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The Hague Convention on the Recognition of Divorces and Legal Separations 1970: an effective mechanism for regulating divorce as between the UK and the EU post-Brexit?

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ABSTRACT

This article examines the potential of the 1970 Hague Convention on the Recognition of Divorces and Legal Separations to act as a replacement for Brussels IIa in regulating international divorce as between the UK and the EU. The article proceeds in two steps: first, there is a doctrinal analysis of the 1970 Hague Convention and of its merits and demerits by comparison with Brussels IIa, and secondly, there is a discussion of empirical research undertaken at the University of Aberdeen in conjunction with partner universities in six EU Member States, examining the practical utility of the Convention in Contracting States, and the treatment of international divorce in non-Contracting States. Insofar, as the 1970 Hague Convention is currently applicable in only 12 out of the 27 EU Member States, the article also discusses the likelihood of EU-wide adoption of the Convention. The article concludes that the 1970 Hague Convention has aged relatively well and, on the whole, offers a satisfactory alternative mechanism for the regulation of international divorce in the UK-EU context; however, the article also acknowledges the liberalism of many existing national laws on divorce recognition, suggesting that EU-wide adoption (if it occurs) might not have a very significant impact.

KEYWORDS: Hague Convention, Divorce, Private International Law, Brexit, EU, Brussels IIa

I. INTRODUCTION

This article examines the treatment of international divorces between the UK and European Union (EU) in the aftermath of the UK's departure from the EU ('Brexit'). Up until

31 December 2020,[1] there was automatic recognition of divorces as between the UK and the other EU Member States.[2] The grounds for divorce jurisdiction were harmonized[3] and a *lis pendens* doctrine gave priority to the court first seized in the event of parallel proceedings in two or more Member States with jurisdiction.[4] This cooperation was originally based on the Brussels II Regulation,[5] followed by the Brussels IIa Regulation[6] in 2005, which has since been replaced by the Brussels IIb Regulation[7] in the remaining EU Member States as of 1 August 2022.

The UK's departure from the EU has brought a renewed focus onto the 1970 Hague Convention on Recognition of Divorces and Legal Separations (the '1970 Hague Convention'). This convention was previously somewhat overshadowed by Brussels IIa insofar, as most of its Contracting States were also EU Member States who gave priority to Brussels IIa in their relations inter se.[8] Since Brexit, however, the 1970 Hague Convention has come back into the spotlight as an alternative (replacement) mechanism for managing international divorces as between the UK and the EU.

This article attempts to answer a number of important questions. To what extent does the 1970 Hague Convention provide an effective framework for managing international divorces by comparison with the previous regime based on Brussels IIa? How do the two instruments differ? Can a convention adopted more than 50 years ago cater satisfactorily for contemporary needs? Is EU-wide participation in the 1970 Hague Convention desirable—and feasible? Has Brexit generated significant difficulty for divorcing couples with British and EU connections, such that a replacement for Brussels IIa is sorely needed in this context?

This article proceeds in two steps. First, there is a doctrinal discussion of the general scheme and merits of the 1970 Hague Convention, as well as its adequacy (and potential and feasibility) as a replacement for cooperation based on Brussels IIa as between the UK and the EU. Secondly, there is a discussion of empirical research undertaken at the University of Aberdeen, in conjunction with partners in Belgium, Croatia, Ireland, Italy, Lithuania, and Poland—on the practical utility of and necessity for relying on the 1970 Hague Convention in the context of existing national laws.

The article draws two principal conclusions. First, based on the doctrinal discussion, it is suggested that although it was drafted in a different era of divorce regulation, the 1970 Hague Convention is a flexible instrument with the capacity to cater for present-day divorce systems. Secondly, however, the empirical study suggests that EU-wide adoption of the 1970 Hague Convention (if this occurs and is attainable) might not have any very significant practical impact across Europe (although it should still add some value in terms of legal certainty and the enhancement of the status of the Convention more generally).

[1] For details of the transitional arrangements, see Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ CI 384/1, Art 67; European Union (Withdrawal Agreement) Act 2020, s 39(1); SI 2019/519 Jurisdiction and Judgments (Family) (Amendment etc) (EU Exit) Regulations 2019 (as amended by SI 2020/1574), Reg 8(1).

[2] Pursuant to Art 21 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L338/1 ('Brussels IIa').

[3] Brussels IIa, Art 3.

[4] Brussels IIa, Art 19.

[5] Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses [2000] OJ L160/19 ('Brussels II').

[6] See n 2.

[7] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) [2019] OJ L178/1 ('Brussels IIb'). Brussels IIb applies (and the predecessor instruments applied) in all EU Member States except for Denmark.

[8] See Brussels IIa, Art 60 (now Brussels IIb, Art 95).

II. THE 1970 HAGUE CONVENTION ON RECOGNITION OF DIVORCES AND LEGAL SEPARATIONS: A DOCTRINAL ANALYSIS

1. Scope of application and interpretation

The 1970 Hague Convention is in force in 20 countries, including the UK, and 12 out of the 27 EU Member States (Cyprus, Czechia, Denmark, Estonia, Finland, Italy, Luxembourg, Netherlands, Poland, Portugal, Slovakia, and Sweden). Seven other non-EU countries are also Contracting States (Albania, Australia, China (Hong Kong), Egypt, Moldova, Norway, and Switzerland).

The 1970 Hague Convention is often described as a 'simple' Convention insofar as it mandates recognition of divorces and legal separations from other Contracting States (upon satisfaction of certain conditions) but (unlike Brussels IIa) it does not demand the adoption of harmonized rules of jurisdiction.[9] Nonetheless, although its *main* focus is on cross-border 'recognition', the 1970 Hague Convention also has *some* influence on jurisdictional policy (as will be discussed below).

Unlike Brussels IIa (and Brussels IIb), the 1970 Hague Convention does not apply to annulments, but only to divorces and legal separations[10] (both of which are also within Brussels IIa and Brussels IIb). Annulments are, however, increasingly rare, and so this substantive difference is of little practical importance.[11]

As regards divorces, the 1970 Hague Convention has perhaps a broader scope than Brussels IIa insofar as it encompasses divorces obtained by 'judicial *or other* proceedings'.[12] Brussels IIb makes specific provision for the recognition of extra-judicial divorces obtained by authentic instrument or registered agreement[13] (as well as for the recognition of judicial divorces), and Brussels IIa was recently interpreted by the CJEU as extending to divorces granted under the control of non-curial public authorities (in that case, a divorce by agreement before an Italian civil registrar).[14] Thus, while the EU regimes clearly extend beyond the realm of judicial divorce, the 1970 Hague Convention is even more flexible and open-textured in its treatment of 'private' divorces.[15] By its reference to 'other proceedings', the 1970 Hague Convention seems to allow for inclusion of divorces obtained *without* any control being exercised by a public authority,[16] and therefore to go beyond what was in

[9] See eg, P. Bellet and B. Goldman, 'Explanatory Report: Convention on the Recognition of Divorces and Legal Separations', Acts and Documents of the 11th Session (1968) Book II (English trans) [7]; A. Anton, 'The Recognition of Divorces and Legal Separations' (1969) 18 (3) *International and Comparative Law Quarterly* 620, 623–24.

[10] As is the case with Brussels IIa (and Brussels IIb), the 1970 Hague Convention does not apply to ancillary financial orders for (ex-)spouses, but only to the status decree (see Art 1 1970 Hague Convention).

[11] See eg, Office for National Statistics, 'Divorces in England and Wales: 2021' (2 November 2022), <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2021> accessed 26 September 2024; it is reported that by comparison with 113,505 divorces granted in England and Wales in 2021, there were only 231 annulments (and this reflected a decrease on 297 annulments in 2019 and 257 annulments in 2020).

[12] Art 1 (emphasis added). Art 1 also requires that the divorce or legal separation must be 'legally effective' in the Contracting State of origin.

[13] Arts 64–68.

[14] Case C-646/20 *Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht v TB* ECLI:EU:C:2022:879 [53]–[54]. For a critical perspective, see E. Bargelli, 'Reshaping the Boundaries Between "Decision" and Party Autonomy: The CJEU on the Extrajudicial Italian Divorce' (2023) 8 (1) *European Papers* 43.

[15] See Bellet and Goldman (n 9) [6], [12]–[13].

[16] Ibid. See also *NP v KRP (Recognition of Foreign Divorce)* [2013] EWHC 694 (Fam), [2014] 2 FLR 1. For an overview of the interpretation of 'other proceedings' in the case-law of the English courts, and its inclusion *inter alia* of Islamic *talaq* divorces and Hindu *panchayat* customary divorces, see M. Ní Shúilleabháin, '"A Peculiarly Pointless Line of Division": Recognition of Proceedings and Non-Proceedings Divorces under the Family Law Act 1986' in A. Dickinson and E. Peel (eds), *A Conflict of Laws Companion: Essays in Honour of Adrian Briggs* (Oxford University Press, 2021) pp. 273–96. See also *Botwe v Brifa* [2021] EWHC 2307 (Fam).

contemplation under Brussels IIa. This is significant in a context of ever-increasing 'privatisation' of the divorce process, and the ever-diminishing involvement of judges.[17]

There may also be some dissimilarity in scope between Brussels IIa and the 1970 Hague Convention where divorces of same-sex couples are concerned. Although it was drafted more than 50 years ago, the 1970 Hague Convention used gender-neutral language, referring to 'spouses', rather than 'husband' and 'wife'. And so, as is the case with Brussels IIb, the language of the 1970 Hague Convention is inclusive, and it can be applied to the divorces and legal separations of same-sex spouses. There is, however, no supra-national court with an ultimate interpretative authority over the 1970 Hague Convention. Thus, while it is likely that the CJEU will adopt an autonomous definition of 'spouses' for the purposes of Brussels IIb (binding across the EU)[18]; there is probably going to be ongoing national variation under the 1970 Hague Convention, with some Contracting States opting for a broader inclusive interpretation and others adhering to a narrower heteronormative conception of 'spouses'.[19]

The two instruments also diverge in terms of their reflection of, and textual alignment to, contemporary divorce practice and the accessibility of divorce in the modern world. Some of the states involved in negotiating the 1970 Hague Convention had, at that time, a policy of indissolubility of marriage (Italy, Spain, and Ireland[20]) and this state of affairs manifests in a number of its provisions, which seek to mediate access to divorce and non-evasion in that context (Articles 2(5), 7, 19(2), and 20). By the late 1990s, when the 'Brussels II' negotiations were underway, all of the EU Member States made provision for divorce in their domestic laws, and so there was no need to legislate for this problem.[21] It follows that by comparison with Brussels IIa (and Brussels IIb), the text of the 1970 Hague Convention seems somewhat anachronistic, and a number of its provisions are effectively redundant in the present-day European context.[22] Nonetheless, although it might be preferable if these provisions could be excised from the text of the 1970 Hague Convention, in practice, they pose no real difficulty and can simply be ignored without detracting from the logical coherence of the remaining provisions.

It was acknowledged in a report for the EU Commission in 1995 that the 1970 Hague Convention 'does not … seem to have raised any major difficulties of interpretation'.[23]

2. Divorce jurisdiction and the 1970 Hague Divorce Convention

As indicated above, the 1970 Hague Divorce Convention is a 'simple' Convention and does not directly prescribe the grounds to be used for divorce jurisdiction in Contracting States. However, as will be discussed later, Article 2 of the Convention makes divorce recognition

[17] See further E. d'Alessandro, 'The Impact of Private Divorces on EU Private International Law' in J. M. Scherpe and E. Bargelli (eds), *The Interaction Between Family Law, Succession Law and Private International Law* (Intersentia, 2021) pp 59–75; K. Bogdzevič, N. Kaminskienė and L. Vaigė, 'Non-Judicial Divorces and the Brussels II bis Regulation: To Apply or Not to Apply?' (2021) 7 (1) *International Comparative Jurisprudence* 31.

[18] Insofar as 15 out of the 27 EU Member States now allow for marriage of same-sex couples within the domestic legal order, most recently Greece (and there is a 'common core' in favour), it seems ever more likely that the CJEU will interpret 'spouses' under Brussels IIb as including same-sex spouses (see M. Ní Shúilleabháin, 'Same-Sex Couples in European Private International Law—Finding a Path through the Labyrinth' (2024) *Family & Law*). While under Brussels IIb, the language is entirely gender-neutral, under Brussels IIa, Annex I made reference to 'husband' and 'wife'.

[19] See Bellet and Goldman (n 9) [17].

[20] Bellet and Goldman (n 9) [39]; *Actes et Documents de la Onzième Session* (1968) – Divorce.

[21] There was briefly a time when Brussels II(a) was in force in Malta, prior to the introduction of divorce there (2004–2011), but the text was never adapted to cater for this situation (which proved to be short-lived).

[22] Indeed, globally only the Philippines and the Vatican do not allow for divorce, and in the Philippines the introduction of divorce appears to be imminent: see F. M. Cervantes, 'Absolute Divorce Bill Hurdles 2nd Reading in House' *Philippines News Agency* (16 May 2024) <https://www.pna.gov.ph/articles/1224828> accessed 26 September 2024. In this context, Arts 2(5), 7, 19(2), and 20 of the 1970 Hague Convention—designed for indissolubility of marriage—will not be discussed in any detail in this article.

[23] M. Fallon, 'The Value Added by a European Union Instrument on Jurisdiction and the Enforcement of Judgments in Matrimonial Causes in the Light of Existing Conventions, Report Requested by the Commission of the European Communities' (1995), p. 1.

conditional on satisfaction of certain personal connections to the granting state, and these are often described as 'indirect' rules of jurisdiction[24] because there is a natural incentive for Contracting States to adopt corresponding jurisdictional criteria to maximize the scope for recognition. The Article 2 connections also, of course, represent an international consensus on appropriate divorce fora. It is not surprising therefore to find that Article 3 Brussels IIb (previously Article 3 Brussels IIa) closely reflects the conditions of Article 2 of the 1970 Hague Convention in harmonizing the grounds for divorce jurisdiction across the EU[25] (although the two texts are not identical). Very similar grounds for divorce jurisdiction (echoing Article 3 Brussels IIa) remain applicable in England and Wales,[26] and in Northern Ireland.[27] In Scotland, divorce jurisdiction has reverted to the grounds applicable prior to the coming into force of the Brussels II Regulation, and while these criteria do not reflect the detail of Article 2 of the Hague Convention in the same way as Article 3 Brussels IIb (and the corresponding English grounds), they are nonetheless reasonably well aligned with Article 2 of the 1970 Hague Convention.[28] Indeed, recognition under the 1970 Hague Convention was a clear priority at the time of their original adoption.[29]

Thus, the 1970 Hague Convention has had a significant influence on the grounds for divorce jurisdiction across Europe, even though on the face of it, it does not purport to deal with this at all (and Contracting States retain domestic autonomy in determining the grounds for jurisdiction).[30]

Although the 1970 Hague Convention generally avoids any direct intervention in matters of jurisdiction, it does include a provision on the suspension of proceedings (*lis pendens*). This is in Article 12, which states that '[p]roceedings for divorce or legal separation in any Contracting State may be suspended when proceedings relating to the matrimonial status of either party to the marriage are pending in another Contracting State'. As noted by the Bellet and Goldman Explanatory Report, Article 12 'does not expressly require, in order for the proceedings to be suspended, that the foreign proceedings invoked should have been commenced first' and 'suspension is … optional'.[31] It follows that this is not a mandatory

[24] See eg, P. Beaumont and G. Moir, 'Brussels Convention II: a New Private International Law Instrument in Family Matters for the European Union or the European Community?' (1995) 20 (3) *European Law Review* 268, 272; also Fallon (n 23) 1.

[25] See P. Franzina, 'The Interplay of EU Legislation and International Developments in Private International Law' in P. Franzina (ed), *The External Dimension of EU Private International Law After Opinion 1/13* (Intersentia, 2017) pp. 197–98. Art 3 Brussels IIb provides as follows: ' … jurisdiction shall lie with the courts of the Member State: (a) in whose territory: (i) the spouses are habitually resident (ii) the spouses were last habitually resident, insofar as one of them still resides there, (iii) the respondent is habitually resident, (iv) in the event of a joint application, either of the spouses is habitually resident, (v) the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or (vi) the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is a national of the Member State in question; or (b) of the nationality of both spouses'. Cf Art 2 1970 Hague Convention which mandates recognition if, at the date of institution of proceedings, in the State of origin, '(1) the respondent had his habitual residence there; or (2) the petitioner had his habitual residence there and one of the following further conditions was fulfilled – (a) such habitual residence had continued for not less than one year immediately prior to the institution of proceedings; (b) the spouses last habitually resided there together; or (3) both spouses were nationals of that State; or (4) the petitioner was a national of that State and one of the following further conditions was fulfilled – (a) the petitioner had his habitual residence there; or (b) he had habitually resided there for a continuous period of one year falling, at least in part, within the two years preceding the institution of the proceedings … '. See further Section II.3.A.

[26] Domicile and Matrimonial Proceedings Act 1973, s 5(2), as amended by SI 2019/519 (n 1) and the Divorce, Dissolution and Separation Act 2020 (Consequential Amendments) Regulations 2022 (SI 2022/237). S 5(2) carries over the grounds laid down in Art 3 Brussels IIa with the addition of jurisdiction based on the domicile of either spouse.

[27] Matrimonial Causes (Northern Ireland) Order 1978/1045, Art 49(2), as amended by SI 2019/519 (n 1).

[28] Domicile and Matrimonial Proceedings Act 1973, s 7(2A), as amended by the Jurisdiction and Judgments (Family, Civil Partnership and Marriage) (Same Sex Couples) (EU Exit) (Scotland) (Amendment, etc) Regulations 2019/104 (Scottish SI). In Scotland, jurisdiction depends on the domicile, or habitual residence for 1 year, of either spouse.

[29] See Scottish Law Commission, 'Family Law Report on Jurisdiction in Consistorial Causes Affecting Matrimonial Status' (Scot Law Com No 25, 1972).

[30] See Bellet and Goldman (n 9) [7], [24].

[31] Ibid [50].

lis pendens doctrine with a strict 'first-in-time' modality akin to that laid down in Article 19 Brussels IIa, but rather a flexible discretion to suspend proceedings (and therefore perhaps closer in nature to the *forum non conveniens* doctrine applicable in the UK).[32]

The discretionary nature of Article 12 was intended to avoid pre-emptive proceedings.[33] This was a problem associated with Article 19 Brussels IIa, and it was often criticized for incentivizing a race to court, and for inhibiting consensual settlement.[34] However, other commentators commended the simplicity of the mandatory *lis pendens* and its avoidance (by comparison with a discretionary stay mechanism) of expensive, time-consuming forum disputes.[35] Whatever the merits of the two systems (on which opinions vary), it is generally agreed that the demise of the strict *lis pendens* doctrine—as between the UK and the EU—is a very significant Brexit-related change in the field of international divorce.[36]

In divorce actions commenced in the UK since 1 January 2021, it is crystal clear that the UK courts are once again empowered to stay proceedings as a matter of discretion[37] and it is equally clear that such stays may be granted in favour of proceedings in any country, EU or non-EU. What is much less clear, however, is whether the EU Member States may stay divorce proceedings in the event of a parallel (or prior) divorce action in the UK, and this is where Article 12 of the 1970 Hague Convention may be of value.

It is often suggested that EU Member States can (and do) use domestic laws to avoid conflict with earlier divorce proceedings in a third (non-EU) country,[38] but this practice may be incompatible with EU law (at least in those EU Member States not party to the 1970 Hague Convention). In *Owusu v Jackson*, in the context of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, it was determined by the CJEU that an EU Member State with jurisdiction under the 1968 Convention could not decline that jurisdiction in favour of a third (non-EU) country with closer connections to the dispute,[39] and it was subsequently widely accepted[40] (albeit not unanimously[41]) that this precluded any stay or suspension of proceedings even if parallel proceedings were underway in a third (non-EU) country, and that the same principle applied to divorce jurisdiction conferred under the Brussels IIa Regulation.

[32] Domicile and Matrimonial Proceedings Act 1973, ss 5 and 11 (and schs 1 and 3).

[33] Anton (n 9) 634.

[34] See eg, G. Smith, D. Hodson and V. Le Grice, 'Brexit and International Family Law: A Pragmatic Approach to Divorce and Maintenance' [2018] (12) *Family Law* 1554, 1557–58; M. Ní Shúilleabháin, 'Ten Years of European Family Law: Retrospective Reflections from a Common Law Perspective' (2010) 59 (4) *International and Comparative Law Quarterly* 1021, 1040.

[35] See eg, Resolution, 'Brexit and Family Law' [2018] (1) *International Family Law* 25, 35; R. Bailey-Harris and J. Wilson, 'Brexit: To Hell in a Handcart—Episode II' [2016] (6) *Family Law* 692, 693.

[36] See K. Trimmings and K. Kalaitsoglou, 'International Family Law in the United Kingdom Beyond Brexit: Focus on Matrimonial Matters and Habitual Residence of the Child' (2020-21) 22 *Yearbook of Private International Law* 217, 219–22; J. M. Carruthers and E. B. Crawford, 'Divorcing Europe: Reflections from a Scottish Perspective on the Implications of Brexit for Cross-Border Divorce Proceedings' (2017) 29 (3) *Child and Family Law Quarterly* 233, 250–51.

[37] See n 32.

[38] See eg, M. de'Sanna, 'The Updated Legal Landscape for Cross-Border Family Law Cases Post-Brexit, Particularly in Relation to Italy-UK Cases' [2023] (1) *International Family Law* 40, 42; S. Cooper and D. Carrillo, 'Breaking Up is Hard To Do' [2017] (1) *International Family Law* 43, 46; EU Commission, 'Impact Assessment Accompanying the Document Proposal for a Council Regulation on Jurisdiction, the Recognition and Enforcement of Decisions in Matrimonial Matters and the Matters of Parental Responsibility, and on International Child Abduction (recast)' SWD (2016) 207 final, p. 26.

[39] Case C-281/02 *Owusu v Jackson* [2005] ECR I-1383.

[40] See eg, *O'K v A* [2008] IEHC 243; Impact Assessment (n 38) p. 16 and 25; K. Trimmings, 'Matrimonial Matters under the Brussels IIa Regulation' in P. Beaumont and others (eds), *Cross-Border Litigation in Europe* (Bloomsbury, 2017) pp. 813–15; U. Magnus and P. Mankowski, 'Introduction' in U. Magnus and P. Mankowski (eds), *European Commentaries on Private International Law: Commentary—Brussels IIter Regulation* (OttoSchmidt, 2023) p. 56; P. Torremans (ed), *Cheshire, North & Fawcett Private International Law*, 15th edn (Oxford University Press, 2017) p. 975; D. Browne, 'Forum Non Conveniens in Divorce Cases' [2022] (3) *International Family Law* 167.

[41] See eg *JKN v JCN* [2010] EWHC 843 (Fam); *Mittal v Mittal* [2013] EWCA Civ 1255.

In the commercial context, the problem was substantially remedied by the introduction of Articles 33 and 34 of the Brussels I Recast Regulation 1215/2012[42] (a discretionary stay mechanism in the event of prior proceedings in a third non-EU country) and it was originally envisaged that Brussels IIb would include equivalent provisions.[43] In the end, however, this did not transpire (it seems all reform of matrimonial jurisdiction was put on hold because of political disagreement on same-sex marriage).[44]

Against this backdrop, Article 12 of the 1970 Hague Convention has the potential to fill an important gap in the architecture of Brussels IIb, if only in the 12 EU Member States which are party to the 1970 Hague Convention. On the face of it, Article 12 of the 1970 Hague Convention seems to allow authorities in these 12 participating EU Member States to stay proceedings in the event of parallel divorce proceedings in the UK, even if this would ordinarily be prohibited under Brussels IIb.

A difficulty arises, however, from the awkward wording of the disconnection clauses in Brussels IIb and the 1970 Hague Convention.

Article 98 Brussels IIb provides that the 1970 Hague Convention 'shall continue to have effect in relation to matters not governed by this Regulation'. This wording clearly allows EU Member States which are also Contracting States to the 1970 Hague Convention to recognize third (non-EU) country divorces as per the Convention (third-country divorce recognition clearly being a matter 'not governed' by Brussels IIb), but it is less obvious that this wording allows for the application of Article 12 of the 1970 Hague Convention by an EU Member State—because the exercise of divorce jurisdiction is clearly a matter 'governed by' Brussels IIb. Of course, it might be argued (and this is supported by dicta in a recent CJEU decision[45] on the interaction of Brussels IIa and the 1996 Hague Convention on Protection of Children) that a disconnection clause (in that case Article 61(a) Brussels IIa) should not be interpreted in a manner incompatible with the EU Member States' international obligations. However, in that CJEU case, the 1996 Hague Convention itself appeared to directly preclude the prioritization of EU law,[46] whereas the 1970 Hague Convention does not appear to give Article 12 the same precedence in the event of a subsequent international instrument on the same matter. Article 18 of the 1970 Hague Convention provides as follows:

> This Convention shall not affect the operation of other conventions to which one or several Contracting States are or may in future become Parties and which contain provisions relating to the subject-matter of this Convention.
>
> Contracting States, however, should refrain from concluding other conventions on the same matters incompatible with the terms of this Convention, unless for special reasons based on regional or other ties, and, notwithstanding the terms of such conventions, they undertake to recognise in accordance with this Convention divorces and legal separations granted in Contracting States which are not Parties to such other conventions.

Article 18 of the 1970 Hague Convention clearly prohibits any new convention obligation, which interferes with the obligation to recognize divorces from other Contracting States, but

[42] Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1.

[43] EU Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000' COM (2014) 225 final, p. 9.

[44] Impact Assessment (n 38), pp. 33-34; see also M. Ní Shúilleabháin, 'An Overview of the Principal Reforms in Regulation (EU) 2019/1111' (2020-21) 22 *Yearbook of Private International Law* 117, 120–25.

[45] C-572/21 *CC v VO* ECLI:EU:C:2022:562 [39], [42].

[46] Ibid [41].

it does not safeguard the power to suspend proceedings (Article 12) in the same way.[47] Therefore, it is arguable that an EU abrogation of Article 12 of the 1970 Hague Convention is not impermissible, and that this power to suspend proceedings no longer exists in those EU Member States that are party to the 1970 Hague Convention. It would follow that stays in favour of UK divorce proceedings are prohibited in all EU Member States, whether participating in the 1970 Hague Convention or not.

If EU Member States (even those participating in the 1970 Hague Convention) are not permitted to grant a stay in the event of simultaneous divorce proceedings in the UK, it is likely that there will be an increase in irreconcilable judgments.[48]

3. Recognition of divorces between Contracting States to the 1970 Hague Convention

A. Recognition criteria

Article 2 of the 1970 Hague Convention provides that 'divorces and legal separations shall be recognised' in all other Contracting States, where at the date of institution of proceedings in the Contracting State of origin, one of a number of specified connections was satisfied.[49] Mutual and respondent connections are given priority—and Article 2 provides for recognition of a divorce if the spouses were both nationals of the Contracting State of origin or if the respondent was habitually resident there. Where petitioner connections are invoked, additional 'fortifying' factors[50] must be established (for the discouragement of forum shopping)[51]—and the petitioner, relying on their own habitual residence in the Contracting State of origin, must establish, in addition, either that their habitual residence endured for one full year prior to the institution of proceedings, or that the spouses had had their last habitual residence together in that Contracting State of origin, or that the petitioner was also a national of that State. (The petitioner who was no longer habitually resident in the Contracting State of origin at the date of institution of proceedings could also rely on their nationality of that State in combination with evidence of previous habitual residence of a year's duration, falling, at least in part, within the 2 years preceding the institution of proceedings.)

As discussed above, there is no requirement that Contracting States adopt jurisdictional criteria mirroring the terms of Article 2—and, in a sense, the jurisdictional ground invoked in the state of origin is an irrelevance: what matters is that the existence of the relevant Article 2 connection can be factually established before the authorities of the Contracting State where recognition is sought. However, in practice, as has been seen, Contracting States often tend to align their jurisdictional criteria with Article 2, and under Article 6(1), the recognizing authorities are bound by the 'findings of fact on which jurisdiction was assumed' in cases where the respondent appeared. Thus, if a court in the Contracting State of origin determines (in defended proceedings) that the respondent was habitually resident there at

[47] While Art 18 of the 1970 Hague Convention, on the face of it, appears to apply to regional cooperation in the form of Brussels IIa and Brussels IIb, in fact it was originally targeted at Contracting States who wished to restrict divorce recognition as between themselves (to prevent forum shopping), and not at an instrument for more intensive recognition of divorce (as is the case with the Brussels II project): see Anton (n 9) 642. See also Bellet and Goldman (n 9) [59] suggesting that the second paragraph of Art 18 is directory and not mandatory. The above analysis assumes that Brussels IIb may be characterised as a 'convention' for the purposes of Art 18—but this seems reasonable insofar as the CJEU in *CC v VO* (n 45) was willing to classify Brussels IIa as an 'agreement' for the purposes of Art 52(3) of the 1996 Hague Convention.

[48] Bellet and Goldman (n 9) [50].

[49] Art 4 also allows for recognition in the context of a cross-petition where an Art 2 connection was satisfied at the time of institution of proceedings for the original petition or cross-petition—and Art 5 deals with conversions of legal separations and specifies that fulfilment of Art 2 at the time of the original separation is sufficient for recognition of the ensuing divorce. See also Art 3 discussed *infra*.

[50] Beaumont and Moir (n 24) 272.

[51] Anton (n 9) 629–30; Bellet and Goldman (n 9) [5], [27]; Law Commission (and Scottish Law Commission), 'Hague Convention on Recognition of Divorces and Legal Separations' (Law Com No 34, Scot Law Com No 16, 1970) 12.

the commencement of proceedings, and assumes jurisdiction on this basis, the underlying factual findings cannot be revisited in recognition proceedings in another Contracting State, and so one would expect that the recognition of the divorce should be very easily established in these circumstances.

Also, the jurisdictional rules of the Contracting State of origin have a direct relevance under Article 3. This provision specifies that if the Contracting State of origin 'uses the concept of domicile as a test of jurisdiction in matters of divorce or legal separation', 'habitual residence' under Article 2 shall be deemed to include 'domicile' as it is used in that state of origin. Accordingly, if the state of origin allows for divorce jurisdiction based on 'domicile', the Article 2 criteria are *extended* to allow for recognition based on the respondent's 'domicile' simpliciter, or based on the petitioner's 'domicile' (in combination with the fortifying factors).[52] And so, Contracting States like the UK, which use domicile *and* habitual residence in conferring divorce jurisdiction, will benefit from enhanced recognition in other Contracting States.

B. Defences and reservations

Even if the Article 2 criteria were satisfied in the Contracting State of origin, a divorce may be refused recognition if it is manifestly incompatible with the public policy of another Contracting State (Article 10), or if it is incompatible with an earlier judgment of that Contracting State where recognition is sought, or with an earlier judgment recognized or entitled to recognition in that Contracting State (Article 9), or if there was a denial of natural justice in the state of origin ('adequate steps were not taken to give notice of the proceedings … to the respondent, or if he was not afforded a sufficient opportunity to present his case') (Article 8). The 1970 Hague Convention also allows a Contracting State to reserve the right to refuse recognition where nationals of that state have divorced abroad in accordance with a law which would not have been applicable under its own domestic private international law rules and leading to a different outcome to that which would have obtained domestically (Article 19(1)).[53] Six EU Member States have availed of this reservation (Cyprus, Czechia, Italy, Luxembourg, Poland, and Slovakia). Aside from the reservation in Article 19(1), however, the 1970 Hague Convention generally prohibits review on the merits (in Article 6), and it is not otherwise permissible to refuse recognition on the basis of differences with internal divorce law, or with the law that would have been applied pursuant to domestic private international law rules.[54]

C. Recognition under the 1970 Hague Convention v recognition under Brussels IIa

Under Brussels IIa, divorce recognition was automatic: pursuant to Article 21(1) a divorce pronounced in another EU Member State had to be recognized 'without any special procedure being required'. (The same approach is now laid down in Article 30(1) Brussels IIb.) Under the 1970 Hague Convention, by contrast, there is no unification of the 'machinery for recognition'[55] and Contracting States may each have their own procedures for determining the recognition of a divorce from another Contracting State.[56]

[52] Bellet and Goldman (n 9) [32].

[53] Art 21 makes provision for another reservation: for non-recognition of legal separations in Contracting States whose domestic law does not provide for legal separations and where one of the separating spouses was a national of a state without legal separation. Also, Art 24 allows Contracting States to reserve the right not to apply the Convention retrospectively (to foreign divorces obtained before the Convention entered into force in that Contracting State).

[54] Art 6.

[55] Bellet and Goldman (n 9) [6], [10], [52].

[56] Anton (n 9) 633.

The two systems are also fundamentally different insofar as a check on the existence of a personal connection to the Contracting State of origin is a pre-condition of recognition under Article 2 of the 1970 Hague Convention, while any jurisdictional review by the recognizing state is absolutely prohibited under Brussels IIa and Brussels IIb.[57]

The scale and scope of the required Article 2 'check' will, however, vary—in some cases, it will be very straightforward, bringing the situation much closer to the arrangements under Brussels IIa and Brussels IIb, while in other cases, establishing compliance with Article 2 of the 1970 Hague Convention may require much more substantial deliberation and enquiry. As noted above, the grounds for divorce jurisdiction in the EU and the UK mostly align with Article 2 of the 1970 Hague Convention. Thus, in defended cases (where the respondent has appeared and Article 6(1) applies) the recognizing authorities should normally be able to arrive at a speedy conclusion on the satisfaction of Article 2 (drawing on the jurisdictional findings of the court of origin). In undefended cases, however, the recognizing authorities may have to make an independent assessment of the Article 2 connections[58]—and even in defended cases, the court of origin may have used a 'non-matching' ground for jurisdiction,[59] or there may be an argument that due to different definitions of habitual residence,[60] the factual findings of the court of origin are not determinative in the Contracting State where recognition is sought.[61]

On the face of it, Article 22 Brussels IIa (and Article 38 Brussels IIb) lay down public policy, natural justice, and irreconcilable judgments defences, which closely reflect those set out in Articles 8, 9, and 10 of the 1970 Hague Convention. It seems, however, that these 'Brussels' defences are intended to be much more narrowly circumscribed in the intra-EU context of 'mutual trust'[62]—and, although the Bellet and Goldman report emphasizes the need for 'restrictive interpretation',[63] it is likely that the 'Hague' defences will apply in a wider range of circumstances.[64] Also, there is no equivalent to the Article 19(1) reservation in Brussels IIa or Brussels IIb: on the contrary, there is a strict prohibition on review as to substance, and on non-recognition due to differences in applicable law (Articles 25 and 26 Brussels IIa; Articles 70 and 71 Brussels IIb).

While the Brussels IIa (and Brussels IIb) recognition obligation is generally much tighter, and admits of fewer exceptions than that laid down in the 1970 Hague Convention, it is noteworthy that the latter instrument goes further in guaranteeing the right of remarriage.

[57] See Art 24 Brussels IIa; Art 69 Brussels IIb.

[58] See Anton (n 9) 636; Bellet and Goldman (n 9) [37]: it was suggested at the time of adoption of the 1970 Hague Convention that most divorces were undefended (and therefore that the Art 6 obligation to accept the findings of fact of the court of origin would apply in only a minority of cases). It is unclear as to how Art 6 will apply in the context of the contemporary trend towards extra-judicial divorce by agreement (see d'Alessandro (n 17); Bogdzevič, Kaminskienė and Vaigė (n 17)).

[59] eg where divorce jurisdiction in Scotland or England was based on the petitioner's domicile at the date of institution of proceedings: other Contracting States are not obliged to recognize a divorce on that basis alone under Arts 2 and 3 1970 Hague Convention.

[60] In Case C-289/20 *IB v FA* EU:C:2021:955 the CJEU determined, for the purposes of Art 3 Brussels IIa, that a spouse could only have one single habitual residence at a time. This contrasts with the traditional English view that a spouse could have two contemporaneous habitual residences and invoke either in establishing divorce jurisdiction: see *Ikimi v Ikimi* [2001] EWCA Civ 873 [28], [32]; *Mark v Mark* [2005] UKHL 42 [37].

[61] See Bellet and Goldman (n 9) [38] and Law Commission (n 51) 15 acknowledging that the recognising Contracting State may have a different legal interpretation of habitual residence.

[62] Rec 21 Brussels IIa; Rec 55 Brussels IIb.

[63] Bellet and Goldman (n 9) [9] (also [46] on the use of 'manifestly' in Art 10).

[64] Anton (n 9) 635 notes that the use made of the Art 10 public policy defence will 'vary from system to system' and may include *fraude à la loi*. Although the Hague defences are likely to be generally broader in scope, it is noteworthy that Art 9 of the 1970 Hague Convention is slightly narrower than Art 22 Brussels IIa and Art 38 Brussels IIb insofar as the latter allow priority to be given to irreconcilable forum judgments whether they came earlier or later—whereas Art 9 only allows for the prioritisation of *earlier* incompatible forum judgments. For a detailed comparison of the Hague defences (as enacted into English law) and the Brussels IIa defences, see M. Ní Shúilleabhain, *Cross-Border Divorce Law: Brussels II bis* (Oxford University Press 2010) pp. 255–71.

Although the spouses' personal law is traditionally applied in determining the right to (re) marry[65] (and in determining the substantive validity of any second marriage),[66] Article 11 of the 1970 Hague Convention confirms that the non-recognition of the divorce under the personal law may not 'preclude either spouse from remarrying', if that divorce is entitled to recognition under the 1970 Hague Convention. Article 11 is clear in guaranteeing the right to remarry in Contracting States in such circumstances, but one would assume (although this is not quite so explicit) that Article 11 also guarantees the recognition in Contracting States of a second marriage celebrated elsewhere (assuming there was no other impediment to that second marriage under the personal law). Brussels IIa and Brussels IIb do not directly address the question of remarriage in the context of a conflict with the personal law, but it is likely that the principle of effectiveness of EU law (*effet utile*) will lead to the same outcome as under Article 11 of the 1970 Hague Convention and that the obligation to recognize the Member State divorce will prevail.[67]

In analysing the recognition of divorces under the 1970 Hague Convention, it is also important to emphasize that it sets a floor and not a ceiling,[68] and Contracting States are free to provide for more generous recognition of divorces under national law. This flexibility (laid down in Article 17) is valuable in facilitating participation by liberal states who may wish to go further and by more conservative states who do not. However, this latitude may also result in a perceived sidelining of the 1970 Hague Convention in those more liberal Contracting States. If national laws are more generous, there is no reason to have recourse to the Convention, and there may be a sense that the Convention is irrelevant.

The significance of Article 17 is discussed further below as part of the empirical research findings. Nonetheless, even in the context of more generous national laws on recognition, it is contended that the 1970 Hague Convention still has a real value. From an external perspective, an international convention offers a level of transparency and legal certainty that is absent in the context of reliance on local national private international law rules: a spouse based in another country may be reassured by the guarantee of recognition under the 1970 Hague Convention, even if the divorce would in any event be afforded recognition under (a more generous) national law. Thus, it is argued that the 1970 Hague Convention eases recognition between the UK and the 12 EU Contracting States, even assuming the availability of lenient national laws on divorce recognition.

4. Likelihood of all EU Member States becoming Contracting States

Although 12 EU Member States are already Contracting States to the 1970 Hague Convention, it does not yet apply in some of the more populous EU Member States like France and Germany. It does not extend to other Member States with significant numbers of British residents (eg, Spain and Ireland),[69] nor to some of the EU Member States, which experienced substantial migration to the UK in the pre-Brexit years (eg, Romania and Lithuania).[70] Thus, if the 1970 Hague Convention is to function as an effective substitute for Brussels IIa in UK-EU international divorce matters, the participation of the other 15 EU Member States must be secured. Indeed, it seems that there is strong support from within

[65] D. Coester-Waltjen, 'Marriage' in J. Basedow and others (eds), *Encyclopedia of Private International Law* (Edward Elgar, 2017) p. 1231.

[66] Ibid.

[67] Ní Shúilleabháin (n 64) 275–78.

[68] See Bellet and Goldman (n 9) [4]: the Convention 'lays down a minimum' standard.

[69] See Office for National Statistics, 'Living Abroad: British Residents Living in the EU' (April 2018) <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/articles/livingabroad/april2018> accessed 26 September 2024.

[70] Migration Observatory at the University of Oxford, 'EU Migration to and from the UK' (November 2023) <https://migrationobservatory.ox.ac.uk/resources/briefings/eu-migration-to-and-from-the-uk/> accessed 26 September 2024.

the UK for this solution.[71] It is, however, clear that adoption of the 1970 Hague Convention in the remaining 15 Member States will be decided at the EU level, and not by the Member States individually, because the EU has exclusive external competence in this area.[72]

In general, the EU Commission seems to be open to the idea of cooperating with the UK through the use of Hague Conventions.[73] In joining the 1970 Hague Convention, EU Member States, whose jurisdictional rules are already well-aligned with the Article 2 recognition criteria, have much to gain in terms of increased international recognition for their divorces. If the EU were to authorize participation, and the remaining 15 Member States proceeded to ratification or accession,[74] this would bring the total number of Contracting States to 35, which might in turn prompt other third (non-EU) countries to join in order to achieve wider recognition for their divorces. Accordingly, aside from supporting those European citizens with strong connections to both the EU and the UK, EU-wide participation could provide a more general boost to the standing and attractiveness of the 1970 Hague Convention.[75]

If, however, the EU decides to initiate the process of achieving full adoption of the 1970 Hague Convention across all Member States, this will not be a straightforward proposition. The EU Council must achieve unanimous agreement to legislate in this policy area (family law)[76] and there may be political pushback from those Member States (France and Germany) who previously indicated their lack of interest in the 1970 Hague Convention (at the time of embarking on the Brussels II project in the 1990s).[77] Even if their position has since softened, maintaining coherence with the UK may not be a political priority.[78] A similar lack of interest might also be expressed by other EU Member States with relatively few citizens living in the UK (and a small or negligible British population domestically): such Member States, with no real skin in the game, may feel that there are many more important matters deserving the EU's attention.

Further, it is possible that EU Member States opposed to the recognition of same-sex marriage may raise objections as they did at the time of the negotiations on Brussels IIb—even though the 1970 Hague Convention (like Brussels IIb) only touches tangentially on this question.[79] Indeed, the recent experience of such opposition may lead to a reticence at EU level: why reopen Pandora's box when the gains for the EU might be thought to be limited.

[71] See eg, D. Hodson 'Family Law in England and Wales After Fully Leaving the EU' [2020] (2) *International Family Law* 103, 106; Smith, Hodson and Le Grice (n 34) 1560; N. Lowe and D. Hodson, 'The UK's Family Law Prospective Position on Fully Leaving the EU' [2018] (11) *Family Law* 1391, 1397; P. Beaumont, 'Interaction of the Brussels IIa and Maintenance Regulations with (Possible) Litigation in Non-EU States: Including Brexit Implications' in I. Viarengo and F. Villata (eds), *Planning the Future of Cross Border Families: A Path through Coordination* (Bloomsbury, 2020) pp. 337–38. The Conservative Government (in 2020) also expressed its general support for the EU–UK cooperation using Hague Conventions: see HM Government, 'The Future Relationship with the EU: The UK's Approach to Negotiations' (February 2020), 30.

[72] See Opinion 1/13 EU:C:2014:2303; also European Parliament JURI Committee, 'The Future Relationship between the UK and the EU following the UK's Withdrawal from the EU in the Field of Family Law' (PE 608.834, Oct 2018) p. 26.

[73] See EU Commission, 'Communication from the Commission to the European Parliament and to the Council: Assessment on the Application of the United Kingdom of Great Britain and Northern Ireland to Accede to the 2007 Lugano Convention' COM (2021) 222 final, p. 4; also EU Commission, 'Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules in the Field of Civil Justice and Private International Law' (27 Aug 2020), p. 8 observing that '*currently* only 12 EU Member States are contracting parties' to the 1970 Hague Convention (emphasis added).

[74] The EU cannot itself become a party to the 1970 Hague Convention because it only makes provision for State parties, and not for accession by a Regional Economic Integration Organisation (REIO) on behalf of all Member States as is the case with more recent instruments: see D. Hodson, *The International Family Law Practice*, 6th edn (LexisNexis, 2021) [3.131].

[75] Beaumont (n 71) 338.

[76] Art 81(3) TFEU.

[77] See House of Lords Select Committee on the European Communities, 'Brussels II: The Draft Convention on Jurisdiction, Recognition and Enforcement of Judgments in Matrimonial Matters' HLP 19 (1997-98) 5th Report, pp. 36–37.

[78] See Trimmings and Kalaitsoglou (n 36) 224; also A. Dutta, 'Brexit and International Family Law from a Continental Perspective' (2017) 29 (3) *Child and Family Law Quarterly* 199, 208–09.

[79] See n 44; also Dutta (n 78) 208.

Thus, even assuming the UK government and the EU Commission are broadly favourable to the idea of EU-wide adoption of the 1970 Hague Convention, this ambition may not be easily realized.

III. THE 1970 HAGUE CONVENTION ON RECOGNITION OF DIVORCES AND LEGAL SEPARATIONS: EMPIRICAL RESEARCH

A research project led by the University of Aberdeen (Scotland/UK) and carried out in collaboration with partners in six EU Member States (Belgium, Croatia, Ireland, Italy, Lithuania, and Poland) explored the practical utility of the 1970 Hague Convention in the context of existing national legal frameworks.[80] The below analysis is based on the national reports that were produced under the auspices of this project. The discussion begins with the states that are not party to the 1970 Hague Convention (Belgium, Croatia, Ireland, and Lithuania) and then moves onto consider (in more detail) the experiences of the three participating countries which are Contracting States (Italy, Poland, and the UK).

1. Non-Contracting States

Belgium, Croatia, Ireland, and Lithuania (amongst other EU Member States—see above) are not bound by the 1970 Hague Convention. Nonetheless, the national reports are not indicative of significant problems with divorce recognition as between these countries and the UK. For example, it was reported that the Belgian Code of Private International Law 2004 'has an open and flexible regime for recognition of foreign decisions, including divorces', and therefore, the 1970 Hague Convention would not 'further facilitate recognition in Belgium'.[81] Nonetheless, it was noted that, for the sake of reciprocity, it might be beneficial for Belgium to become a Contracting Party to the Convention.[82] In contrast to Belgian law, Irish law on the recognition of foreign divorces is generally 'very restrictive'[83] (usually requiring a spouse to be 'domiciled' in the common law sense in the country of origin at the date of institution of proceedings).[84] However, in 2020, in anticipation of the UK's departure from the Brussels IIa system, specific legislation was adopted 'to provide for a level of continuity for recognition of UK divorces post-Brexit'[85] and so UK divorces (unlike other non-EU country divorces) are usually recognized without any difficulty in Ireland. Against this backdrop, it seems that although ratification of the Convention would lead to an overall easing of foreign divorce recognition in Ireland, this would not be important for those who had divorced in the UK. Also, as discussed below, Irish and Belgian divorces are readily recognized in the UK under the Family Law Act 1986, so whatever the *general* benefits of reciprocity under the 1970 Hague Convention, the Convention is unlikely to effect any significant change in the *specific* context of UK–Belgian and UK–Irish relations.

[80] See Section I. The project is titled 'Protection of international families with links to the European Union post-Brexit: Collaborative Scotland-EU partnership' and was funded by the Royal Society of Edinburgh. More information is available at <https://www.abdn.ac.uk/law/research/centre-for-private-international-law/protection-of-international-families-with-links-to-the-european-union-postbrexit-1439.php> accessed 26 September 2024.

[81] T. Kruger, 'Protection of International Families Post-Brexit: National Report for Belgium', June 2023, pp. 6–7 (on file with the authors).

[82] Ibid.

[83] M. Ní Shúilleabháin, 'Protection of International Families Post-Brexit: National Report for Ireland', May 2023, pp. 7–8 (on file with authors).

[84] S 5 Domicile and Recognition of Foreign Divorces Act 1986.

[85] Ss 124–26 of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020.

2. Contracting States to the 1970 Hague Convention

A. Italy

Italy has been a Contracting Party to the Convention since 1986[86]; however, it appears that the instrument has been only of a limited utility in that jurisdiction, due to the following reasons.[87]

First, the majority of the Contracting Parties to the Convention[88] are also Member States of the EU (or were EU Member States for a long period of time, ie, the UK), meaning that the recognition of divorces and legal separations originating from those Contracting States has been/was dealt with under the Brussels IIa, now Brussels IIb Regulation, rather than the Convention.

Secondly, the 1970 Hague Convention is not internationally in force between Italy and all the non-EU Member States that are Contracting Parties to the Convention.[89] In fact, Italy has not accepted, pursuant to Article 28, paragraph 4 of the Convention, the accession of some of the Contracting States, notably Albania and Moldova—two States with strong social ties with Italy, given the significant number of Albanian and Moldovan nationals residing in Italy.[90] This means that the Convention is not applicable in Italy in cases involving the recognition of Albanian and Moldovan divorces or legal separations.

Thirdly, in several cases, Italian courts considered that they did not need to resort to the 1970 Hague Convention for the purposes of recognizing divorces or legal separations emanating from Contracting States to the Convention on the ground that those divorces and separations were entitled to recognition, in the cases concerned, under the Italian domestic rules of private international law (which are, in fact, rather liberal).[91] As explained above,[92] this approach is in line with Article 17 of the Convention.[93]

It should be noted that to date only a handful of cases has been decided under the 1970 Hague Convention in Italy, and none of these decisions appears to provide a significant contribution to the interpretation of the provisions of the Convention.[94]

[86] Italy signed and ratified the Convention on 19 February 1986. It entered into force on 20 April 1986. The Italian Government made a reservation under Art 19(1) (see Section II.3.B). See Hague Conference on Private International Law ('HCCH'), 'Status Table: Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations' <https://www.hcch.net/en/instruments/conventions/status-table/?cid=80> accessed 26 September 2024.

[87] P. Franzina, 'Protection of International Families Post-Brexit: National Report for Italy' October 2023, 7 (on file with the authors).

[88] 13 out of 20. See HCCH (n 86), also Section II.1.

[89] A low reciprocity rate within the Convention is a concern more generally: M. Ní Shúilleabháin and J. Holliday, 'Divorce' in P. Beaumont and J. Holliday (eds), *A Guide to Global Private International Law* (Bloomsbury, 2022) p. 455.

[90] As of January 2022, 396,918 Albanian nationals resided in Italy, with the Albanian community amounting to approximately 11% of Italy's non-EU population. See Ministero del Lavoro e delle Politiche Sociali, 'The Albanian Community in Italy: Migrant Population Annual Report—Executive Summary', p. 1, < https://integrazionemigranti.gov.it/AnteprimaPDF.aspx?id=6139> accessed 26 September 2024. As of January 2022, there were 113,579 Moldovans legally residing in Italy. See Ministero del Lavoro e delle Politiche Sociali, 'The Moldovan Community in Italy: Migrant Population Annual Report—Executive Summary', p. 1 < https://integrazionemigranti.gov.it/AnteprimaPDF.aspx?id=6173> accessed 26 September 2024. See also Instituto Nazionale di Statistica, 'Non-EU Citizens Holding a Residence Permit' <https://www.istat.it/en/press-release/non-eu-citizens-holding-a-residence-permit-year-2011/> accessed 26 September 2024.

[91] Regulated by the Private International Law Act No. 218/1995. See Ministero degli Affari Esteri e della Cooperazione Internazionale, 'Recognition of Foreign Judgments (Divorce, Adoption, Change of Name or Surname, etc)' <https://www.esteri.it/en/servizi-consolari-e-visti/italiani-all-estero/stato-civile/riconoscimento-di-sentenze-straniere/#:~:text=name%20or ... -,Recognition%20of%20foreign%20judgments%20(divorce%2C%20adoption%2C%20change%20of%20name,with%20the%20Italian%20legal%20system> accessed 26 September 2024.

[92] Section II.3.C.

[93] Art 17 provides that '[the] Convention shall not prevent the application in a Contracting State of rules of law more favourable to the recognition of foreign divorces and legal separations.' This of course includes domestic rules of private international law pertaining to divorce recognition.

[94] Franzina (n 87).

B. Poland

Poland acceded to the 1970 Hague Convention on 25 April 1996 and the Convention entered into force there two months later, on 24 June 1996.[95] In Poland, the recognition of divorces and legal separations is normally carried out by Civil Status Registrars while updating civil status records.[96] Although it is open to the parties to apply for a judicial decision on the recognition of a divorce or legal separation, the courts tend to redirect such applications to the Civil Status Registry.[97]

In line with Article 17 of the Convention,[98] Civil Status Registrars normally apply Polish domestic rules on the recognition of foreign divorces and legal separations as they consider those rules to be more favourable than the rules set out by the Convention.[99] Under the domestic rules on recognition,[100] a foreign judgment or other decision of a foreign authority issued in a civil matter is recognized by operation of law,[101] unless one of the grounds for non-recognition applies.[102] These grounds resemble (although are not identical with) those found in the Convention: first, the decision is not final in the country of origin or was issued in a case falling within the exclusive jurisdiction of Polish courts[103]; secondly, a respondent who did not defend on the merits was not served with the divorce or legal separation petition in due time to enable defence[104]; thirdly, a party to the proceedings was deprived of the possibility of defending the petition for a divorce or legal separation[105]; fourthly, there already is a final judgment of a Polish court or a foreign court judgment recognized in Poland on the same matter[106]; and fifthly, the recognition would be contrary to the fundamental principles of the legal order of the Republic of Poland.[107]

C. The UK

The UK signed the 1970 Hague Convention over five decades ago, on 1 June 1970, ratified it 4 years later, on 21 May 1974, and the instrument entered into force there the following year, on 24 August 1975.[108] The UK Government made a declaration under Article 23, which means that the Convention applies to all three parts of the UK—England and Wales,

[95] HCCH (n 86). Like Italy, Poland made a reservation under Art 19(1) (see Section II.3.B). Additionally, Poland made a reservation under Art 24, which guarantees the right not to apply the Convention to a divorce or to a legal separation obtained before the date on which the Convention came into force in the recognizing State. Ibid.

[96] A. Wysocka-Bar, 'Protection of International Families Post-Brexit: National Report for Poland', June 2023, pp. 15–16 (on file with the authors).

[97] Ibid.

[98] See Section II.3.C, also n 93.

[99] Wysocka-Bar (n 96).

[100] Art 1145 of the 1964 Code of Civil Procedure.

[101] This was emphasized by the Polish Supreme Court in the decision *III CZP 112/15*, 23 March 2016. In this decision the Court also addressed the inter-relationship between the 1970 Hague Convention and domestic law: '[…] the Hague Convention defines only the scope of its application and the substantive prerequisites for the recognition of divorces and separations, but does not rule on the mode of recognition, ie, whether this is done by operation of law or requires a deliberative proceeding. Assuming in this regard the applicability of the law of the recognizing state, it must be taken into account that in Poland foreign judgments are subject to recognition by operation of law, without the need for separate proceedings in this regard (Art 1145 of the CCP). This means that the court before which a foreign judgment is invoked assesses independently, *ad casu*, whether it is subject to recognition in Poland.'

[102] Art 1145 of the 1964 Code of Civil Procedure.

[103] Art 1146, paras 1(1) and (2) of the 1964 Code of Civil Procedure. Such jurisdiction may exist with respect to parties who are Polish nationals, are domiciled in Poland and have their habitual residence in Poland. There is no equivalent provision contained in the Convention.

[104] Art 1146, para 1(3) of the 1964 Code of Civil Procedure. Cf Art 8 of the 1970 Hague Convention.

[105] Art 1146, para 1(4) of the 1964 Code of Civil Procedure. Cf Art 8 of the 1970 Hague Convention.

[106] Art 1146, para 1(6) of the 1964 Code of Civil Procedure. Cf Art 9 of the 1970 Hague Convention.

[107] Art 1146, para 1(7) of the 1964 Code of Civil Procedure. Cf Art 10 of the 1970 Hague Convention.

[108] HCCH (n 86). Like Poland, the UK made a reservation under Art 24. Ibid. See n 95. For a detailed account of the discussions that preceded the ratification of the Convention in the UK, see Law Commission (and Scottish Law Commission) (n 51).

Scotland, and Northern Ireland.[109] The application of the Convention extends to the UK territorial units: Bermuda, Gibraltar, Guernsey, and Isle of Man and Jersey.[110]

The 1970 Hague Convention was originally implemented in the UK by the Recognition of Divorces and Legal Separations Act 1971, which was later replaced by Part II of the Family Law Act 1986.[111] Unlike the 1971 Act, the Family Law Act 1986 does not differentiate between divorces that fall within the scope of the 1970 Hague Convention and those that fall outside of its scope.[112]

As explained above,[113] the 1970 Hague Convention may require a connecting factor that provides the basis for the recognition of the foreign decree (ie, habitual residence/domicile or nationality), to be reinforced by other 'fortifying' factors designed to discourage forum-shopping.[114] For the sake of simplicity, the UK legislation departs from these complicated 'fortifying' factors.[115] In addition to seeking to avoid unnecessary complexity,[116] the legislature was persuaded also by the Law Commissions' argument that the recognition stage is not the appropriate stage at which to discourage forum-shopping. This is because at that stage the forum-shopping, if any, has already taken place, and the real problem is to prevent limping marriages.[117]

Under the Family Law Act 1986, the validity of an overseas divorce or legal separation will be recognized if it is effective under the law of the country in which it was obtained, and if at the date of the commencement of the proceedings, either party to the marriage was habitually resident or domiciled in the country in which the divorce or legal separation was obtained; or was a national of that country.[118] There is a separate rule for the recognition of overseas divorces and legal separations obtained otherwise than by means of proceedings.[119] Such a divorce or legal separation will be recognized if effective under the law of the country in which it was obtained; and if at the date on which it was obtained, each party to the marriage was domiciled in that country; or either party to the marriage was domiciled in that country and the other party was domiciled in a country under whose law the divorce or legal separation is recognized as valid; and neither party to the marriage was habitually resident in the UK throughout the period of 1 year immediately preceding that date.[120]

The inclusion of divorces and legal separations obtained otherwise than by means of proceedings in the Family Law Act 1986 contrasts with Article 1 of the 1970 Hague Convention, which refers only to 'divorces and legal separations obtained in another Contracting State *which follow judicial or other proceedings* officially recognised in that State

[109] HCCH, 'Declaration/Reservation/Notification' <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=464&disp=resdn> accessed 26 September 2024.

[110] From 20 August 1972, 28 January 1977, 21 May 1974, 21 May 1974, and 21 May 1974, respectively. Ibid.

[111] K. Trimmings and K. Kalaitsoglou, 'Protection of International Families Post-Brexit: National Report for the United Kingdom' June 2023, p. 7 (on file with the authors). For an in-depth analysis of Part II of the Family Law Act 1986, see Torremans (n 40) 1005–37.

[112] Cf ss 2–6 of the Recognition of Divorces and Legal Separations Act 1971. See also The Law Commission and the Scottish Law Commission, 'Recognition of Foreign Nullity Decrees and Related Matters' (Law Com No 137, Scot Law Com No 88, 1984) [6.3–6.6].

[113] Section II.3.A.

[114] Arts 2 and 3 of the 1970 Hague Convention.

[115] See s 46 of the Family Law Act 1986; Trimmings and Kalaitsoglou (n 111) 7.

[116] See Law Commission and Scottish Law Commission (n 51) [27]–[29].

[117] Ibid [29]. 'Limping marriage' has been defined as 'a marriage which is recognised in one country but not recognised in another with the unhappy results that may follow therefrom—namely bigamous remarriage, illegitimate children and uncertainty or confusion over status and property rights.' *Quazi v Quazi* [1980] AC 744 (HL), 776.

[118] Ss 46(1) and (3) of the Family Law Act 1986.

[119] For judicial interpretation of 'proceedings', see eg, *Quazi v Quazi* [1980] AC 744 (HL); *Chaudhary v Chaudhary* [1985] Fam 19; *H v H (Validity of Japanese Divorce)* [2006] EWHC 2989 (Fam); and *H v S* [2011] EWHC B23 (Fam). See also n 16, and Torremans (n 40) 1017–19. It should be noted that none of the relevant cases involved a Contracting Party to the Convention.

[120] Ss 46(2) and (3) of the Family Law Act 1986.

[...].' Although the Explanatory Report to the 1970 Hague Convention gives the term 'proceedings' a very broad interpretation,[121] the UK approach seems to go further. It expressly recognizes that divorces and legal separations can be obtained without there having been any proceedings (eg, divorce by a 'bare' *talaq*),[122] and, unlike the Convention, explicitly facilitates the recognition of such divorces and legal separations.

The Family Law Act 1986 thus goes beyond the requirements of the 1970 Hague Convention in extending recognition to 'non-proceedings' divorces, in relinquishing the 'fortifying' factors and in extending the same (very liberal) recognition criteria to divorces and separations from Convention and non-Convention countries alike. This latter approach was intended to avoid the fragmentation and complexity, which would ensue if there were two different sets of rules applicable to divorces/legal separations originating from the 1970 Hague Convention Contracting States and divorces/legal separations originating from non-Convention countries.[123] The Family Law Act 1986 also goes beyond the Convention in applying the very same rules to foreign annulments. Insofar as the Family Law Act 1986 is more favourable to recognition than the Convention demands, this is of course permitted by Article 17.[124]

Insofar as the 1970 Hague Convention envisages that a divorce must be 'obtained' abroad,[125] this language (replicated in the 1986 Act) has caused some difficulty in the UK in dealing with 'transnational' divorces, where some 'steps' in the divorce process were taken domestically.[126]

The Family Law Act 1986 provides an exclusive list of the grounds on which recognition may be denied. These defences largely mirror those set out in the Convention: (i) natural justice (Article 8)[127]; (ii) irreconcilable judgments/res judicata (Article 9)[128]; and (iii) public policy (Article 10).[129] Additionally, there is a further ground in each of the two instruments—the 'no subsisting marriage' defence in the Family Law Act 1986[130] and a defence based on the fact that both spouses are nationals of States which do not provide for divorce (Article 7 of the Convention).[131]

The research identified several recent cases under the Family Law Act 1986 in which the 1970 Hague Convention was mentioned.[132] However, none of these cases fell within the scope of the Convention because the countries involved were not Contracting Parties.

[121] Defined as 'a minimum of acts, steps or formalities required to be taken by established rules and carried out by an authority or at any rate with the agreement of such authority or in its presence.' Bellet and Goldman (n 9) [13]. See also Section II.1.

[122] See Torremans (n 40) 1012–14. The authors recognize, however, that the Convention definition of 'proceedings' lacks precision (and that it might be argued that bare *talaqs* are encompassed). This point would therefore benefit from clarification by the Hague Conference in a future Review Special Commission on the 1970 Convention. See Ní Shúilleabháin and Holliday (n 89) 459.

[123] Law Commission and Scottish Law Commission (n 51) [19]; Trimmings and Kalaitsoglou (n 111) 7.

[124] See Section II.3.C.

[125] Art 1.

[126] See *R v Secretary of State for the Home Department Ex p Fatima (Ghulam)* [1985] QB 190, and *Berkovits v Grinberg* [1995] Fam 142. For a discussion on this point, see Torremans (n 40) 1015–17; L. Collins and J. Harris (eds), *Dicey, Morris & Collins on the Conflict of Laws*, 16th edn (Sweet & Maxwell, 2022) pp. 1117–18; and Ní Shúilleabháin and Holliday (n 89) 459 (arguing that 'transnational divorces' should be allowed to benefit from the Convention recognition mechanism not least because with increased privatization and digitization of divorce 'transnational divorces' will become more and more common).

[127] S 51(3)(a) of the Family Law Act 1986 (for proceedings divorces). See eg *El Fadl v El Fadl* [2000] 1 FCR 685; *A v L (Overseas Divorce)* [2010] EWHC 460; *Ivleva v Yates* [2014] EWHC 554 (Fam); *Olafisoye v Olafisoye* [2010] EWHC 3540 (Fam); and *H v H (Talaq Divorce)* [2007] EWHC 2945 (Fam).

[128] S 51(1) of the Family Law Act 1986.

[129] S 51(3)(c) of the Family Law Act 1986. See eg *Lachaux v Lachaux* [2019] EWCA Civ 738; *Golubovich v Golubovich* [2010] EWCA Civ 810; *Eroglu v Eroglu* [1994] 2 FLR 287.

[130] S 51(2). See also the additional defence in s 51(3)(b) for 'non-proceedings' divorces (based on lack of certification).

[131] See Section II.1.

[132] See *Parveen v Hussain* [2022] EWCA Civ 1434; *Lachaux v Lachaux* [2019] EWCA Civ 738; *H v S* [2011] EWHC B23 (Fam); *Golubovich v Golubovich* [2010] EWCA Civ 810.

IV. CONCLUSION

The 1970 Hague Convention is a flexible instrument which has aged relatively well.[133] It allows for mutual recognition of most divorces between Contracting States and for the avoidance of parallel proceedings. It also nudges Contracting States towards jurisdictional harmonization—all the while preserving a degree of domestic autonomy, both in terms of setting grounds for jurisdiction and allowing for more generous recognition of divorces.

If the 1970 Hague Convention were to apply across the EU, it would allow for a relatively high degree of mutual recognition of divorces granted in the UK and the EU. However, at present, it only applies in 12 EU Member States and so the UK's departure from the EU may potentially lead to an increased incidence of 'limping' UK divorces in the 15 EU Member States, which are not party to the 1970 Hague Convention (or at the very least to increased uncertainty where recognition is contingent on satisfaction of local private international law rules or on outmoded bilateral treaties).[134] However, our empirical research findings reveal that EU Member States (both Contracting States to the 1970 Hague Convention and non-Contracting States) often have relatively generous national rules—and our research suggests that even Contracting States do not often have recourse to the Convention. Accordingly, one should not overestimate the impact of EU-wide adoption of the 1970 Hague Convention.

The UK Family Law Act 1986 makes very generous provision for recognition of foreign divorces. This is a positive insofar as it mitigates the impact of Brexit and UK citizens and residents who divorce in EU Member States will, in most cases, continue to have their new status recognized in the UK. However, the liberalism of UK law can also be a negative from a UK perspective, insofar as it weakens the UK's hand in any negotiations: if EU Member State divorces are already recognized in the UK, there may be a sense that EU Member States have relatively little to gain in adopting the 1970 Hague Convention.

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[133] See Trimmings and Kalaitsoglou (n 36) 222–23; Ní Shúilleabháin and Holliday (n 89) 462.

[134] See Dutta (78) 203. New bilateral treaties are possible with the cooperation of the EU Commission using Regulation (EC) No 664/2009 [2009] OJ L20/46 but this has not been used much: J.J. Kuipers, 'Regulations (EC) Nos 662/2009 and 664/2009: Can Exclusivity be Successfully Reconciled with Flexibility?' in P. Franzina (ed), *The External Dimension of EU Private International Law After Opinion 1/13* (Intersentia 2017) p. 175.

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