FACULTY OF ADVOCATES

Comments on EU Proposal to Revise Council Regulation (EC) No 2201/2003

These are detailed, technical and important changes to the Regulation and there is insufficient time to advise on the full impact. However, having worked with Council Regulation (EC) No 2201/2003 for over ten years it would be difficult now to put ourselves in the position where the Regulation no longer applied, at least pending the full withdrawal from the EU by which time there should have been a full reconsideration of the matters covered by the Regulation.

In brief:

Matrimonial proceedings

Scotland is affected by the "rush to court", for the opposite reasons to those that prevail in England. There are marriages where a regime that focuses on division of the value of property acquired during the marriage and a clean break with no ongoing support is very attractive to one spouse and highly unattractive to the other. It is to be regretted that this is not to be addressed.

The Commission has also failed to address the interrelationship between the Maintenance Regulation (Council Regulation (EC) 4/2009) and the Regulation under consideration. These two require to be harmonised to avoid difficulties for spouses who may be required to cope with competing proceedings in two jurisdictions.

It is however appreciated that the United Kingdom has particular difficulties as it has chosen not to opt in to Rome III.

Return of the Child

This part of the proposal relates to the intra-EU application of the Hague Convention on the Civil Aspects of International Child Abduction. In Scotland we already centralise Hague cases in the Court of Session and have a procedure that in principle complies with the proposals. Measures that encourage a similar approach in other member states is welcome.

The proposal that there should be only one appeal is attractive in promoting expedition, particularly given the current procedures for appeal to the Supreme Court which now slow down second appeals (by requiring an application for

permission to appeal with time scales that would not fit with the expedition required in these cases), but the drawback is that the Supreme Court has been instrumental in elucidating legal principle in a number of cases. If we prevented a second appeal we would lose the capacity to secure an authoritative decision in cases of difficulty, bearing in mind that Supreme Court decisions have an impact on Hague cases world-wide.

Provisional enforceability of a return order gives rise to difficulties if the order for return is reversed on appeal. There have been two recent litigations on this involving the USA (*Re L (A Child)* [2013] UKSC 75, [2014] AC 1017 and the *Chafin* case in the US Supreme Court). It is however noted that whether to declare a return order immediately enforceable is left to the discretion of the court where these matters should be weighed.

Abolition of exequatur

The retention of some safeguards is to be welcomed and realistic.

The new proposal for a stay of enforcement where there are temporary circumstances such as a serious illness of the child that would put the best interests of the child at grave risk are in principle helpful, but it should be recognized that this will present a focus of litigation. There may in practice be a degree of overlap between a change in circumstances that provides a ground to refuse enforcement and a temporary circumstance that would justify a stay.

Actual enforcement is always going to present a difficulty. There are a wide variety of approaches to enforcement. These are a matter of national law. In Scotland, physical enforcement by sheriff officers of an order relating to a child may be distressing and harmful in itself. It should rightly be seen as a last resort.

If enforcement is to be promoted then 'soft measures' such as international mediation should also be promoted to encourage child-sensitive approaches to enforcement. There will also require to be some mechanism in Scotland to address the proposed requirement to take steps to obtain the co-operation of a child who is objecting to enforcement.

Hearing the child

The difficulty here has been that different member states have dealt with the requirement to give the child the opportunity to express a view in different ways. In Scotland, domestic law is compliant both with article 12 of the United Nations Convention on the Rights of the Child and the proposed revisal to the Regulation. The issue for our courts is an inconsistency in practice over the age at which children should be offered this opportunity and the means of doing so. The means is currently being addressed in terms of domestic procedure.

Placement in another member state

At present Scotland tends to be a receiving state, in particular for children from Ireland requiring secure accommodation. We have managed this process efficiently, partly by dispensing with the delays built into the current Court of Session rules designed to allow time for appeals, as being inconsistent with the case law of the CJEU (H*ealth Service Executive v SC* Case C-92/12 PPU). Suspension for two months to allow for an appeal of enforcement of an order for the child to be placed in secure accommodation would defeat the object and the Court of Session have in practice granted enforcement without suspension.

We therefore have no issue about this but there can be no objection in principle to changes in the Regulation to improve the way it operates.

Co-operation between Central Authorities

The proposal here is helpful.