The Functioning of the Brussels IIa Regulation

STEP response to consultation

18 July 2014

Introduction

STEP is the worldwide professional association for practitioners dealing with family inheritance and succession planning. The Society helps to improve public understanding of the issues families face in this area and promotes education and high professional standards among its members.

STEP has over 19,400 members across 95 jurisdictions from a broad range of professional backgrounds, including lawyers, accountants, trust specialists and other practitioners in this area. STEP members help families plan for their futures, specialising in a wide range of activities, from drafting a relatively simple will to more complex issues surrounding international families, protection of the vulnerable, family businesses and philanthropic giving.

We welcome this opportunity to respond to the consultation on the functioning of the Brussels IIa Regulation. Our comments below relate to how the Regulation affects the UK, but with also some reflections from an Italian perspective. However, we believe the examples below illustrate the broad range of impacts the Brussels IIa Regulation has.

Consultation response

The grounds of jurisdiction in Brussels IIa are already very wide. If anything, this should be narrowed rather than expanded further. We would question the need for a forum necessitates provision where the courts of non-Member States have jurisdiction (although, of course, there is such a provision in the Succession Regulation).
There is a danger that the EU in effect takes on the role of ‘international policeman’ (to coin Lord Goff’s phrase in *Airbus Industrie v Patel*) by providing access to its courts in such circumstances that, by definition, have more to do with non-Member States than Member States.

In Brussels IIa, the alternative bases of jurisdiction for divorce are overly extensive, with the result that they are very claimant friendly, facilitating forum shopping and, in tandem with the court first seised rule, encouraging a race to court.

The outcome of the race to court can be decisive. We would request clarification as to the rationale behind the underlying philosophy of such extensive choice, as currently the logic is unclear, especially given that Brussels I carefully limits the claimant’s choice of fora and to adopt a default rule in favour of the defendant’s domicile to protect the defendant.

In addition, there is greater choice for the claimant on divorce than there is on the death of a spouse in the Succession Regulation. Moreover, given that only some Member States are bound by Rome III on choice of law in respect of divorce (the UK is, of course, not), there are extensive opportunities to forum shop on the merits.

It would perhaps be prudent therefore to establish a hierarchical set of jurisdiction rules in Brussels IIa, as in Brussels I, starting with the common habitual residence of the spouses, if there is one.

However, from a private client perspective, particular problems follow from an English court having mandatory jurisdiction under the Regulation over divorce proceedings. In particular, English courts are still largely wedded to “one stop” resolution of divorce and ancillary relief claims. If they have mandatory jurisdiction over the divorce, the chances are that they will take jurisdiction over the financial aspects of divorce under the Matrimonial Causes Act 1973.
Given the refusal of English courts to apply choice of law rules to the financial aspects of divorce either, and their starting point of 50/50 division on divorce in England, and, even post-*Granatino v Radmacher*, less favourable treatment of pre-nuptial agreements than in many other Member States, there is a very strong incentive to forum shop in England.

To give an example of how this might be done, one could be habitually resident in England for 12 months (six months if one is a British national) even if both parties were habitually resident overseas for the entire duration of the marriage. Indeed, we now have the curious position where there are separate jurisdiction rules in the Maintenance Regulation to Brussels II; but English courts apply different, national rules of jurisdiction in respect of other financial aspects of divorce.

**Trusts**

The particular trusts problem is that Brussels IIa leads to the English courts having mandatory jurisdiction in a broad range of cases, which leads to “one stop” English national grounds of jurisdiction being asserted over ancillary relief claims.

Since the English courts treat their powers to vary foreign law trusts upon divorce under s.24(1)(c) of the Matrimonial Causes Act 1973 as overriding mandatory rules (e.g. *Charalambous*), they then apply the law of the forum to this issue, and to other issues such as whether the trust is a resource available to one of the spouses, notwithstanding that the Hague Trusts Convention (Art 8(2)(h)) states that the starting point is that the law applicable to the trust should apply.

The fact that foreign law is hardly ever applicable in ancillary relief proceedings was confirmed by the Supreme Court in *Granatino v Radmacher*. This leads to conflict with Overseas Territory and Crown Dependency jurisdictions. The Jersey courts, for example, as demonstrated in *Re B* and *Mubarak*, have “firewall” legislation stipulating that unless the law applicable to the trust is applied by the English courts, they will not recognise or enforce the resulting judgement.
The result can be that a trustee, who may have submitted to the English courts, may be caught in a very difficult situation, with conflicting guidance from English and offshore courts.

The English approach to the financial aspects of divorce may at first seem idiosyncratic, but this is exactly the sort of problem and forum shopping risk that arises because the Brussels IIa jurisdiction rules are too wide.

It could be that there should be scope for choosing the forum by way of jurisdiction clause. That choice should be limited, as it is in the Succession Regulation. The obvious restriction would be that the choice be limited to the fora which would otherwise have jurisdiction under a revised Brussels IIa Regulation.

We can, however, also see a strong case for allowing a choice of the relevant connecting factors at the time the choice is made (and not just the connecting factor when divorce proceedings are started), so that parties know when they make the choice that it is valid and which courts will have jurisdiction.

It is perhaps a curious anomaly that there is a power to transfer proceedings to the courts of another Member State in respect of responsibility for children (Article 15), but not in respect of divorce.

From a UK perspective, we would welcome measures that prevent inconsistent judgements but which also provide: scope for transfer to a more expedient forum; reduces the incentive to rush to the English courts; and limits the power of the court first seised rule. The power could helpfully be extended to divorce.

Articles 33 and 34 of the recast Brussels I (which will apply to proceedings commenced on or after 10 January 2015) will allow a limited discretionary power to stay proceeding where the courts of a non-Member State were first seised.
Unfortunately, some recent EU Regulations (including the Succession Regulation) can give the impression that the EU is operating in a vacuum, separate from non-Member State jurisdictions.

This, in turn, can promote uniform outcomes within the EU but lead to more collisions with non-Member States.

In the cases of divorce and responsibility for children, the possibility that one of the spouses will settle in a jurisdiction overseas exists; as does the fact that much of the family wealth may be located in a non-Member State (including land). It might then be beneficial to incorporate a power to stay proceedings in favour of the courts of Non-Member States.

We would request further evidence to support he suggestion that there might be an additional bases of jurisdiction where none of the parties is habitually resident in a Member State and/or they do not share a common nationality of a Member State.

Other areas in which we would seek clarification:

It would be helpful if Article 7 was clarified to stipulate that it should only be invoked when Articles 3, 4, 5 are not practically useful. This would mean that ‘habitual residence’ could be virtually skipped.

Prorogation of jurisdiction in Article 12 leads one to think that any matter related to parental responsibility is a weak issue in respect of legal separation or divorce. Should it not, in fact, be to the contrary?

Regarding residence or domicile, a strict connection with the real centre of life business and affairs should be clearer in order to avoid ‘dummy establishments’ which could have impacts on consequent parental responsibility.
Case study: Italy

Legal separation and divorce are two different proceedings. If an ex-spouse dies after legal separation but before divorce, the inheritance rights are still valid. There would appear to be no way that Article 5 could be implemented in this instance.

Problems often arise regarding property. The family home is a benefit mainly devoted to children but of relevant economic interest for their parents. There isn’t a separated proceeding to be started for the claim of the family house.

To avoid inheritance rights being invoked by the survivor spouse, a separate proceeding should be introduced for the declaration of the separation and divorce charge.

Conclusion

To reiterate, the grounds of jurisdiction in Brussels IIa are already vast and we would caution against this being expanded further. The EU runs the risk of becoming, in effect, ‘international policeman’ by providing access to its courts in such circumstances, which, by definition, have more to do with non-Member States than Member States.