

THE INTERNATIONAL FAMILY LAW GROUP

iGuides to family law and practice

Introduction to international aspects of family law

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Introduction

Very many people now marry or live with someone with a different nationality or who is a resident of another country. Many people live and work abroad. Many people marry abroad.

Yet when relationships break down, there is no single international law to look after rights, entitlements and claims including the best interests of children.

Too often it is a combination of the national laws of the various countries concerned. Some of these national laws can be very different, even directly contradictory with each other. As a consequence, there can be very different outcomes of court proceedings in one country which has a connection with the family from those in another country which also has a connection. There can be very different timetables, procedures, opportunities for legal representation, disclosure powers, publicity and ways of looking after children's interests. Taking urgent and specialist advice is very important. This includes lawyers consulting together in the countries concerned on behalf of a client.

Where children are involved, there are a number of international conventions which generally work well in a number of countries to safeguard the interests of children, particularly to maintain the status quo of their residency until new arrangements can be agreed. However urgent action is sometimes needed, particularly where children have been taken across international boundaries without the consent of both parents.

Just because one was married abroad does not mean that the divorce has to take place abroad. Equally, although married in England, it may be advantageous to be divorced in another country with which there is a connection.

On our web sites at www.iflg.uk.com and www.davidhodson.com we have set out information about a number of matters affecting international families including international children. This note is no substitute for the more detailed information. Moreover it is very important to obtain urgent and specialist advice. This note is an introduction.

Speed is very important

Do not delay in seeking legal advice as speed is very important.

It is fundamental with cases involving another European country. This is because the country which first receives family law proceedings deals with them even though another country might have a closer connection. This law is known as Brussels II. The financial outcomes across Europe on divorce can differ dramatically, even in average, semi-detached and PAYE families. Issuing first, even by a matter of minutes, may make a difference of many thousands of pounds, perhaps millions.

Accordingly, where another European country is involved, seek immediate specialist advice, and do so before negotiating direct, engaging in mediation or perhaps even discussing the possibility of proceedings with your spouse. We do not like having to give this information because we are very committed to mediation, counselling, attempted reconciliations and negotiation. Nevertheless this is the impact of this law.

Although this priority on being first to issue is not so fundamental with some countries outside of Europe, it may still be advantageous to issue first so again take advice quickly.

Financial provision on divorce and freezing orders

This can vary greatly between countries and states. It is therefore crucial at the outset to consider which is the most favourable country for the proceedings to take place. You should take urgent legal advice, especially if you think your spouse may move assets and get them out of your reach or that of the family Court. Many countries are able to make a freezing orders to make sure that assets are secure in one location in order that the court may make orders which are affective and enforceable.

Forum shopping

This is the term used when spouses and their lawyers decide which country is the best in which proceedings should be commenced. Often, where there are two or more countries which could deal with matters regarding a family, one may be advantageous to one spouse and the other advantageous to the other spouse. Proceedings are then commenced by each spouse in each country and the courts have to decide which is the more appropriate country to deal with the case.

Between the courts in the various countries in the United Kingdom, there is a hierarchy of criteria to be applied.

Between the member states of the European Union, it is simply on the basis of which country received the proceedings first.

Between England and many other countries outside the European Union, it is decided on a number of discretionary factors, primarily looking at which country has the closest connection with the family. These forum disputes can be very costly, with lawyers in two countries involved. They are often very public, very lengthy and very acrimonious.

Crucially, before deciding to embark on a forum dispute, it is very important to balance speed and tactical, financial advantages against wider impact on you, your family and the rest of case. Whilst important to consider forum issues, a financial order is not the only criteria. There must also be considered the extra delay and significantly increased costs of forum litigation. They are invariably emotional and distressing to the family members, with intense feelings aroused.

Forum disputes still bear all the worse hallmarks of aggressive and tactical litigation that good conciliatory practice in England and Wales has done so much to eradicate.

Some of the factors to take into account include:

- Whether any court would recognise the marriage and have jurisdiction to deal with the divorce in any event.
- All countries which have possible jurisdiction i.e. the connections with which you or your spouse have with other countries and their requirements (e.g. residence/domicile) to establish jurisdiction. Some countries e.g. USA and Switzerland have a federal basis so each State should be considered separately. Warning: the definition of domicile is very different abroad. Also admitting domicile or residence can have tax or immigration/nationality consequences so take advice if this should be relevant.
- The type and amount of financial Orders which are likely to be made in each jurisdiction and whether there are any especially significant matters e.g. some European countries take conduct materially into account. This will require telling the legal advisers the approximate financial circumstances of

each of you.

- The powers of the foreign Court to order and obtain disclosure. It is pointless going to a jurisdiction where you might obtain a better order (i.e. a higher percentage) if your spouse can hide assets from the court. Some jurisdictions have weak disclosure powers and are weak on effective enforcement.
- Whether the order in the foreign Court can be enforced in the jurisdiction in which the assets are held. Otherwise it will be worthless. Can Orders freezing assets be obtained to preserve assets pending trial? Spouses with international connections are often particularly adept at shifting assets around the globe very quickly.
- The likely children orders - submitting to a foreign jurisdiction for financial orders may give that Court power to make orders concerning the children which may be contrary to your wishes and may outweigh the financial benefit of proceedings in that jurisdiction.
- Family law work involves personal decisions. Take account of the practicalities of the situation. Do you speak the language? Can you tolerate the inconvenience of travel and costs? Will there be more publicity abroad? You may get a better financial order abroad but prefer proceedings here. What will be the impact on co-parenting of a unilateral issuing of proceedings for tactical reasons?
- Will the Decree of Divorce be recognised in any country in which you expect to live and/or remarry?
- The effect of any pre-marriage or similar marriage contract or separation agreements
- Existence and possibility of agreements about where the divorce should take place, and their enforceability.
- Whether the foreign proceedings would be stopped or stayed by a court order and if, notwithstanding a foreign financial Order, your spouse could still apply for a financial order after an overseas divorce
- Whether the court might transfer consideration of financial issues to another more suitable country even though the divorce was pronounced here.

See the more substantial checklist on our web sites

Will my marriage or my divorce abroad be recognised here?

Foreign marriages are invariably recognised in England. The formalities of the marriage abroad must have been carried out according to the law of the country where it took place. Each party must have the capacity to marry according to their home country (place of domicile) before they got married. Civic authorities in England often require sight of the original marriage certificate or a copy certified by a lawyer, together with a certified translation if appropriate.

Divorces pronounced in United Kingdom are automatically recognised in each of the UK countries.

Divorces pronounced across the European Union are recognised in all EU countries save for the most exceptional of circumstances.

Divorces pronounced outside of the European Union depend on whether they were granted by means of proceedings or other than by means of proceedings. If by means of proceedings, and the local law practice was followed correctly, then it is very likely that the foreign divorce will be recognised.

A greater difficulty often arises where the divorce was granted without the involvement of judicial proceedings. This is often in the case of religious divorces, such as talaqs. These are recognised in many parts of the world and are sometimes recognised in England. However as they do not always require the giving of advance notice to the wife, England takes great care before recognising them. Specialist advice should be taken.

A divorce has to be completed and ended in one country. Accordingly a talaq or a Jewish get commenced in one country, such as England, and ended, perhaps with a registration process, in another country will not be recognised. It is known as transnational divorces.

In a number of circumstances, England will recognise polygamous marriages.

Working with lawyers abroad

Bearing in mind the importance of speed and deciding which country is better for you and how to take steps on your behalf in the other country, the information regarding the foreign jurisdictions must be quickly and easily accessible for you and your English lawyer. Also co-ordination of action/advice in separate jurisdictions between lawyers is essential.

Advice will be needed in the other relevant jurisdictions from specialist family lawyers on at least:

- jurisdiction, taking care of impact of admissions of residence and domicile on any tax planning or nationality
- applicable law
- the grounds for divorce and any prior period of separation
- likely financial Orders
- disclosure requirements
- enforcement, in that jurisdiction and abroad
- procedure followed
- likely arrangements for children
- availability of legal aid
- publicity and confidentiality
- the likely time that the proceedings will take
- the likely legal costs

International aspects regarding children.

The courts of many countries take very seriously any attempts to take a child abroad without the consent of the other parent.

If in doubt, you should obtain consent to your travel plans. This even includes short holidays. If certain English court orders are made regarding children, it is compulsory to obtain consent. We can explain this.

Taking children abroad without consent is known as child abduction. Taking the children abroad for a holiday with the consent of the other parent and then not returning them is also a child abduction.

Child abduction is a criminal offence. It can carry a prison sentence.

Many countries across the world have signed the Hague Convention on Child Abduction. Countries cooperate with each other for the return of children. The parent whose child has been adapted is invariably entitled to free legal representation in the other country for the child's return.

This is a very specialised area, even within the context of international family law.

If a parent who is the primary carer wants to move to live in another country and to take a child abroad permanently, it is necessary to make an application for a relocation order. The courts are generally sympathetic to such applications but consider carefully the best wishes of the child and the impact on the left behind parent. Good proposals for contact have to be made, sometimes including financial proposals regarding the additional cost of contact, before permission to relocate with the child will be given. Careful preparation of the application is essential for success. Opposing well-prepared applications for relocation is not easy, but can be successful in certain circumstances.

Are the family law proceedings in England and Wales, in the United Kingdom, in the British Isles or what and where ?

The family law map of the British Isles is often very confusing to lawyers from abroad. See our fact

sheet, “ England expects not to be confused with Scotland” on our websites.

In summary, the Republic of Ireland is a sovereign state and member of the European Union including for family law purposes. The United Kingdom comprises the remainder of the British Isles and is also a member of the European Union. However within the United Kingdom are several countries which each have their own family law systems. England and Wales are treated as one country but Scotland and Northern Ireland have their own family laws. Scotland is very different to England in this regard. Generally family law orders made in one part of the United Kingdom are recognised elsewhere. Lawyers in one country in the United Kingdom do not have automatic rights of audience elsewhere. There are some similarities in the content of the family law, but it is more based on geographical proximity than shared legal or political developments. In the context of forum disputes, lawyers from outside the United Kingdom may find that where more than one UK country has jurisdiction, one country may be significantly more advantageous for their client and another. Local advice should always be taken.

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.

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