



## FACULTY OF ADVOCATES

### **Response from the Faculty of Advocates FAMILY AND CIVIL LAW AND BREXIT**

#### **Introduction**

The Faculty of Advocates welcomes the consideration being given by the Scottish Government to Brexit and Family Law. This is an important area of law and practice that is likely to affect many families resident in Scotland and persons with Scottish connections. It is an area in which the current provisions depend on reciprocity that will be lost when the United Kingdom leaves the European Union. In consequence it is one of the areas where European Union law cannot be transposed wholesale into domestic law and in which further action to deal with the consequences of this lack of reciprocity will be required.

Further, it is our view that Scotland cannot simply fall back on earlier measures. Measures such as the 1970 Hague Convention on the Recognition of Divorces and Legal Separations and concepts such as *forum non conveniens* now look out of date. This is particularly so after the experience of many years of freedom of movement which means that there are many more international families in Scotland - and sadly a long experience of modern family breakdown. There will require to be fresh consideration of a modern Scottish approach to international private law in this area.

#### **Question 1**

The Faculty of Advocates welcomes the anticipated agreement for a transitional period during which there will be ongoing judicial co-operation and the effective continued application of current EU family law instruments until 31 December 2020. There would be substantial benefits to retaining this regime in the longer term.

The UK's continued participation in the current regulatory regime may well be made conditional on acceptance of CJEU decisions in relation to family law instruments, but it would in any event be to Scotland's benefit to have access to the CJEU to seek decisions relating to the operation of EU instruments in this area, particularly given the influence of these decisions on other international instruments, including the interpretation of Hague Conventions. It is of course important to recall that the CJEU's jurisdiction in this area effectively relates to matters of procedure, not substantive domestic law.

It is acknowledged that exclusion from EU policy development after Brexit would be a drawback. There may be scope for maintenance of access to new databases post-Brexit in any event. Some, such as the iSupport facility for enforcement of maintenance (aliment) will be both Hague and EU based. It may require to be accepted that a limited role will continue to exist for the CJEU, to determine procedural issues arising.

It is also important to make the point that without the EU instruments there are significant gaps in provision for international litigation, the most important of these being in relation to jurisdiction in divorce and in relation to maintenance.

## **Question 2**

The Faculty notes that the question refers only to recognition of family law judgments. While recognition is important, the key issue is more likely to be enforcement.

Recognition is generally pertinent to divorce. While there is some cover for recognition in the 1970 Hague Convention on the Recognition of Divorces and Legal Separations, that Convention has not been updated as it has been superseded, to a material extent, by Council Regulation (EC) No 2201/2003 ("*Brussels II bis*"). In consequence when we leave the EU there may be no provision for Scottish divorces to be recognised in a number of states, including Ireland. Further the existing domestic provision in the Family Law Act 1986, which distinguishes between divorces secured in proceedings and 'non-proceedings' divorces, has been subject to academic criticism as incoherent. If we leave the EU without

any provision for recognition of divorce the terms of the 1986 Act will require reconsideration.

In the areas of parental responsibility and maintenance the most pressing issues relate to enforcement. Brussels II *bis* provides for direct enforcement of contact and of certain orders following refusal of a return under the Hague Child Abduction Convention, and for a declaration of enforceability for other orders. The recasting provisions propose an attractive route for enforcement, which is both direct, but enlists the powers of domestic courts. Families in Scotland will miss out on this. The Hague 1996 Parental Responsibility Convention will allow enforcement based on declaration of enforceability, but the procedure will be procedurally more complex, slower and more expensive than some existing, and the developing, EU provisions. However, it is difficult to see how Scottish families could accept that orders transmitted into Scotland would be subject to advantageous fast track enforcement, while outgoing orders would not. The disadvantages may simply have to be accepted.

It may be a forlorn hope to think that if Scotland voluntarily makes favourable arrangements for enforcement of orders from EU states, those states will give some sort of favourable treatment to Scottish orders, when the status of the UK will in future be that of a third country, non-member state. The likely effect of such a generous gesture may be to abandon a potential negotiating advantage which could be useful in the future.

### **Question 3**

The most pressing issue in this area is not so much the rules on jurisdiction, but the rules on dealing with conflicting proceedings, ie when the same or closely related cases are commenced in different courts, where should the point be determined? If matters proceed in different courts that involves parties in considerable additional expense, and there is a risk of conflicting decisions.

The EU rules on jurisdiction itself are largely sensible, save for some lack of coherence between the rules for jurisdiction in actions of 'maintenance' in Council Regulation (EC) No

2009/4 (the “Maintenance Regulation”) and the rules for divorce in Brussels II *bis* where financial orders may relate to ‘maintenance’. This can cause problems where a ‘maintenance’ action is commenced, and another party then seeks divorce but cannot raise matters of financial provision. The problem does not arise in many civil law countries as there are matrimonial property regimes covering division of assets, whereas in Scotland we do not have a matrimonial property regime. We provide for orders on divorce which may have multiple purposes, one of which may be ‘maintenance’. Subject to resolution of this issue there can be little objection to retaining habitual residence as the primary ground for jurisdiction. We would not wish to see a return to reliance on ‘domicile’ as the primary ground as this is a complex and uncertain concept, dependent on facts and circumstances in each case, and therefore a difficult matter to advise on. Parties would have limited certainty about the conduct of their affairs were we to revert to use of ‘domicile’ as the principal connecting factor for exercise of jurisdiction.

The reference in paragraph 24 of the consultation paper to courts being “barred” from hearing cases appears to be a reference to the rules resolving the problem of multiple proceedings, rather than the basic jurisdiction rules. The civil law generally determines which court should hear a case by reference to the principle of *lis pendens*, ie which court started first. This has the drawback of forcing parties into court (the so-called ‘rush to court’) but is straightforward, simple and cheap. In contrast the old Scottish rule of *forum non conveniens*, which essentially relies on determination of the most appropriate court is unpredictable for litigants, expensive and often impracticable. It may be pointless for a Scottish court to decide it is the most appropriate forum, if that is not going to deter a court elsewhere from continuing with litigation on the same point. Scottish residents will be at a permanent disadvantage as they may establish that their case should be heard by a Scottish court, but if (say) a French court where the litigation started first presses on, they risk securing a useless Scottish order that cannot be enforced.

#### **Question 4**

The first point to make is that the Hague and Lugano Conventions do not cover jurisdiction in divorce. The Lugano Convention is relevant in family law only in the sphere of

maintenance. The UK signed the original Lugano Convention as a member as a result of its EU membership. To rejoin the Lugano Convention on leaving the EU would require the consent of all other EFTA states (Norway, Switzerland, Iceland and EU as a block). The Lugano Convention does little more for family law than the Hague Maintenance Convention of 2007, save possibly in relation to jurisdictional rules. Lugano does have a prorogation provision in matters of maintenance. While this also appears in the Maintenance Regulation it can potentially sit badly with the conflict rules on divorce as it may preclude a court hearing a divorce from exercising full jurisdiction in the area of financial provision. It would therefore require some careful consideration.

The general difficulty with the Hague measures is they are by their nature based on achieving a wider consensus and as a result tend to reflect greater compromise and less clarity. The Hague Conventions of 1996 in relation to parental responsibility and of 2007 in relation to maintenance would however go some way towards ameliorating problems in family law. The Hague 1996 Parental Responsibility Convention in particular does have a coherent scheme for resolving conflict and for recognition and enforcement of decisions, albeit generally with less expedition than available under the EU instrument (particularly as to be recast). There are, of course, no jurisdictional rules in the Hague Maintenance Convention. That Convention does not require the co-operation of Central Authorities in relation to enforcement of spousal support, although the EU has by concession stated its Central Authorities will assist in this area. That concession will not be lost after Brexit.

### **Question 5**

It would be advantageous to avoid a time lag between the application of EU measures and the application of the Hague Conventions. If the transitional period could be used to allow the UK to ratify the relevant measures in its own right, so they come into force immediately after the transitional period, that would be a considerable benefit. If this were not done then there would be a time lapse in which litigants would have to elect between securing an order that could only be enforced in Scotland, or asking the court to defer making a decision until they could secure an order that could be enforced under Hague measures. Family law

orders are often time-critical. Three months may be a long period for (say) a parent to forgo a contact order, or a dependant to forgo maintenance.

### **Question 6**

It has been said by some that Brexit will make international private law in this area simpler. We fundamentally disagree. The EU regulations have focussed on reciprocity and certainty. Removal of the regulations makes the law less certain and is likely to increase the cost of litigation. This needs to be factored into the provision of both the court service and legal aid.

Whereas the coherence of EU provision, and its reinforcement of the Hague Convention on the Civil Aspects of International Child Abduction, discouraged movement from state to state to avoid court orders, Brexit may well have the reverse effect and some consideration should be given to how this might be addressed in Scotland. On the other hand many practitioners have regarded the additional features of Brussels II *bis* which allow courts of a child's habitual residence to make enforceable return orders, even when return is rejected in the place to which a child has been taken, as a step too far. This feature of the regulation may not be missed.

However the loss of the EU Protection Measures Regulation (Regulation (EU) No 606/2013), allowing enforcement of protection granted in one EU member state to be made in another, is counter to the current emphasis on safeguards from domestic violence. If some agreement could be reached to replicate this measure that would be welcome and would be consistent with current policy in this difficult area.

Finally, if the Maintenance Regulation no longer applies inter-state, further consideration should be given to its application intra-UK, and whether the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 (SI 2011/1484) should be repealed and replaced with a measure that is consistent with the jurisdiction provisions to apply in the future.

**Question 7**

We have nothing to add from the perspective of family law. Civil law is, of course, a much wider issue on which there will require to be extensive consultation over many areas and aspects.