

THE INTERNATIONAL FAMILY LAW GROUP

iGuides to family law and practice

Brussels II

Brussels II is probably the most important international family law, certainly within Europe and apart from the Hague Convention in respect of child abduction. It has dramatically changed the law and the practice of the law for families with connections with more than one European Union country.

Overview

Until 1 March 2001, proceedings between England and other European countries to decide which of two competing countries was the more appropriate one to deal with the divorce and ancillary financial matters were dealt with by discretionary stay law, primarily on the basis of closest connection, as still prevails between England and the rest of the world. But suddenly, with minimal advance notice with the European family law professions, it all changed with Brussels II. This EU Regulation introduced identical divorce jurisdiction across Europe. Fundamentally for stay laws, it introduced the principle of the first to issue proceedings in time secured jurisdiction. This aspect has transformed international family law and made it very necessary for fast, experienced and knowledgeable practitioners with immediate access to similarly specialist lawyers in other jurisdictions. Brussels II has given rise to huge injustices. Lawyers need not feel shy in explaining these to clients so that they can fully understand what is happening - and not blame their lawyers! Amendments to BII in March 2005 did not change the divorce and stay aspects. Lawyers now need great care and great speed to deal with cases when there is the possibility of separate proceedings within Europe

Introduction

Brussels II was shorthand for Council Regulation (EC) No 1347/2000, in force on 1 March 2001, *concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses*. On 1 March 2005, it was completely replaced by Council Regulation (EC) No 2201/2003 of 27 November 2003, *“concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility”*. This Regulation was known variously as BII revised or BIIr, BIIA or, often, BII bis; bis meaning approximately encore, although encore more in the way of repeat than rejoice! None of the 2005 changes affected the original BII on stays of divorce proceedings (although changing Article numbering) so it is simply referred to here as BII

From 1 March 2001 at the time of introduction of Brussels II, the EU was Austria, Belgium, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom. On 1 May 2004 Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia joined, often known as the Accession States. Its population of 380 million then rose to 455 million. On 1 January 2007, Bulgaria and Romania joined with an additional 20 mill population. It is estimated that the population in early 2008 is now approximately 497 million. This is two thirds greater than the US population of 300 million. With the world population being approximately 6.6 billion, the family law jurisdiction of Europe represents approximately 7.5% of the world. More crucially, it represents a considerable percentage of the world's mobile international families. It is impossible to underestimate the importance of the combined family law jurisdictions represented within Europe brought together under Brussels II.

Brussels II is a European Union Regulation (not a directive) and so directly applicable in member states, does not need implementation through United Kingdom legislation and prevails over domestic law.

For EU family law purposes, the United Kingdom includes Gibraltar (Art 299(4) of the EC Treaty) but not the Isle of Man or the Channel Islands. Denmark is a member of the European Union but has chosen to opt out of Brussels family law regulations unless where indicated. References throughout this book to the European Union, being always in a family law context unless shown, exclude Denmark. Forum disputes with Denmark and non European Union countries in Europe must be considered as forum disputes with the rest of the world as set out below.

The first change of Brussels II was to introduce across the EU identical jurisdiction for divorce and family matters. No longer need a lawyer enquire of jurisdiction in any EU state. It is set out clearly in BII. For countries such as England, with previously considerable reliance on sole domicile, it was a big change to one primarily of residence. Moreover there are several jurisdiction grounds, some linking habitual residence with a period of time, some relying on simple residency, some overlapping. Sole domicile or nationality is no longer available if another EU state has jurisdiction.

Herein lay an additional aspect. Each state was given the option of an additional ground which is only available if no EU state has jurisdiction. For UK and Eire this is sole domicile. For others it is sole nationality

It is the second change where BII has become so hated and has so flown against the whole direction of family law in many conciliatory orientated countries, of which England is probably pre-eminent across the world. Many countries, primarily common law jurisdictions, have a discretionary forum law, often based on forum non conveniens or similar and so courts would look to ascertain the country with which the family had the closest connection.

Moreover judges in many countries, particularly England, publicly deprecated the party who broke first from the marriage and unilaterally issued proceedings without any attempt to negotiate or resolve. Before BII, the English courts had a complete discretion about granting stays and followed balance of convenience and closeness of a country with the parties and the family. In this, they were publicly turning their backs on being influenced by which party is the first to issue. In Mytton (1977) 7 Fam. Law 244 the stay of English proceedings were refused, although Swiss proceedings were earlier in time, because the wife and children with the agreement of the husband had made their home in England. In S v S (Divorce: Staying Proceedings) (1997) 2 FLR 100.112 Wilson J made clear that in this jurisdiction at least not much turns on being first to issue. "It would be indeed unfortunate to encourage litigants to think that they can win an advantage by racing." Also Goff LJ in de Dampierre (1987) 2 FLR 300.311B. Thorpe J in M v M (1994) 1 FLR 399.403G condemned stealth and deceit in relation to the issue of proceedings in the other jurisdiction. This is entirely in keeping with the SFLA Code of Practice and the SRA Family Law Protocol. But it was demolished overnight within Europe by Brussels II.

Instead BII introduced a simple "first past the post" provision. The first party to issue proceedings in a country secured priority whatever the strength, or weakness, of the connection with that country - provided of course jurisdiction existed. The country receiving the family law proceedings second in the EU has to stay its proceedings of its own accord, even though the connection may be much stronger.

Brussels II implicitly directly encouraged the practice of racing to issue into international family law practice: the fact that Euro civil servants then expressed amazement and dismay at the consequential advice and actions of practising lawyers is evidence of how badly thought out was this law and the harmful effect it has had on many spouses and families. Professional practitioner organisations such as the SFLA International Committee had warned that this would occur: these warnings were disregarded or discounted.

BII "first to issue secures jurisdiction" is certainly easy and simple to apply and immediately ends the substantial costs of discretionary forum litigation; some of the many appeals to the law reformers in

Brussels. But it has had major consequences in practice. As Europe still has very different financial outcomes between countries, there is a huge importance in securing jurisdiction in the most favourable jurisdiction to obtain the most favourable financial outcome.

Yet it involves simply issuing first. Seemingly the Euro bureaucrats did not realise the disadvantages. Four were immediately obvious and have proved so in practice.

1 No one should mediate (or propose or engage in any other ADR) until they have first issued to secure jurisdiction. Then, what chance is there for successful mediation or other ADR if one party knows the other has taken unilateral and tactical steps to secure their interests in litigation? Many mediators give little prospect of successful outcomes in mediation after such an ominous and acrimonious start. It is good practice never to propose mediation or any other ADR in a potential BII forum dispute without securing jurisdiction by issuing first.

2 But it is even worse. Who arguably would now suggest relationship counselling if to do so and admit the marriage was in difficulties might prompt and then precipitate the other spouse to issue first to their significant advantage? And having issued first and tactically, what chance is there for successful counselling? BII directly encourages and endorses the party who is making the break in the marriage, whom many in society would often consider at least the more responsible for bringing an end to the relationship and without giving a full chance to overcome relationship difficulties and save saveable marriages.

3 Agreements about jurisdiction, choice of law and location for any proceedings are irrelevant under BII. So pre-marriage agreements with jurisdiction clauses, choice of law regimes, even post separation agreements about preferred jurisdiction count for nothing. Private ordering in family matters is highly encouraged in many jurisdictions and favoured by many spouses. Yet Brussels II simply ignores such agreements. Entering into a separation agreement is highly dangerous if another country's courts might later deal with the case: it is good practice for the lawyer to issue immediately instead. BII does not even allow courts to transfer cases abroad consensually. Even the European Union proposes in its draft regulation known as Rome III that parties should be able to agree between themselves on the law to be applied in their case.

4 Finally obtaining advice as to which is the best jurisdiction requires good lawyer contacts in other countries and an ability to pay for that advice (and invariably pay upfront and quickly). In short BII favours the wealthier spouse with easy access to specialist (often expensive) lawyers with international experience. The less wealthy spouse suffers badly. The spouse requiring public funding is totally vulnerable.

Major disadvantages of BII

- no mediation or other ADR until jurisdiction is secured
- possibly no discussion of marital difficulties or marital counselling until jurisdiction is secured
- agreements are irrelevant, and dangerous to conclude until jurisdiction is secured
- favours wealthier spouse with easy access to lawyers with international experience, and directly disadvantages the financially weaker spouse

So BII favours the wealthy, the one initiating the relationship break up, the one who is not prepared to consider mediation and counselling etc. It is difficult to conceive of a more non family friendly piece of legislation, out of step with the whole global ethos of family law practice. Yet local, national UK politicians have been powerless. Attempts by family law professions since March 2001 to alleviate some of the worse elements have come to nothing. It should not have been introduced without also

harmonising financial outcomes but the European Union law reformers would not listen to practitioners. Until reform arrives, lawyers and clients have each to work to their own advantage with this law however much it offends the whole basis on which the remainder of family law work is undertaken.

Moreover BII did not just affect those with international practices. Local divorce law and procedure has been affected including in totally domestic divorce cases.

Brussels II also deals with issues of child abduction, recognition of children orders and other matters concerning children, which is not dealt with in this note.

Jurisdiction in BII

BII provides identical jurisdiction for divorce and other marital proceedings across the European Union. It has 7 bases of jurisdiction, some of which clearly overlap. They are (Art 3):

(1) *“In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State*

(a) *in whose territory*

- *the spouses are habitually resident, or*
- *the spouses were last habitually resident, insofar as one of them still resides there, or*
- *the respondent is habitually resident, or*
- *in the event of a joint application, either of the spouses is habitually resident, or*
- *the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, **or***
- *the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the UK and Ireland, has his or her “domicile” there*

(b) *of nationality of both spouses or, in the case of the UK and Ireland, of the “domicile” of both spouses.*

(2) *For the purposes of this regulation, “domicile” shall have the same meaning as it has under the legal systems of the UK and Ireland.*

Article 6 says a spouse who:

- *is habitually resident in the territory of a member state or*
- *is a national of a Member State, or, in the case of the UK and Ireland, has his or her “domicile” in the UK and Ireland*

may be sued in another member state only in accordance with articles 3, 4 and 5.

The court in which proceedings are pending under Article 3 also has jurisdiction for a counterclaim, (Article 4), which in English terms would include an Answer and cross petition. When a country has given judgment on legal separation, it also has jurisdiction to convert that judgment into a divorce if the law of the member state allows, (Article 5). This has relevancy as the time period between the legal separation and the divorce can be quite long in some countries e.g. Italy.

Although reference in Art 6 is to “may”, the reference also to “only” makes this a mandatory provision and exclusive jurisdiction. So Brussels II Art 3 jurisdiction applies to cases where there is a spouse habitually resident in a EU state or a national or domiciled in (as applicable) a EU state in accordance with Art 3. No other basis of jurisdiction is then permitted.

Each member state can adopt its own additional, residual basis of jurisdiction to apply if and only if no

EU member state has jurisdiction in accordance with Article 3 above. England and Wales (as part of the United Kingdom), and the Republic of Ireland, have adopted sole domicile without any residential qualification. The sole domicile basis is in s5(2) DMPA 1973. It is believed that all or almost all other EU states have adopted sole nationality without any residential qualification. However this basis of sole domicile as a jurisdiction for divorce etc in England and Wales does not exist if any of the Article 3 jurisdictional bases exist, irrespective of no other EU country being involved. It is good practice on precedent divorce petitions to give a clear delineation between the Article 3 jurisdiction criteria and the sole domicile jurisdiction.

Accordingly it is essential for the lawyer to ascertain how long each family member spends in each country when looking at the question of jurisdiction, what are the connections to give rise to habitual residence, what are the nationalities and possible domiciles.

If a country is seized of the case over which it has no jurisdiction under Brussels II Art 3 and over which the courts of another member state have jurisdiction, it has an obligation to declare of its own motion that it has no jurisdiction, Article 17. This is part of the requirements on the local courts proactively to consider jurisdiction issues.

If a Respondent, habitually resident in a state other than the country in which the proceedings are taking place, does not enter an appearance, in English terms an acknowledgement of service, the Court with jurisdiction must stay the proceedings as long as it is not shown (in effect, until it can be shown) that he has been able to receive the divorce documents in sufficient time to enable him to arrange for his defence or that all necessary steps have been taken to this end, Article 18. However this does not apply if service was in accordance with the EU Service Regulation 1348/2000

The court has a duty of his own motion under Brussels II to consider issues of jurisdiction. Most English family courts now have created systems to analyse before the special procedure application if there are any jurisdiction issues. If any doubts are raised or if jurisdiction is disputed either generally or because of the existence of other proceedings, courts will normally stay any further action and seek an early hearing for an explanation. It is good practice to advise the court of any such issues.

If under Article 3 a member state has jurisdiction in a matrimonial case with a Respondent who is not a European Community national or resident, another member state could have no jurisdiction on its own national law, its own residual basis. Only if no member state has jurisdiction under Brussels II is jurisdiction governed by local law.

Application for divorce jurisdiction in England and Wales

The present divorce jurisdiction in England and Wales is set out in summary in the box.

What is jurisdiction for a divorce in England and Wales?

1. Both parties are habitually resident here
 2. Both parties were last jointly habitually resident here and one still resides here
 3. Respondent is habitually resident here
 4. Petitioner is habitually resident here if has been residing here for the past 12 months before the petition was issued
 5. Petitioner is domiciled here and is habitually resident here if residing here for at least 6 months before the petition was issued
 6. Both domiciled here
- If none are available and no other EU state has Art 3 jurisdiction, then
7. Sole domicile

Reference to joint applications in Art 3(1)(a) would have applied if the Family Law Act 1996 had been implemented with its possibility of joint petitions, but this is now irrelevant in England following abandonment of the divorce law elements within FLA 1996.

Crucially, and unlike Article 17 of Brussels I, there is no power to agree, or confer, jurisdiction. So whereas under Brussels I the parties can agree jurisdiction on maintenance and ensure the maintenance proceedings are in that jurisdiction, they cannot agree on jurisdiction for divorce via Brussels II. Jurisdiction clauses in pre-marriage and other marital agreements are irrelevant. It is difficult to see any rationale or consistency for this.

It is therefore fundamentally dangerous to agree separation agreements, incorporating financial terms negotiated on separation, in cases with any European connections. If during the period of the separation and pending a proposed English divorce another country has jurisdiction and one party issues in that country, there is a risk that the courts of that country would not adhere to the terms of the separation agreement. It is good practice in these circumstances to proceed immediately to a divorce to create certainty and finality

There is no power to transfer divorce cases to the country with the closest connection or by agreement. This power now exists in children cases from 2005 in the revised Brussels II. It does not exist in divorce cases. The EU law reformers have indicated informally that they are sympathetic to a transfer power but have done nothing.

Gone crucially in BII cases is the pre BII divorce jurisdiction for example either on the basis of the sole domicile of the Respondent where there is no form of residency or, as more often used, on the sole domicile of the Petitioner where unsupported by the Petitioner's habitual residence if residing here for at least 6 months. The sole domicile ground had been important. So, for example, the fleeing English wife who leaves her Portuguese husband in Lisbon and abandons her past, perhaps spousal, domicile of choice in Portugal to return to England reviving her domicile of origin as the plane crosses the white cliffs of Dover no longer has automatic jurisdiction here. She has to acquire six months residency and habitual residence here. Her spouse has 6 months to commence proceedings in his home country if that is more favourable to him. Many lawyers have had to recommend to clients in the situation of acquiring six months residency in their country of domicile to keep their spouse sweet and happy, perhaps even misleading the other spouse about their plans, and so enable them to acquire the 6 month residency and then seize forum. Equally many lawyers acting for the left behind spouse have had to double guess whether the foreign spouse who has returned "home" is genuinely reflecting on the prospects of reconciliation or is in reality counting the days before the six months residency allows the issue of a petition. Lawyers for each spouse are put in an invidious professional and personal position. Invariably, with anxieties of negligence claims, most lawyers consider the safest course of action for the left behind spouse is simply to issue quickly before the six months expire. In so doing, undoubtedly some saveable marriages have then irretrievably broken down.

The situation may be mitigated in part by the definition of habitual residence in Marinos 2007 2 FLR 1018, allowing an immediate adoption of habitual residence akin to domicile, but it still requires six month simple residence.

There is no priority of the jurisdiction qualifications in article 3. Any and all can be used.

Stays within Europe under BII

A primary purpose of Brussels II is to avoid forum disputes between member states. It does this not by forum conveniens which tends to encourage discretionary uncertain litigation but by adopting the

concept of *lis pendens*; who is the first to issue. It is much easier, simpler, less litigious but can work considerable injustice as set out above. Agreements cannot give priority nor give jurisdiction to a country. There is no power to transfer cases to a more convenient or closer connected jurisdiction.

Brussels II does not cover property consequences of marriage nor maintenance which is Brussels I nor other matters known in England as ancillary to divorce. However these ancillary matters, especially financial claims on divorce, remain with the jurisdiction dealing with a divorce: hence the crucial importance of securing jurisdiction.

The fundamental importance of speed is shown in LK v K (Bill revised: maintenance pending suit) [2006] 2 FLR 1113, where divorce petitions were issued in England and France within an hour or so of each other.

By Article 19(1), *where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different member states, the court second seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.* This means the second seized must decline jurisdiction in favour of the one first seized. There is no discretion.

Sometimes there is a dispute whether the court in which the proceedings were first issued does in fact have jurisdiction. During this period, the courts second seized stay their own proceedings. Then *where the jurisdiction of the court first seized is established, the court second seized shall decline jurisdiction in favour of that court* (Art 19(3)). This does not prevent the petitioner in the proceedings second in time from then bringing proceedings in the court in which the action was first issued. There is no opportunity for the country first seized of the proceedings to stay them in favour of the second in time jurisdiction, even though the latter may have the closer connection.

In Wermuth 2003 1 FLR 1029 at para 34, Thorpe LJ described these issues including reminding the English courts not to take any steps to usurp the function of the courts in the member state first served. *“First, we must espouse Brussels II and apply it wholeheartedly. We must not take or be seen to take opportunities for usurping the function of the judge in the other Member State. Once another jurisdiction is demonstrated to be apparently first seized, the jurisdiction must defer by holding itself in waiting, in case that apparent priority should be disproved or declined. Secondly, one of the primary objectives of Brussels II is to simplify jurisdictional rules and to eliminate expensive and superfluous litigation. A divorcing couple that has to litigate the consequences of the marital breakdown is not blessed. The couple that first litigates where to litigate might be said to be cursed. In reality it is a curse restricted to the rich. Only they can afford such folly. This case is a paradigm example.”*

Bill requires that the national courts should be proactive in reviewing matters and staying its own proceedings if it is thought that there are prior proceedings in another European Union jurisdiction, see Arts 17 and 18 above. Many family courts now have internal procedures to identify this if shown up on an acknowledgement of service or other correspondence. See above for the duty to notify of other proceedings. It is good practice to bring this actively to the attention of the court office rather than simply allow it to be considered on a special procedure application. Many courts will then stay the divorce proceedings for investigation on what is happening with the other proceedings in the other European Union jurisdiction.

An application for a stay under Article 19 because there are ongoing proceedings first in time in another European Union state should be made to a district judge who could adjudicate or refer to another court e.g. High Court, r2.27 A(1). In practice, when the court is aware of other proceedings including if it appears that the court does not have jurisdiction or is or may be required to stay the proceedings, the court will make a temporary stay and itself fix a date for an explanation by the parties of what is happening, for further evidence and to determine whether there should be a stay or other order, r2.27A (2). Where the court makes any decision under Articles 16-19 it must give reasons for its decision.

Where it makes a finding of fact, it must state such findings. Obviously such written reasons and orders may need to be considered in other jurisdictions and other proceedings. An order under Article 17 that the court has no jurisdiction must be recorded by the court in writing.

Where the issue of jurisdiction depends on the interpretation of law or proceedings of another jurisdiction, the practice has developed in England, although tellingly it is believed not elsewhere in Europe, to transfer the issue to that country for adjudication and on the basis that local lawyers and local courts are better placed to deal with interpretation of local law. The court required to determine jurisdiction including the court first seized does not necessarily have to consider the question of jurisdiction, especially if it involves interpretation of another country's local law: Chorley 2005 2 FLR 38, below. In this case, an issue arose before an English court whether the commencement of proceedings via a conciliation process in French divorce law constituted issue of proceedings for the purposes of Article 19. The English court held that the matter should be determined by the French court which was obviously very familiar with its own domestic procedure.

Despite a mandatory declining in jurisdiction in favour of the first in time jurisdiction or for the existence of a judicial jurisdiction investigation, the court can still take provisional including protective measures, Art 20. However an order for maintenance pending suit which includes provision for legal fees was said not to be protective or provisional : Wermouth above where it was said *"their objective is to ensure that the rights of parties and ultimate effectiveness of a judgment are not frustrated by the actions of one party pending resolution of their respective rights. In the international context, it is vitally important to ensure that provisional measures are not used to frustrate internationally agreed principles of jurisdiction."*

In Moses-Taiga 2006 1 FLR 1074, it was said maintenance pending suit powers were exercisable even when the divorce jurisdiction was subject to challenge.

In LK v K (BII revised: maintenance pending suit) [2006] 2 FLR 1113 where England was probably first in time - the issue not yet been fully resolved - and therefore the competent court, Singer J said the court was entitled to award maintenance pending suit to include an element for legal costs. It was an exceptional case, given the wife's need to meet ongoing costs liabilities if she were to be able to bring her case before the court. While recognising the potential injustice to the husband, nevertheless the balance of unfairness would fall more heavily on the wife than on the husband if the order were declined. He was very clear that the wife's solicitors would be unable to continue to represent her without legal costs as part of maintenance pending suit as she had no funds of her own nor any income with which to meet such legal funding. She could not and should not be expected to continue this complex litigation in person as would be the only likely outcome if no order is made.

In an area of work which so favours the wealthier party, many English practising lawyers would consider that without the opportunity of legal representation through legal funding, such as maintenance pending suit, the prospects of any rights being protected are limited. The Wermouth judgement appears based more on the policy of international comity than the reality of rights through legal representation and may perhaps be overturned. The decision of Mr Justice Singer in LK v K (BII revised: maintenance pending suit), admittedly a decision where it seemed that England would have jurisdiction, is thoroughly realistic and practical. This funding should be available as a protective measure.

An interim payment cannot be provisional unless re-payment of the sum is guaranteed if the application is unsuccessful. This might be overcome by undertakings and assurances of return of payments received. It seems maintenance pending suit can only be pursued in the country first seized; and some countries do not have sophisticated maintenance pending suit provisions including as to costs.

As to whether the divorce proceedings in one jurisdiction are finalised, so that the divorce and any related jurisdiction has come to an end, the Court of Appeal in Moore, 2007 2 FLR 339, held that Article 27 applied so that proceedings in the country first seized were fully determined when any appeal had

been concluded.

Brussels II does not cover maintenance obligations (Art 1 (3)) which are the preserve of Brussels I. However in Moore above, the Court of Appeal felt able to allow Part III proceedings in England after a Spanish divorce as the application made by the husband to the Spanish court was for property rights adjustment, not maintenance, so England was not bound by Brussels I.

In Prazic (2006) 2 FLR 1128, the Court of Appeal applied Art 19 and exercised its discretion to stay jurisdiction under TOLATA in favour of related French ancillary relief proceedings. It was held the wife's English TOLATA application was strategic and superfluous to the French proceedings. They were the same cause of action. It could not circumvent BII.

There are specific provisions regarding the service within the European Union and separate Service Regulations which need to be consulted

This is taken from "A Practical Guide to International Family Law" (Jordans 2008) by David Hodson, with acknowledgement. Further details can be found within the book and from David Hodson.

This iGuide is for information only and specialist legal advice should always be taken. For further details contact The International Family Law Group at 020 3178 5668 and www.iflg.uk.com.

(c) February 2009