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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

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?

No.

Please give reasons for your answer.

In the family law area we have a very satisfactory international system for regulating the private international law applicable to children. It would be better, and easier, for the UK to apply that international system in its relationships with EU Member States rather than the EU law system. The international system is found in the Hague Conventions of 1980 on Child Abduction, 1996 on Child Protection and 2007 on Maintenance. These are all part of the EU *acquis* so they will apply between the UK and EU if no special deal is done on these matters after the transitional period. For the detailed reasons for my position see Paul Beaumont "Private international law concerning children in the UK after Brexit: comparing Hague Treaty law with EU Regulations" (2017) *Child and Family Law Quarterly* 213-232 (available in an earlier form as Working Paper No. 2017/2- Private international law concerning children in the UK after Brexit: comparing Hague Treaty law with EU Regulations by **Paul Beaumont)**. See also Working Paper No. 2018/1 -Interaction of the Brussels IIa and Maintenance Regulations with [possible] litigation in non-EU States: Including Brexit Implications **by Paul R Beaumont**

Advantages of applying the international approach:

a) Simplicity – no need for lawyers and judges to know both the EU system and the international system:

b) the international system is not distorted by issues of EU integration eg the override system in Brussels IIa on child abduction cases that the UK opposed but felt obliged to accept to create a compromise in the EU but has been shown not to work can be abandoned (see Paul Beaumont, Lara Walker and Jayne Holliday, "Conflicts of EU courts on child abduction: the reality of Article 11(6)-(8) Brussels IIa proceedings across the EU" (2016) 12 Journal of Private International Law 211-260.). Even though Brussels IIa may improve the override system it would still be better to abandon it (see Working Paper No. 2016/6 "Parental Responsibility and International Child Abduction in the proposed recast of Brussels IIa Regulation and the effect of Brexit on future child abduction proceedings" by Paul Beaumont, Lara Walker and Jayne Holliday available at http://www.abdn.ac.uk/law/research/working-papers-455.php).

c) the reciprocity with EU Member States under the international conventions is exact whereas if we try to apply EU law unilaterally there will be no reciprocity and if we try to have a special deal to keep the EU law provisions applying it will be lacking in reciprocity because the UK will no longer be bound by decisions of the CJEU and nor will it be able to refer cases to the CJEU on the relevant EU instruments.

d) the advantage of EU instruments over Hague Conventions is that the former can be amended (though not easily as unanimity is require din the Council for family law) but that advantage is lost if the UK is no longer a Member State of the EU. Updating a bilateral agreement with the EU would be no easier than trying to negotiate a new Hague Convention (we were able to negotiate a new Maintenance instrument in the Hague in 2007 replacing the instruments from the 1950's).

e) the UK courts can play a fuller role in developing the uniform interpretation of the Hague family law conventions which promotes the progressive unification of private international law globally and not just regionally.

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

Yes and no.

Please give reasons for your answer.

Yes in relation to the recognition of foreign divorces because we took a liberal approach to this when we implemented the Hague Convention on the Recognition of Divorces and Legal Separations and decided to apply that Convention's rules to all foreign divorces and not just those coming from Contracting States to that Convention (as permitted by Article 17) – see Paul Beaumont and Peter McEleavy, *Anton's Private International Law* (SULI, 2011, 3rd edn) pages 766-767.

However, in relation to matters covered by the Hague 1996 and 2007 Conventions where central authorities play an important role it is best to restrict the benefits of recognition and enforcement of judgments to those coming from Contracting States. We want to encourage even wider ratification of those Conventions and the EU Member States are all bound by them (apart from Denmark in relation to Hague 2007).

In relation to child abduction we should not apply the Brussels IIa override system and we should not recognise and enforce such judgments coming from other EU Member States except in accordance with Hague 1996.

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?

Yes (except for cases governed by Hague 1996 in which case the jurisdiction and conflict of jurisdiction rules in that Convention should be applied properly whenever a case is connected to a Hague 1996 Contracting State (including all EU States)).

Please give reasons for your answer.

The jurisdiction rules that apply to divorce in Brussels IIa are very broad and have no hierarchy. They encourage a race to the court when coupled with the strict *lis pendens* system in Brussels IIa. Thought should be given as

to the appropriate divorce and financial relief jurisdiction rules when it is possible for the courts in Scotland to decline jurisdiction in favour of a clearly more appropriate court elsewhere on a flexible case by case basis due to the use of *forum non conveniens*.

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?

Yes.

Please give reasons for your answer.

I have written elsewhere explaining my reasons for this position including in evidence to the Scottish Parliament Justice Committee. See eg the following publications:

Paul Beaumont "Private international law concerning children in the UK after Brexit: comparing Hague Treaty law with EU Regulations" (2017) *Child and Family Law Quarterly* 213-232.

Mukarrum Ahmed and Paul Beaumont, "Exclusive choice of court agreements: some issues on the Hague Convention on Choice of Court Agreements and its relationship with the Brussels Ia Regulation especially anti-suit injunctions, concurrent proceedings and the implications of Brexit" (2017) 13 Journal of Private International Law 386-410.

Working Paper No. 2018/1 -Interaction of the Brussels IIa and Maintenance Regulations with [possible] litigation in non-EU States: Including Brexit Implications
by Paul R Beaumont

I have explained above why the Hague Conventions are preferable to the EU family law instruments of Brussels IIa and the Maintenance Regulation. In addition to the points made above it is worth saying that the EU Maintenance Regulation requires UK courts to automatically recognise and enforce maintenance judgments from the other EU Member States (apart from Denmark) because they are parties to the Hague Maintenance Protocol on Applicable Law. The EU courts are not so

obliged in relation to UK maintenance judgments. The Hague Maintenance Convention 2007 creates parity in these matters between the UK and the EU Member States and this system should apply after the transitional period. It is favourable enough for maintenance creditors without being unfairly favourable.

In relation to non-family civil and commercial matters I would be perfectly content to go back to the general law that we apply to non-EU domiciliaries at the moment - as found in Schedule 8 to the Civil Jurisdiction and Judgments Act 1982 coupled with forum non conveniens rather than lis pendens – in relation to EU domicilaries. Of course we would apply the Hague Choice of Court Convention 2005 to cases where there is an exclusive choice of court agreement and one of the parties is resident in an EU Member State.

If we are concerned about the loss of recognition and enforcement of Scottish non-family, civil and commercial judgments in other EU Member States the it would make sense to try to remain a party to the Lugano Convention – at least until the new Hague Recognition and Enforcement Convention is agreed in 2019 and can then be approved by the EU and ratified by 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?

No impact for families in relation to Hague 2005 which is a commercial instrument.

In relation to Hague Maintenance 2007 there might be some loss of enforcement of maintenance awards for 3 months vis a vis our European partners if we are not also parties to the Lugano Convention (not much loss if we are parties to it because it still applies to maintenance). For non-EU States the losses would be potentially for enforcement of maintenance awards for a three month period.

However, the transitional period should allow the UK to ratify the two Hague Conventions (2005 and 2007) with **no gap** after the end of the transitional period.

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.

Just to reiterate that we can gain a big advantage by not continuing to apply Brussels IIa to the child abduction override orders that give too much weight to the orders of the courts where the child was habitually resident immediately before the abduction.

See Paul Beaumont, Lara Walker and Jayne Holliday, "Conflicts of EU courts on child abduction: the reality of Article 11(6)-(8) Brussels IIa proceedings across the EU" (2016) 12 *Journal of Private International Law* 211-260.). Even though Brussels IIa may improve the override system it would still be better to abandon it (see Working Paper No. 2016/6 "Parental Responsibility and International Child Abduction in the proposed recast of Brussels IIa Regulation and the effect of Brexit on future child abduction proceedings" by Paul Beaumont, Lara Walker and Jayne Holliday available at http://www.abdn.ac.uk/law/research/working-papers-455.php).

A return to the combination of Hague 1980 and Hague 1996 for our relations with our EU partners (what we do currently with our Commonwealth and US partners as well as with all other Hague Contracting States) is a much more balanced regime in this context which is likely to be fairer to abducted children many of whom are abducted by their primary carers.

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 UK should be at the forefront of agreeing the new Hague Convention on Recognition and Enforcement of Judgments in Civil and Commercial Matters in July 2019 and then in ratifying it

quickly so that momentum is created for that Convention throughout the world as a solid basis of minimum harmonisation of the rules on recognition and enforcement of judgments.

Family and Property Law
Justice Directorate
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July 2018

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6 August 2018.