



## FAMILY AND CIVIL LAW AND BREXIT

### QUESTIONS IN LETTER DATED 23 JULY 2018

You are welcome to reply to some or all of the questions.

It would be helpful to have responses by 16 August 2018 but we would consider points made after then.

Please reply to Simon Stockwell, Family and Property Law, GW15, St Andrew's House, Regent Road, Edinburgh, EH1 3DG (phone: 0131 244 3322) or by email to [family.law@gov.scot](mailto:family.law@gov.scot)

When replying, it would be helpful if you could use "Family and civil law and Brexit" as the heading in your email and letter.

In the interests of transparency, the Scottish Government would intend to publish the responses to the letter. If you do not wish your response to be published, please let us know and we will treat your response as confidential. However, the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 (FOISA) and might need to release information under FOISA.

Question 1. Should EU provisions on family law continue to apply after the proposed transition period?

The answer depends on whether continued application of EU law would be by virtue of a unilateral decision of the UK (/Scottish) Government, or by agreement between the UK and the EU.

*Please give reasons for your answer.*

*By unilateral decision of the UK (/Scottish) Government: 'No'*

Unilateral conversion of the *acquis* into British (/Scots) law by the UK (/Scottish) Government cannot bring about the required reciprocity or mutuality which lies at the heart of the Brussels and Lugano regimes. In jurisdiction and judgment enforcement, it would mean operating a domestic, inevitably unilateral version, e.g., of Brussels II *bis* and of the Maintenance Regulation. The UK/Scotland should not try unilaterally to operate a system that is designed to be bilateral or reciprocal in nature. If the UK (/Scottish) Government should act unilaterally to continue to apply EU provisions on family law after the proposed transition period, the result would be a lop-sided application of the relevant regulations, which would be highly undesirable.

The second problem that would emerge from any unilateral UK (/Scottish) decision to convert directly-applicable EU law into domestic law is that EU law would continue to develop, and change from time to time, as interpreted by the CJEU and EU Member State courts, whereas, after Brexit, interpretation of the scope and content of the rules as translated into UK/Scots law would be a matter for UK courts, and the UK Supreme Court, in particular. Over time diverging interpretations of the (*prima facie*) 'same' body of rules would emerge

as between the UK and the rest of Europe, meaning that identity of forum in a cross-border (European) family law dispute would take on new significance.

If the UK (/Scotland) were to apply a domesticated version of, e.g., Brussels II *bis* and the Maintenance Regulation, the national version of these instruments ultimately would diverge from those applied and interpreted among EU27. Diverging instruments would introduce more complication than benefit. A good example of this pertains to the current Brussels II *bis* recasting exercise. If (as seems highly likely) the Recast Regulation should come into force *after* the putative March 2019 withdrawal date and, on the 'domesticated legislation' strategy, the UK (/Scottish) Government converts Brussels II *bis* into domestic law and continues to apply it even after the rest of Europe is transposed to the Brussels II *bis* Recast regime, there would be marked divergence between the UK and EU27 versions of the regulation. Applying old EU law would be worse than applying current EU law, but it would be entirely against the ethos and rationale of Brexit for the UK, post-Brexit, *unilaterally* to incorporate Brussels II *bis* Recast into UK domestic law.

*By agreement between the UK and the EU: 'Yes'*

The UK Government can secure reciprocity only if it acts by agreement with EU27. The preferable strategy, in our opinion, is for the UK Government to strive for a reciprocal solution with EU27. The UK Government, recognising that international cooperation and mutual recognition benefits all parties, should continue to seek to negotiate an agreement with EU27 that will allow for continued civil judicial cooperation on a reciprocal basis, reflecting the substantive principles of cooperation which exist under the current European framework.

For detailed analysis and comment, see:-

- J M Carruthers and E B Crawford, *Divorcing Europe; Reflections on the Implications of Brexit for Cross-Border Divorce Proceedings* (Child and Family Law Quarterly, Special Issue, September 2017) C.F.L.Q. 2017, 29(3), 233-252.
- J M Carruthers, 'Brexit - the implications for civil and commercial jurisdiction and judgment enforcement' 2017 S.L.T. Issue 21, 103-108.
- E B Crawford and J M Carruthers, "Brexit: The Impact on Judicial Cooperation in Civil Matters Having Cross-border Implications: A British Perspective", in *European Papers*, 2018, Vol. 3, No. 1.

Question 2. Should Scotland recognise family law judgments from EU Member States, even if the UK leaves the EU without a negotiated settlement?

If the UK should leave the EU without a negotiated settlement, Scotland should cease recognising EU Member State family law judgments via operation of the existing body of European rules. Judgments from EU Member States should be treated in the same way as judgments from non-EU Member States, and the rules which apply under Scots law to recognition of non-EU judgments should apply accordingly.

*Please give reasons for your answer.*

Even if a version of, e.g., Brussels II *bis* were to operate in the UK as part of the transfer of the *acquis*, UK judgments would not fall to be recognised in another EU Member State under the European regime. Without express agreement between the UK and EU27, other EU Member States would be unable, post-Brexit, to extend

the operation of the European regulations to UK judgments. As explained above, it would be wholly inappropriate to apply the European rules in the UK/Scotland on a unilateral, i.e. non-reciprocated, basis.

There is a body of rules which currently applies to recognition in the UK/Scotland of non-EU judgments and post-Brexit these rules should be called into operation in respect of EU judgments.

Question 3. If the UK leaves the EU without a negotiated settlement, should jurisdiction of the courts in family cases revert to the position before EU provision was introduced in this area?

No.

*Please give reasons for your answer.*

If the UK should leave the EU without a negotiated settlement, the rules of jurisdiction in family law cases will have to be very carefully reviewed and revised to take account of the new circumstances (and the opportunity should be taken to make such adjustments as may be considered appropriate in the light of experience in applying the current rules), but it would be naïve and inappropriate merely to return the rules to their pre-Europeanised state and to seek to restore a pre-Europeanisation *status quo*.

At para 23 of the Consultation Paper it is stated, ‘... there is no guarantee that EU jurisdictional rules would be followed by Member States in respect of Scotland after Brexit.’ It should be noted that, even if a version of, e.g., Brussels II *bis* should operate in the UK/Scotland as part of the transfer of the *acquis*, EU Member States will not – because they *cannot* – extend these Regulations to UK proceedings (e.g. rules on *lis pendens*) or to UK judgments. All the rules in Brussels II *bis* and in the Maintenance Regulation are couched in the language of ‘other Member State’, and without express agreement between the UK and EU27, other EU Member States will be unable, post-Brexit, to extend the operation of the regulations to UK proceedings/judgments.

Question 4. Would the Hague Conventions and the Lugano Convention adequately replace the European instruments discussed in paragraphs 27-28 for family and civil international law?

If the UK should leave the EU without a negotiated settlement, the Hague/Lugano regime would provide a very good fall-back or substitute set of rules. While one can do a line-by-line comparison or analysis of the various Hague and Brussels instruments, and find, on the detail, particular benefits or drawbacks in either system, essentially, with regard to child abduction, child protection, maintenance, and choice of court, it is reassuring to UK citizens that other international regimes exist, which can afford a measure of protection post-Brexit.

The existence of Hague Conventions would assist post-Brexit particularly in relation to children where there is an established, sophisticated international regime. However, things are not quite so satisfactory in relation to adults and divorce jurisdiction, or in relation to civil and commercial matters.

There is no modern Hague instrument concerning divorce *jurisdiction*, though the overseas divorce *recognition* rules contained in the Family Law Act 1986 derive from a 1970 Hague Convention.

In civil and commercial jurisdiction, striking agreement in relation to Lugano II would be a second-best option because the UK would lose the improvements hard won through Brussels I Recast. Lugano II predates Brussels I Recast, meaning that its content has not been improved in the manner of that latest Brussels regulation.

Likewise, the 2005 Hague Convention, though useful, is considerably less useful than the Brussels and Lugano regimes, for it applies only in the rather restricted circumstances of there being an exclusive jurisdiction agreement in favour of the court giving judgment. The 2005 Convention is a potentially very useful instrument, but in no way can it be compared with the sweep of jurisdiction and judgment enforcement rules contained in the Brussels I Recast regulation.

In our opinion, therefore, in view of the mutual benefits which pertain under the European regime, it is legally expedient from UK *and* EU27 perspectives to continue to work towards retaining a reciprocal system which ensures virtually automatic recognition of judgments across the EU. The political goal should be for the UK Government to seek to negotiate with EU27 a bespoke bilateral agreement regarding the existing Brussels regime. The UK should seek to negotiate an agreement with EU27 to deal with the suite of EU private international law instruments as a package: seeking to secure an agreement parallel to Brussels I Recast (and sibling instruments such as Brussels II *bis*) is the solution favoured by UK parliamentary committees, and is widely supported by subject experts and legal practitioners in the UK.

Question 5. If there was a time lag between the Maintenance Regulation and Brussels 1A ceasing to apply and the UK rejoining the 2007 and 2005 Hague Conventions and the Lugano Convention, what would the impact of this time lag be for families?

Inevitably there would be an adverse impact insofar as parties would lose the benefits of certainty, mutuality and reciprocity which exist under the current regimes.

Greater complexity clearly attends those Hague instruments to which the UK is a party only by dint of being a European Member State. In order for the UK to continue to have the benefit of such Hague instruments, it will be necessary, after agreement to that end has been struck between the UK and EU27, to ensure that there is no dissent by any other Contracting State which is party to the relevant convention, to the UK's continuing status as a party bound by the instrument. Assuming no dissent, such an agreement should be lodged with the Convention depositary.

Question 6. Are there any other points about the impact on Scots family law of Brexit which you wish to make?

Yes.

*If yes, please outline your points.*

Intra-UK conflict of laws problems in the post-Brexit landscape:

In the context of the conflict of laws, particularly in family law, there may be perceivable benefits from having the UK Parliament legislate for the entire UK, thus lessening the likelihood of intra-UK conflict of laws problems. The resultant legislation may contain separate provision for each legal system within the UK (cf. Matrimonial and Family Proceedings Act 1984 – Part 3 (England) and Part 4 (Scotland); and the Civil Partnership Act 2004, which affects reserved matters as well as devolved matters), but, if that is the case, steps should be taken to ensure that the legislation demonstrates internal UK coherence.

Question 7. Are there any other points about the impact on civil law of Brexit which you wish to make?

Yes.

*If yes, please outline your points.*

The Brussels and Lugano regimes offer easy access to UK courts (which is good for the legal services market) and portability of UK judgments across Europe. Enforcing a UK judgment in an EU Member State without the benefits of the current regime inevitably would take longer and cost more than it does currently. Whilst many disputes do not proceed to trial on the merits, and there may be no resultant judgment to have recognised and enforced abroad, the prospect and/or reality of portability is important and valuable for litigants. Conversely, while there are long-established mechanisms in the UK, common law and statutory, enabling enforcement of non-EU judgments in the UK, the rules are more cumbersome and restrictive, and slower, than those currently in place. Accordingly, it would be legally expedient to retain a reciprocal system which ensures virtually automatic recognition of judgments across the EU.

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**16 August 2018**