



Law Society
of Scotland

Consultation Response

Family and Civil Law and Brexit

August 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Family Law sub-committee and Civil Justice Committee welcome the opportunity to consider and respond to Scottish Government's questions on family and civil law and Brexit. The committees have the following comments to put forward for consideration.

Questions

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

Yes.

We note that the terms of the draft Withdrawal Agreement provide for the continuing application of provisions on family and civil justice for the duration of any transition period. However, we must also consider the possibility that no Withdrawal Agreement in these terms will be agreed.

We generally support the continuing application of EU provisions on family law on a reciprocal basis and have argued for agreement between the UK and the EU on the basis that civil judicial cooperation can continue as close to the current arrangements as possible. It is in the interests of the UK and the EU27 to provide for certainty and confidence in the application and enforcement of family actions in cross-border cases. Although alternative provisions, such as the Hague conventions, exist, these are more complex and less certain than the EU framework in practice. Moving away from the EU provisions to the system which currently applies to cross border actions involving a third country may result in delays, increased costs, and uncertainty for at least a period of time but it is an area of law which has significant common law and statutory provisions which are well known.

Developing a unique agreement between the EU and UK which facilitates full reciprocity would provide certainty for families in determining which court has jurisdiction and on what basis decisions may be enforced in another.

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

Yes.

Recognition of judgements from other jurisdictions is common, but this is less certain and clear in application than the use of the system that exists under the current EU law framework.

There are a range of different types of judgments, with different levels of enforcement in the Scottish courts.

(a) Declarators of fact.

Scottish Courts are not bound by findings of fact in a foreign judgement. Accordingly a foreign judgement which purports to establish a fact is not necessarily conclusive but can be accepted in non-contentious matters.

(b) Interdicts

A judgement of this type is generally only enforceable within the territorial limits of the Court which granted it. This applies to common law cases and cases falling outside the ambit of the Brussels/Lugano regime. Under those treaties orders for either implementation of an order or interdict, as well as those which are money judgements have the advantage of the enforcement scheme provided among member or contracting states.

(c) Judgements in rem

These judgements establish rights over property and are effective against the world at large.

(d) Judgments effecting status

These kinds of judgement are covered by the special statutory rules contained in the Family Law Act of 1986 Part II (non EU judgements) and Brussels II bis (EU judgements) establish rights which should be recognised internationally without the aid or intervention of a foreign Court and have a status in unrelated litigation.

Where the case is not an EU case the common law applies. The case of *Administrator of Austrian Property v Von Lorang* 1927 S.C.(H.L.) 80 is the leading case and provided that an annulment of marriage granted by a Court in Wiesbaden, Germany and recognised in the Scottish Courts had a direct effect upon a property dispute in Edinburgh.

(e) Judgements in personam

Judgements of this type such as claims for debts or damages for breach of contract can only be enforced in Scotland by the holder of the actual personal right looking for enforcement in Scotland.

Options for enforcement of third country commercial or civil judgements include:-

1. By action for decree conform which confirms the foreign judgement in the Scottish Courts.
2. Registration of judgement under the Administration of Justice Act 1920 or the Foreign Judgement (Reciprocal Enforcement) Act 1933.

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.

In the absence of further detail on alternative proposals, we assume that the default situation if no negotiated settlement is reached would be to revert to the pre-EU law position. This law currently applies to third country litigation and is a known and workable system. Although it may be possible to retain the EU framework by incorporating it into Scottish law, this would be a system without any guarantee of reciprocity. Unilateral rules on establishing jurisdiction are less likely to be of benefit.

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?

No.

The Hague Conventions and the Lugano Convention are sub-optimal when compared to the EU instruments which currently apply. However, they may be considered as something better than the third country, non-EU law option.

EU family law is based upon these Conventions. Reliance on them will provide an adequate, but not an enhanced system. They are less effective than the EU provisions, and the transition would likely result in increased delay, costs, and uncertainty, at least in the short term.

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?

The issue of time lag will cause uncertainty and likely delays in process, and will need to be addressed.

Because of the time lag, there will be gaps in the application of the treaties, unless mitigating steps are taken. The following possibilities apply:

The UK could make an interpretive declaration or reservation upon signature or ratification of the relevant treaty. A declaration or reservation would be a unilateral statement by the UK, which would propose to modify the legal effect of particular aspects of a treaty: see Article 2(1)(d) of the Vienna Convention Law of the Treaty (VCLT). In this case, the UK would seek to apply the treaty to cover jurisdiction clauses and proceedings that fall within the time lag. This would normally be done when signing or ratifying. However, this avenue is not open if the reservation or declaration is precluded by the terms of the treaty in question: see Article 19 of the VCLT. This means that a careful analysis of the relevant treaty's text is required.

The UK could make a non-binding statement of its interpretation of the treaty's provisions (for example, a statement about the effect of Article 16 of the Hague Convention 2005 in the novel case of the UK's withdrawal from the EU, a Regional Economic Integration Organisation exemption (REIO) under the treaty). This could be done along with, or as alternative to, option (a) above but would be a political statement, rather than have legal effect.

The UK could invite the existing parties to the relevant treaty to amend it to provide for the continued application of the treaty in the circumstances: see Article 39-40 of the VCLT. This could be done by way of specific amendments, or a separate protocol to the treaty. However, it would require the engagement of all parties to the treaty, not just the UK and the EU. It also may be practically difficult, particularly considering that time consuming domestic and international processes are needed.

The UK could propose a subsequent agreement or practice that would provide interpretation of the relevant part of the treaty: see Article 31(3) of the VCLT.

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

Yes.

Operating outwith the framework of EU law will result in the development of private international law and comparative law as a matter of increased importance to address the issues raised by the increasing number of cross-border relationships and high level of mobility and globalisation in many people's lives.

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

Yes.

The position of the legal system of Scotland as part of the UK as a third country will need to be clarified in a wide range of areas, including in relation to the Succession Regulation and matrimonial property regimes.

Non-reciprocation concerning the EPO and similar orders may create transposition problems under the European Union (Withdrawal) Act 2018. These need to be fully explained before proceeding with transposition instruments.

In the event of there being no withdrawal agreement there will need to be adequate contingency plans to deal with pending cases in family and civil matters.

For further information, please contact:

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