"),[87] where the definition of habitual residence was at issue: *In the matter of KL (A Child)*[88] and *In the matter of A (Children)*.[89] The respective decisions include accounts of both the CJEU definition of habitual residence and UK case law, theoretically providing grounds for fruitful discussion about post-Brexit interpretation of the concept of habitual residence of children.

In *In the matter of KL (A Child)*, Baroness Hale straightforwardly recognised that "not all states parties [of the 1980 Hague Convention] would apply an identical test [to determine habitual residence]";[90] a powerful reminder that the concept has different facets according to jurisdiction. Notwithstanding, citing *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)*,[91] Baroness Hale proceeded to apply the concept of habitual residence "as explained" by the CJEU. Arguably, Lady Hale's justification for considering the UK and EU concepts conjunctively, albeit separating their existence, extends further to the UK's membership in the EU. Specifically, Baroness Hale anchored her *dicta*, *inter alia*, in the fact that the 1980 Convention "formed part of the legislative history of the [Regulation No 2201/2003]" and the proposition by Advocate-General Kokott in *A v A (Children) (Habitual Residence)*,[92] that such an approach would ensure "a uniform understanding of the concept of habitual residence".[93]

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[86] J. CARRUTHERS, Discerning the meaning of "habitual residence of the child" in UK courts; a case of the oracle of Delphi, this *Yearbook* 2020, p. 1, 5, 10, 14.

[87] 1980 Hague Convention on the Civil Aspects of International Child Abduction ["the 1980 (Hague) Convention"]. For an account of the relationship between the Regulation No 2201/2003 and the 1980 Convention in the context of Brexit see *e.g.* L. WALKER, The Potential Effects of Brexit on the Cross-Border Circulation of Private Family Law Judgments; with a Particular Focus on Questions Relating to Gender in M. DUSTIN/ N. FERREIRA (eds) *et al.*, *Gender and Queer Perspectives on Brexit, Gender and Politics*, Cham, 2019.

[88] *In the matter of KL (A Child)* [2013] UKSC 75.

[89] *In the matter of A (Children)* [2013] UKSC 60.

[90] *Ibidem,* per BARONESS HALE at [18].

[91] [2013] UKSC 60.

[92] *A v A (Children) (Habitual Residence)* [2014] A.C. 1.

[93] *In the matter of KL (A Child)* [2013] UKSC 75, per BARONESS HALE at [19].

Similarly, in *In matter of A (Children),* Baroness Hale, with whom Lord Wilson, Lord Reed and Lord Toulson agreed, explicitly distinguished the UK concept of habitual residence from the concept adopted by the CJEU, however, stating that "it is highly desirable that the same test be adopted and that, if there is any difference, it is that adopted by the Court of Justice."[94] Baroness Hale referred to a recommendation by the Law Commission of England and Wales, which preferred the adoption of "habitual residence" over alternatives such as domicile and "ordinary residence" precisely because of its extended use in international conventions such as the 1980 Hague Convention and the increased likelihood of it being recognised in an array of jurisdictions.[95]

The embedment of the EU concept of habitual residence in UK precedent is more pervasive than the eye meets. According to Carruthers, it is clear that UK courts have "follow[ed] the European model" in "conscious alignment of the national and European concepts."[96] Arguably, there is faint evidence that the Supreme Court might reconsider its stance; in *In matter of A*, Baroness Hale hinted that there might be scope for debate with regards to Lord Justice Thorpe's dicta in *DL v EL*[97] that "there is now no distinction to be drawn" between the CJEU, the 1980 Convention and the English domestic law test of habitual residence.[98] If Lord Thorpe's approach is adopted, there might be a reasonably uncomplicated departure from the *status quo* in future international child abduction cases. Albeit an unlikely scenario, it might be legally within the scope of section 6 of the Withdrawal Act 2018 for the UK courts to depart from precedent on habitual residence if the concept utilised in the domestic context is considered to be the one of the CJEU, directly effective. It is plausible that the UK courts hold the power to depart from retained EU case law subject to the Supreme Court's test for departing from its own case law.

If Baroness Hale's interpretation is accepted, perceiving habitual residence to be an autonomous and potentially divergent concept under each legal order will not be a direct consequence of Brexit; the seeds of the debate are evident in the respective judgments.[99] Further, to an extent, subtle divergence exists. As noted by Carruthers, "[UK] judges in specific instances depict […] characteristics [of habitual residence] and identify its *indicia"*, thus forming a *stare decisis* of

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[94] "Very recently, in *DL v EL* [2013] EWCA Civ 865, at para 48, the Court of Appeal has expressed the view that "there is now no distinction to be drawn" between the test adopted in each of those three contexts. As we are dealing only with habitual residence under the Regulation, it is not strictly necessary for us to resolve that debate." *Ibidem,* at [34].

[95] *Ibidem.* Custody of Children – Jurisdiction and Enforcement within the United Kingdom, *Law Commission No 138, Scottish Law Commission No 91*, at [4.15]. Available at https://www.scotlawcom.gov.uk/files/1013/1365/3643/rep91.pdf on 16.03.2021.

[96] J. CARRUTHERS (note 84), p. 15.

[97] [2013] EWCA Civ 865.

[98] *In the matter of A (Children)* [2013] UKSC 60, per BARONESS HALE at [34].

[99] *Ibidem* at [34] *cf.* DL v EL (Hague Abduction Convention: Effect of Reversal of Return Order on Appeal) [2013] EWCA Civ 865 per LORD THORPE at [48].

detailed and nuanced legal glosses to the concept.[100] Arguably the "legal glosses," emanating from the extensive judicial commentary that habitual residence has received in the UK courts, might have been influenced by the CJEU decisions but not *vice versa.* The English domestic concept of habitual residence might have been "Europeanised," but it is unlikely that the CJEU will consider national interpretations of habitual residence as authoritative in its decision making. Immediately, the concepts are necessarily separate and (subtly) divergent within the different legal orders. What remains unanswered is the extent to which the Supreme Court will depart from its previous case law embedding the CJEU concept into English domestic law. Arguably, cases such as *In the matter of KL* and *In the matter of* A may be characterised as only partly retained EU case law because the CJEU and UK approach to the concept is analysed in conjunction, but carefully preserving their separate legal existence; effectively, the cases incorporate the CJEU interpretation in Supreme Court precedent, not as an alien concept imposed on the court, but by interpreting the UK concept of habitual residence as akin to the CJEU understanding. As the UK courts are empowered to depart from retained EU case law only, it is unclear whether an established precedent of a "Europeanised," rather than a "European" concept can be departed under section 6 of the Withdrawal Act 2018.[101] The question is one of *lex ferenda*. Considering the explicit and far-reaching influence of the CJEU interpretation of habitual residence and the attention paid by the Supreme Court to international coherence, it is not unimaginable that it will not readily depart from its previous precedent and "have regard" to future CJEU decisions on habitual residence, in recognition of the CJEU's extra-territorial harmonising role.

IV. Conclusion

In respect of jurisdiction in matrimonial matters, the loss of the Regulation No 2201/2003 has resulted in the revival of the doctrine of *forum non conveniens* in the UK. It, however, appears that in the light of modern technological advances some of the rationales behind this doctrine may now be less persuasive, leading to questions over the fitness of this doctrine as a tool to assist in determining jurisdiction post-Brexit. With regards to recognition of decisions on divorce, nullity and legal separation, the legal landscape post-Brexit is rather incoherent, with the 1970 Convention, existing Bilateral Treaties between the UK and EU Member States and individual state private international rules being all part of the framework. This means that the hurdle of recognition and the applicable rules will inevitably vary from one case to another. Navigating this framework is likely to prove more complicated for legal practitioners and judges and more costly for parties. Against

[100] J. CARRUTHERS (note 84), pp. 1, 35.

[101] The term 'Europeanisation' refers to the replacement of national legal provisions by those originating from the European Union in N.A. BAARSMA, *The Europeanisation of International Family Law*, Hague 2011, p. 6.

this background it can be concluded that this is an area where the loss of Regulation No 2201/2003 will be felt most.

Although it is impossible to predict with any certainty how the UK courts will approach retained EU case law, when it comes to interpreting habitual residence of the child, there is an additional uncertainty. In particular, the interpretation of habitual residence of the child by the UK courts, although embracing the CJEU approach, may be characterised as only partly retained EU case law because the CJEU approach is supplemented by guidance from the UK Supreme Court. In effect, the Supreme Court presents the UK approach to habitual residence as akin to the CJEU understanding rather than an (alien) EU concept imposed on the UK courts. This brings into prominence the question whether an established precedent of a "Europeanised," rather than a "European" concept can be departed from under Section 6 of the Withdrawal Act 2018. Assuming that the answer to this question is yes and having regard to the harmonising role of the CJEU, it appears plausible to conclude that the Supreme Court will not readily depart from its interpretation of the concept of habitual residence of the child and may even "have regard" to future CJEU decisions on habitual residence.