Scottish Universities Legal Network on Europe

INTERNATIONAL PRIVATE LAW: FAMILY LAW

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1. Please explain the key rights that are protected and are therefore at risk following the UK's exit from the EU?

International Private Law ('IPL') is the branch of the law of any system which is applied to determine questions involving foreign elements. More particularly, it is the branch of the private law of any legal system which consists of the rules enabling its courts to determine:

a. the rules of *jurisdiction* to be followed by its courts;
b. the system of law which is to be applied by those courts to determine the rights of the parties in cases involving foreign elements ("*choice of law*"); and
c. the extent to which *recognition* is to be given by those courts to decrees of foreign courts, and the manner of *enforcement* of such recognised decrees, if enforcement be necessary; and conversely, the extent to which recognition of its own decrees and, if need be, enforcement thereof is to be accorded elsewhere.

This body of law confers legal rights on UK citizens/residents and persons domiciled in any one of the legal systems of the UK. The creation and development of a supranational body of IPL rules, developed intra-EU and internationally, has been a notable feature of the subject for at least three decades. This construct of EU harmonised rules enables Scottish businesses and individuals to know where they may pursue legal proceedings, and be pursued, among the legal systems of the EU; and to anticipate which country's law(s) will determine the dispute, and enjoy the benefit of certain common procedural rules. Importantly, upon obtaining a judgment from the court of one EU Member State, the recognition and enforcement thereof in another EU Member State, with attendant protective and provisional relief, is facilitated by European regulations currently in place.

The basic system, which is one of reciprocity among EU Member States, applies across the spectrum of private law, from commercial law, including property and insolvency, to family law issues such as recognition of overseas divorces and decisions concerning children, and extends also to procedural matters pertaining to civil and commercial litigation. *The remit of this paper is restricted to the international private law aspects of family law*. The subjects which fall to be outlined concern:

(i) jurisdiction and foreign judgment recognition in *matrimonial matters*;
(ii) jurisdiction and foreign judgment recognition and enforcement in *parental responsibility matters*; and
(iii) jurisdiction and foreign judgment recognition and enforcement in matters relating to *maintenance*.

The content of Scottish IPL rules in family law matters is largely contained in European regulations, which are directly applicable in the UK:

- Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility ('Brussels II *bis'*); and

- Council Regulation (EC) No 4/2009 in matters relating to maintenance obligations ('Maintenance Regulation').

Brussels II bis

Since 1 March 2005, jurisdiction, recognition and enforcement of judgments on matrimonial matters and matters of parental responsibilities have been governed in UK courts by Brussels II *bis*. The Regulation sets out harmonised rules on jurisdiction on divorce, legal separation, marriage annulment, and parental responsibility matters (Ch.II); recognition and enforcement of judgments relating to these topics (Ch.III); and co-operation between central authorities in matters of parental responsibility (Ch.IV). It contains specific rules on child abduction and access rights.

Brussels II *bis* currently is the subject of a recasting exercise (see European Commission proposal of 30 June 2016[1]). The Scottish Government and UK Government have sought views on whether or not the UK should opt in to the negotiations to revise Brussels II *bis*. The decision on 'opt in' is pending. The UK 'opt in' device (q.v.) is an 'all or nothing' mechanism. A UK decision to opt in to the proposed measure means that the UK should be able to influence the content of the proposed new rules. Having opted in, the UK would be bound by the terms of whatever instrument emerges. In our option, it would be better for the UK to participate and seek to exert influence on the shape and content of the revised instrument, than to refrain from participating in the exercise. If Brussels II *bis* (recast) should come into effect before Brexit, it would be better that the UK should be regulated by the same body of revised rules as then will apply in and among the other European Member States, *pace* Denmark, even if the period of time is short during which the UK, as an EU Member State, would be bound by the recast Regulation.

Maintenance Regulation

The Maintenance Regulation has applied in EU Member States, including the UK, from 18 June 2011. It sets out, inter alia, harmonised rules of jurisdiction (Ch.II); rules governing recognition, enforceability and enforcement of decisions (Ch.IV); and a system of co-operation between central authorities (Ch.VII). A maintenance creditor, i.e. any individual to whom maintenance is owed or is alleged to be owed, who obtains in a Member State a maintenance decision will be able automatically to enforce that decision in another Member State without further formalities.

- **Following Brexit**, these European regimes, insofar as they provide for mutual recognition, enforceability and enforcement of decisions would cease to apply as between the UK and other EU Member States.

In addition to being bound by these EU instruments, the UK is a Contracting State party to global harmonisation instruments in family law concluded under the auspices of the Hague Conference on Private International Law:

- Hague Convention on the Civil Aspects of International Child Abduction (1980); and

- Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (1996).

The 1980 Hague Convention

[1] 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} {SWD(2016) 208} (COM(2016) 411/2 2016/0190 (CNS)).

The 1980 Hague Convention on the Civil Aspects of International Child Abduction, and the 1980 Council of Europe ("Luxembourg") Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children brought about great change in the civil law governing cross-border child abduction cases. The UK became party to both Conventions by virtue of the Child Abduction and Custody Act 1985. The 1980 Hague Convention continues to have a very important role, but the same cannot be said of the Luxembourg Convention.

Importantly, both Conventions, in a qualifying EU case, are subject to the overriding authority of Brussels II *bis*. Brussels II *bis*, in its application to parental responsibility matters, principally is concerned with recognition and enforcement of parental responsibility orders emanating from EU Member States. In the specific context of international child abduction, Brussels II *bis* complements the 1980 Hague Convention in a manner which ensures that Brussels II *bis* takes precedence by insisting upon operation of its own special regime for intra-EU child abductions.

- **Following Brexit**, Brussels II *bis* would cease to apply in abductions between the UK and other EU Member States. Post-Brexit, the 1980 Hague Convention would continue to apply without the gloss of Brussels II *bis*, and there could be a continuing role for the Luxembourg Convention.

1996 Hague Convention

The 1996 Hague Convention, which reinforces the operation of the 1980 Hague Convention, is quadruple in nature and establishes uniform rules on jurisdiction, applicable law, the recognition and enforcement of judgments, and co-operation in respect of parental responsibility and measures for the protection of children. It was signed on 1 April 2003 by the then 14 EU Member States. No steps were taken for several years regarding ratification of the Convention, but in 2008, the EU Council adopted a decision authorising certain EU Member States to ratify or accede to the Convention. In the UK, the European Communities (Definition of Treaties) (1996 Hague Convention on Protection of Children etc.) Order 2010 was introduced, which had the effect of rendering the Convention an EU Treaty, and enabling secondary legislation to be put in place in Scotland and England to implement all aspects of the Convention. For ratification to proceed, all EU Member States were required to be ready to proceed *en bloc*. Ultimately, the Convention was ratified by the UK on 27 July 2012 and entered into force on 1 November 2012. Its implementation in Scotland was facilitated by The Parental Responsibility and Measures for the Protection of Children (International Obligations) (Scotland) Regulations 2010.

- **Following Brexit**, with regard to parental responsibility matters and measures for the protection of children, the 1996 Hague Convention should continue to operate to provide rules of jurisdiction and rules for the recognition and enforcement of measures taken by the authorities of other Contracting States.

- Hague Convention on International Recovery of Child Support and Family Maintenance (2007).

  The 2007 Hague Convention was signed on behalf of the EU on 6 April 2011, and came into force in EU Member States, including the UK, on 1 August 2014. The (optional) 2007 Hague Protocol on the Law Applicable to Maintenance Obligations, which was signed on behalf of the EC on 8 April 2010, came into force in Member States, excluding the UK and Denmark, on 1 August 2013.

The Convention's object is "to ensure the effective international recovery of child support and other forms of family maintenance" by establishing a comprehensive system of co-operation between Contracting States; making available applications for the establishment of maintenance decisions; providing for the recognition and enforcement of maintenance decisions; and requiring effective measures for the prompt enforcement of such decisions. The Convention applies on a mandatory basis to child support cases, and by declaration the EU resolved to extend the application of Chapters II (administrative co-operation) and III (applications through central authorities) to spousal support. The instrument's *raison d'être* is to assist a judgment creditor in the encouragement of amicable solutions and in the facilitation of enforcement, together with the collection of maintenance payments. The aim is to streamline procedures at the stage of recognition and enforcement, reducing delays and costs. The International Recovery of Maintenance (Hague Convention 2007) (Scotland) Regulations 2012 facilitate the application of the 2007 Convention in Scotland

Where EU Member States which are bound by the (EU) Maintenance Regulation are Contracting States also to the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (or the 1956 New York (UN) Convention on the Recovery Abroad of Maintenance), questions of priority of instrument arise. These are answered by art.69 of the Maintenance Regulation, to the effect that the Maintenance Regulation shall not affect the application of bilateral or multilateral conventions and agreements to which one or more Member States are party at the time of adoption of the Regulation (art.69.1), but in relations between Member States (i.e. in intra-EU disputes), the Maintenance Regulation takes precedence over the conventions and agreements to which Member States are party.

- **Post-Brexit**, the UK, in principle, should apply the rules contained in the 2007 Hague Convention. By contrast with the 1996 Hague Convention, however, it should be noted that the UK became party to the 2007 Convention, not as a signatory, but as a Member State of the EU on behalf of which the EU as a Regional Economic Integration Organisation became a contracting party.

Risks

If the situation post-Brexit is that "All Britain's laws would remain but the government could pass new laws to overturn EU rules in any areas it wished", one must deduce in the IPL area that, depending on the terms of the putative Great Repeal Bill, in the first instance all relevant EU regulations in the private international law area, including perhaps a Brussels II *bis* (recast) if completed pre-Brexit, would continue to operate until and unless the UK/Scottish Parliaments legislate otherwise.

- *Divergence*: Interpretation in future of the scope and content of the rules currently contained in regulation form, and translated into UK law after Brexit, would be a matter for the UK Supreme Court, rather than, as at present, for the CJEU. This would mean that over time diverging interpretations of the 'same' body of rules would emerge as between the UK and the CJEU. Identity of forum for family law disputes would become of pressing concern; the content and application of rules of jurisdiction in the new 'hybrid' situation themselves would become more complex and contentious, as explained below.

- *Loss of reciprocity*: The current system, so far as it is based upon reciprocity, would cease to exist in relation to the UK. The harmonised system for resolving conflicts of jurisdiction, and for ensuring mutual recognition and enforcement of judgments, would no longer operate between the UK and the remaining EU Member States. Insofar as the European system of recognition and enforcement of judgments is intended to provide for uniformity of status, the departure by the UK from this system would be disadvantageous to UK persons.

  By way of example, Brussels II *bis* sets out a system of mutual recognition and enforcement of judgments in matrimonial matters, founded upon mutual agreement on competent court (jurisdiction). Although Scotland might adopt *ex proprio motu* the rules of jurisdiction currently set out in Chapter II of Brussels II *bis* (or recast, as appropriate), it would be meaningless to say, unilaterally, that the UK is adopting the rules of recognition and enforcement currently set out in Chapter III of the instrument; the effective operation of Chapter III depends upon mutuality and reciprocity among legal systems which are part of a common judicial area. In other words, while UK courts may be prepared to continue to recognise a French divorce or custody decision, UK courts could not oblige a French court to recognise and give effect to a Scottish divorce or custody decision. Indeed the courts and authorities of remaining EU Member States would have no competence, *sub nom* Brussels II *bis*, to recognise a Scottish divorce or custody decision. Accordingly, in the UK post-Brexit, there would be lop-sidedness to any purported continuing effect of Brussels II *bis*. This being so, consideration should be given to whether it would be better to extend to all foreign (i.e. including EU) divorces etc. the system of recognition of overseas divorces etc. set out in the Family Law Act 1986. In the same connection, with regard to conflicting jurisdiction in matrimonial matters, the rule of *lis pendens* provided in Brussels II *bis*, art.19, which provides a solution for conflicts of jurisdiction between EU Member State forums in an effort to avoid irreconcilable judgments, would cease to apply. Post-Brexit, Scottish courts either could revert to the system of discretionary sists under the Domicile and Matrimonial Proceedings Act 1973, Sch.3, or could continue, in the absence of guaranteed reciprocity from remaining EU Member States, to apply a rule of *lis pendens*.

For the purposes of considering how Scotland may continue to protect these rights following an exit from the EU and for exploration of further future devolution of powers in certain areas to Scotland, please explain whether the rights fall within areas devolved to Scotland or currently reserved areas.

The position of Scotland within the UK in the matter of IPL

By the Scotland Act 1998 (as amended by the Scotland Act 2012), matters of Scottish civil law fall within the legislative competence of the Scottish Parliament. Section 126(4)(a) interprets the civil law of Scotland as a reference to the general principles of private law, including private international law. Although IPL generally is a devolved matter falling within the legislative competence of the Scottish Parliament, the private international law aspects of reserved matters likewise are reserved (s.29(4)(b)).

In terms of s.57 of the 1998 Act ("EU law and Convention rights"), despite the transfer to the Scottish Ministers of functions in relation to implementing obligations under EU law, any function of a Minister of the Crown in relation to any matter shall continue to be exercisable by him as regards Scotland for the purposes of s.2(2) of the European Communities Act 1972. In this context, therefore, there is "shared power" between Scottish and UK Ministers. Furthermore, Sch.5, Part 1, para.7 of the 1998 Act reserves foreign affairs, including relations with the EU, but excepting implementation of international obligations, obligations under the Human Rights Convention and obligations under EU law. Within the UK, therefore, legislative vires in this area is to some extent shared.

With regard to the EU private international law harmonisation agenda, the privilege of discretionary opt-in to proposed instruments is one extended not to individual legal systems of the UK, but rather to the UK as a whole, as the EU Member State.

Participation at the Hague Conference on Private International Law

Each EU Member State, as a result of the European harmonisation scheme, has lost its capacity to act autonomously in any matter concerning judicial cooperation in civil law which falls within EU competence.

Following Brexit, it must be anticipated that powers will be repatriated and that the UK will regain its sovereignty with regard to negotiation, and adoption or not, of Hague Conference instruments. The 1980, 1996 and 2007 Hague Conventions, in their subject matter, supply rules in major tranches of family law, and these would become the main source of international reciprocity and cooperation as far as the UK is concerned.

Please also identify, broadly, the main EU and implementing (UK/Scotland) legal sources (and where relevant make reference to other international legal sources for example, the Council of Europe).

The legal basis for the development of this area is founded upon the Treaty of Lisbon. The EU's competence to propose legislation in the field of civil justice was consolidated under Title V of the TFEU, concerning the EU 'Area of Freedom, Security and Justice'. Measures in the field of judicial co-operation in civil matters having cross-border implications are authorised by art.81, (ex-TEC art.65).

To date, the UK has held an advantage over most other EU Member States in that under the Lisbon Treaty, by virtue of Protocol No.21 on the position of the UK and Ireland in respect of the area of freedom, security and justice, it has enjoyed a right not to participate in EU justice and home affairs measures. In terms of Protocol No.21, the default position for the UK has been one of opt-out of proposed measures pursuant to Title V of Part Three of the TFEU, but art.3 permits the UK to notify the President of the Council that it wishes to take part in the adoption and application of any such proposed measure, whereupon it shall be entitled to do so. The Protocol means that when the European Commission proposes legislation founded on a legal base or competence under Title V of the TFEU, the UK does not participate in it unless it chooses to exercise its right to opt in.

2. **Please explain as clearly as possible the impact these rights have; what are the public benefits of these rights? Give specific examples where possible.**

The benefits of the European regimes operative in the family law [and commercial law] areas, insofar as they provide for mutual recognition, enforceability and enforcement of decisions, would cease to apply as between the UK and other EU Member States, giving rise potentially to problems concerning legal status and legal entitlement. The privilege of uniformity of status which has been extended under the European regime will cease to exist. Lack of certainty and increase in expenditure on litigation can be expected to result post-Brexit, something which is particularly prejudicial in relation to parental responsibility matters.

3. **What are the reasonably anticipated developments in this area of rights? (At the EU and / or Council of Europe).**

The EU Justice Agenda 2020

An EU Justice Programme for the period 1 January 2014 to 31 December 2020 has been established,[2] setting general and (so-called) specific objectives for that 6 year period (art.3). The essence of the EU Justice Agenda 2020 is to focus on the consolidation of what has been achieved; the codification of EU law and practice when necessary and appropriate; and the complementing of the existing framework with new initiatives. With particular reference to international private law, the possibility has been raised of the codification of existing instruments in the civil and commercial field. Very significantly, the UK, relying on Protocol No.21, is not taking part in the adoption of the Regulation by which the Justice Agenda 2020 has been set, and is not bound by it or subject to its application.[3]

[2] Regulation (EU) No 1382/2013 of the European Parliament and of The Council of 17 December 2013 establishing a Justice Programme for the period 2014 to 2020 (OJ L 354/73, 28.12.2013).

[3] Recital (34). See for details of UK reaction House of Lords European Union Committee – 13th Report of Session 2013-14: "Strategic guidelines for the EU's next Justice and Home Affairs programme: steady as she goes" (HL Paper 173, April 2014).

4. What is the sectoral potential for Scotland to progress/lead in this area of social protection/rights? Practically, how might it do so? (For example what kind of engagement could Scotland pursue with supra-national and international treaty bodies or organisations?)

Scotland and the UK could seek to exercise a stronger voice at the Hague Conference on Private International Law (cf. work in relation to the 2000 Hague Convention on the International Protection of Adults, which was signed and ratified by the UK for Scotland only).

With respect to jurisdiction and judgment recognition and enforcement, the UK should strive to ensure ongoing effectiveness of the current system by seeking to negotiate an agreement with the EU parallel to the Brussels II *bis* (or recast, as appropriate), along the model of the EC-Denmark Agreement entered into for the purposes of the Brussels I Regulation. The Agreement between the EC and Denmark on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters,[4] extended, as between the EC and Denmark, the provisions of the Brussels I Regulation, with certain amendments of a fairly minor nature. By letter of 20 December 2012 Denmark notified the Commission of its decision to implement the contents of Brussels I Recast, and so that recast regulation applies to relations between the EU and Denmark.[5]

[4] [2005] OJ L299/62. See further Council of the European Union Press Release 8402/06 (re Luxembourg meeting, April 2006), noting agreement concerning the extension to Denmark of the Brussels I Regulation (Decision 6922/06); and The Civil Jurisdiction and Judgments Regulations 2007 (SI 2007/ 1655).

[5] Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters O.J. L79/4, 21.3.2013.