



ARTICLES

BREXIT: THE IMPACT ON JUDICIAL COOPERATION IN CIVIL MATTERS HAVING CROSS-BORDER IMPLICATIONS – A BRITISH PERSPECTIVE

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ABSTRACT: Professors Crawford and Carruthers comment, from a British perspective, on the possible effects of Brexit upon European civil justice harmonisation measures, with particular reference to the Brussels I Recast, Brussels II *bis*, Rome I and Rome II Regulations.

KEYWORDS: Brexit – judicial cooperation in civil matters – European Union (Withdrawal) Bill – Scottish devolution – Lugano II – Hague Conference on Private International Law.

I. INTRODUCTION

The outstanding feature of the modern age of international private law has been the creation and development of a supranational body of rules, developed intra-EU by the European institutions and EU Member States, and internationally at the Hague Conference on Private International Law. Since the 1980s, international private law in the UK has undergone a European revolution in the name of judicial co-operation in civil matters, and the result is a vast body of European international private law directly applica-

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ble in the UK,¹ as well as in the other 27 Member States. As the UK prepares to withdraw from the European Union, this area of international private law must be scrutinised to ascertain what is to happen on Brexit Day and thereafter.²

II. THE EUROPEANISATION PROGRAMME

The EU, in its Justice and Home Affairs portfolio, has delivered an ambitious and wide-ranging programme of harmonisation of laws, with the aim of creating an “Area of Freedom, Security and Justice”. The central policy has been the removal of barriers to the free movement of persons, goods, services and capital. The legal basis for the development of this area is founded upon the Treaty of Lisbon. Measures in the field of judicial co-operation in civil matters having cross-border implications are authorised by Art. 81, “particularly when necessary for the proper functioning of the internal market”.³

The Lisbon Treaty, which is shorthand for two treaties, *viz.* the TFEU⁴ and TEU came into force on 1 December 2009, and as a consequence the EU’s competence to propose legislation in the field of civil justice was consolidated under Title V of the TFEU, concerning the EU “Area of Freedom, Security and Justice”. The TFEU provision on judicial co-operation in civil matters is contained in Art. 81, *viz.*:

“1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

- (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
- (b) the cross-border service of judicial and extrajudicial documents;
- (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
- (d) co-operation in the taking of evidence;

¹ Subject to the UK opt-in, discussed in section III, below.

² This *Article* is drawn from, and develops themes, treated in J.M. CARRUTHERS, *Brexit – The Implications for Civil and Commercial Jurisdiction and Judgment Enforcement*, in *Scots Law Times (News)*, 2017, p. 105; and in J.M. CARRUTHERS, E.B. CRAWFORD, *Divorcing Europe: Reflections from a Scottish Perspective on the Implications of Brexit for Cross-border Divorce Proceedings*, in *Child and Family Law Quarterly*, 2017, p. 233. See also generally E.B. CRAWFORD, J.M. CARRUTHERS, *International Private Law: A Scots Perspective*, Edinburgh: W. Green, 2015.

³ Note the change of wording from Treaty of Amsterdam, Art. 65, which had a stricter test, namely, “insofar as necessary for the proper functioning of the internal market”.

⁴ Which amends and replaces the previous Treaty (of Amsterdam) establishing the European Community (TEC).

- (e) effective access to justice;
- (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
- (g) the development of alternative methods of dispute settlement;
- (h) support for the training of the judiciary and judicial staff.

3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament. The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision".

III. THE UNITED KINGDOM OPT-IN

Under the Lisbon Treaty, by virtue of Protocol no. 21 on the position of the UK and Ireland in respect of the area of freedom, security and justice,⁵ the UK enjoys a right not to participate in EU justice and home affairs measures. The UK secured this position in order to maintain its border controls and to protect its common law system.⁶

In terms of Protocol no. 21, the default position for the UK and Ireland is one of opt-out of proposed measures pursuant to Title V of Part Three of the TFEU, but Art. 3 permits the UK or Ireland to notify the President of the Council, within three months after a proposal or initiative has been presented pursuant to Title V of Part Three, that it wishes to take part in the adoption and application of any such proposed measure, whereupon it shall be entitled to do so. The Protocol means that when the European Commission proposes legislation founded on a legal base or competence under Title V of the TFEU,⁷ the UK does not participate in it unless it chooses to exercise its right to opt in.

⁵ Protocol no. 21 on the position of the UK and Ireland in respect of the area of freedom, security and justice (Protocol no. 21). Prior to the Treaty of Lisbon the opt-in was provided by Protocol no. 4 on the position of the UK and Ireland. See also Protocol no. 22 on the position of Denmark (ex-Protocol no. 5 on the position of Denmark), in terms of which Denmark shall not take part in the adoption of proposed measures pursuant to Title V of the TFEU.

⁶ HM Government, *Review of the Balance of Competences between the United Kingdom and the European Union*, in *Civil Judicial Cooperation*, February 2014, para. 1.17.

⁷ Interpretation of the legal basis of the opt-in has been controversial, in respect of which, see House of Lords, European Union Committee, 9th Report of Session 2014-15, *The UK's Opt-in Protocol: Implications of the Government's Approach*, March 2015. The House of Lords Committee view is that a Title V legal base is required before the opt-in can be triggered. The UK Government position, however, is that the opt-in Protocol applies whenever, in its view, an EU measure contains JHA content, in addition to when a Title V legal base is formally cited (chapter 1, para. 7).

The opt-in enjoyed by the UK⁸ and Ireland, coupled with the Danish opt-out,⁹ means that, especially in cases where the UK and/or Ireland declines to opt in, there has emerged, in the private law subject area in question, a twin-track Europe. While British and Irish interests are thought to be protected by their default opt-out position, from the point of view of other Member States which do not enjoy the benefit of an automatic opt-out, failure by the UK and/or Ireland to opt in risks defeating the goal of a common European area of justice. Additionally, the EU rolling stock can diverge – or, as some prefer to say, proceed at different speeds – by virtue of enhanced cooperation procedure, which allows “participating Member States” to work towards a closer degree of integration and/or approximation of laws, as permitted by Title IV of the TEU.

The UK opted in to the major advances in the international private law harmonisation programme in the matters of civil and commercial jurisdiction and applicable law, but when the programme ventured into private law fields in respect of which, from the common law UK perspective, there was no perceived advantage in participating, the UK refrained from opting in. The UK exercised the right not to opt in to measures including Rome III,¹⁰ the Wills and Succession Regulation,¹¹ the Regulation Establishing the Justice Programme (2014-2020),¹² the Matrimonial Property Regulation,¹³ and the Registered Partnership Property Regulation.¹⁴

While the implications and complications of this twin-track area of freedom, security and justice have been viewed as significant in the narrative of the Europeanisation of private international law rules, they have been eclipsed by the Brexit agenda.

⁸ The privilege of discretionary opt-in to proposed instruments per Protocol no. 21 is one extended not to individual legal systems of the UK, but rather to the UK as a whole, as the EU Member State.

⁹ Protocol no. 22 on the position of Denmark, cit.

¹⁰ Regulation (EU) 1259/2010 of the Council of 20 December 2010 implementing enhanced cooperation in the law applicable to divorce and legal separation.

¹¹ Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

¹² Regulation (EU) 1382/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Justice Programme for the period 2014 to 2020.

¹³ Regulation (EU) 2016/1103 of the Council of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

¹⁴ Regulation (EU) 2016/1104 of the Council of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

IV. THE LEGISLATIVE BACKGROUND

IV.1. THE BRUSSELS INSTRUMENTS

The UK, in common with other EU Member States, currently applies the Brussels I Recast regulation on jurisdiction and the enforcement of judgments in civil and commercial matters¹⁵ (“Brussels I Recast”). The principle of mutual recognition of judgments, founded upon agreement as to acceptable grounds of jurisdiction within the EU, has been the cornerstone of judicial co-operation in civil matters since the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. Under the Brussels regime, common rules of jurisdiction are applied across European Member State courts and a wide range of judgments (not just money judgments) from one European Member State is enforceable in all Member States, subject to limited grounds to refuse enforcement, relatively strictly applied. The Brussels regime was created to support the single market in Europe. Although the typical situation is one concerning European parties litigating *inter se*, the regime applies regardless of where parties come from, assuming there are assets situated in one or more EU Member States out of which an EU Member State judgment may be satisfied.

Following the Brussels family, there are important procedural law instruments, such as Regulation 1206/2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters,¹⁶ and Regulation 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.¹⁷ Additionally, though less significantly, there are regulations the aim of which has been to accelerate the enforcement of Member State decrees, which, in their nature, are uncontroversial, namely, Regulation 861/2007 creating a European small claims procedure¹⁸ and Regulation 805/2004 creating a European Enforcement Order for uncontested claims,¹⁹ and Regulation 1896/2006 creating a European order for payment procedure.²⁰ Of importance in the commercial arena is the Insolvency Recast Regulation.²¹

¹⁵ Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

¹⁶ Regulation (EC) 1206/2001 of the Council of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

¹⁷ Regulation (EC) 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) 1348/2000.

¹⁸ Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.

¹⁹ Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.

²⁰ Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.

Echoing the commercial agenda, since 2001, there has been in place among European Member States of, by virtue of Regulation 1347/2000 on jurisdiction and recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (colloquially known as “Brussels II”),²² a system of allocation of jurisdiction and decree recognition in matrimonial matters. Brussels II was succeeded rapidly by Council Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (“Brussels II *bis*”),²³ which came into force on 1st March 2005. Brussels II *bis* created a single European instrument securing the free movement of matrimonial judgments and parental responsibility judgments, directly applicable among all European Member States, except Denmark.²⁴ Also in family law, Council Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (“the Maintenance Regulation”²⁵) has applied in EU Member States, including the UK,²⁶ since 18 June 2011.

IV.2. THE ROME INSTRUMENTS

European instruments concerning choice of law fall under the “Rome” patronymic. The most significant instrument in choice of law was the 1980 Rome Convention on the Law Applicable to Contractual Obligations (“Rome I”), now replaced by the Rome I Regulation.²⁷ This Regulation, in combination with the Rome II Regulation²⁸ (concerning non-contractual obligations arising out of tort, delict, unjust enrichment, *negotiorum gestio*,

²¹ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

²² Regulation (EC) 1347/2000 of the Council of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses.

²³ Regulation (EC) 2201/2003 of the Council of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) 1347/2000 (variously known as BIIa, and BII revised, but referred to hereinafter as “Brussels II *bis*”).

²⁴ Protocol no. 22 on the position of Denmark, cit., in terms of which Denmark shall not take part in the adoption of proposed measures pursuant to Title V of Part Three of the TFEU.

²⁵ Regulation (EC) 4/2009 of the Council of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. See also Commission Implementing Regulation (EU) 2015/228 of 17 February 2015 replacing Annexes I to VII to Council Regulation 4/2009.

²⁶ The UK did not take part in the adoption of the Maintenance Regulation, and therefore at that point was not bound by it, or subject to its application (recital 47). However, in accordance with Art. 4 of Protocol no. 4 on the position of the UK and Ireland, cit., the UK later notified its intention to accept the Regulation.

²⁷ Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

²⁸ Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

and *culpa in contrahendo*), had the effect of putting in place a harmonised set of rules applicable to the great majority of conflict disputes arising in the law of obligations before all EU Member State courts. Harmonised choice of law provisions followed for participating Member States in the area of wills and succession; and by enhanced cooperation in the areas of divorce and legal separation, wills and succession, matrimonial property and the property consequences of registered partnerships.

V. BREXIT

The pressing question is whether or not the UK and UK citizens, upon Brexit, will lose the signal benefits of the harmonisation era. Can any of this complex, useful, interlocking scheme be salvaged once the UK leaves the EU and assumes the character of a Third State?²⁹

V.1. BREXIT: THE POLITICAL BACKGROUND

Many position papers have been published setting out the political standpoint. From the UK Government side, Prime Minister Theresa May's Lancaster House speech of 17 January 2017, set out her plan for the Brexit negotiations, swiftly followed in February 2017 by the UK Government White Paper (*The UK's Exit from and New Partnership with the EU*). In March 2017, there was published the House of Lords EU Committee, EU Justice Sub-Committee, 17th Report of Session 2016-17, *Brexit: Justice for Families, Individuals and Businesses?*,³⁰ and the House of Commons Justice Committee, 9th Report of Session 2016-17, *Implications of Brexit for the Justice System*.³¹ Subsequently, upon the triggering of Art. 50 TEU, the Department for Exiting the European Union published a White Paper entitled, *Legislating for the UK's Withdrawal from the EU*,³² concentrating on the content and nature of the Great Repeal Bill. Significantly, on 13 July 2017, the *European Union (Withdrawal) Bill* was published (formerly referred to as the [Great] Repeal Bill). In August 2017, the UK Government published *Providing a Cross-border Civil Judicial Cooperation Framework: A Future Partnership Paper*, and on 22 September 2017, the UK Prime Minister delivered a speech in Florence, entitled *UK Government's*

²⁹ See, referring to the UK as a "third country", European Commission, Directorate-General Justice and Consumers, *Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules in the field of Civil Justice and Private International Law*, 21 November 2017.

³⁰ House of Lords EU Committee, EU Justice Sub-Committee, 17th Report of Session 2016/17, *Brexit: Justice for Families, Individuals and Businesses?*, 20 March 2017.

³¹ House of Commons Justice Committee, 9th Report of Session 2016/17, *Implications of Brexit for the Justice System*, 22 March 2017.

³² UK Government, Department for Exiting the European Union, *Legislating for the United Kingdom's Withdrawal from the European Union*, 30 March 2017.

Plan for a New Era of Co-operation & Partnership.³³ On 1st December 2017, the Lord Chancellor and Secretary of State for Justice, The Right Honourable David Lidington MP, wrote to the Chairman of the House of Lords EU Select Committee, with the UK Government's response to that Committee's March 2017, Report on *Brexit: Justice for Families, Individuals and Businesses?*

On the European side, counterweights by which to gauge the approach of EU27 to the UK withdrawal process and wider negotiations are the European Council's Guidelines following the UK's notification under Art. 50 TEU;³⁴ the speeches delivered by Michel Barnier, EU Commission Chief Negotiator for the Preparation and Conduct of the Negotiations with the UK on *The Conditions for Reaching an Agreement in the Negotiations with the UK*,³⁵ and *The Future of the EU*,³⁶ and the Position Paper transmitted to EU27 on Judicial Cooperation in Civil and Commercial Matters, dated 28 June 2017. On 21 November 2017, the European Commission (Directorate-General Justice and Consumers) *Notice to Stakeholders*, regarding the withdrawal of the UK and EU rules in the field of civil justice and private international law, highlighted that from 30 March 2019 the UK will become a "third country". The Commission Notice stated starkly that as of the withdrawal date, the EU rules in the field in question no longer apply to the UK. Specifically, regarding international jurisdiction, the Commission Notice stated,

"the rules on international jurisdiction in EU instruments in the area of civil and commercial law as well as family law no longer apply to judicial proceedings in the United Kingdom and under certain circumstances (in civil and commercial cases where the defendant is domiciled in the United Kingdom) to judicial proceedings in the EU. International jurisdiction will be governed by the national rules of the State in which a court has been seized".³⁷

Likewise, with regard to recognition and enforcement, the Commission Notice stated that,

"judgments issued in the United Kingdom are no longer recognised and enforced in EU Member States under the rules of the EU instruments in the area of civil and commercial law as well as family law, and vice versa. Recognition and enforcement of judgments between the United Kingdom and an EU Member State will be governed by the national law of the State in which recognition and enforcement is sought or by international Conven-

³³ T. MAY, *PM's Florence Speech: A New Era of Cooperation and Partnership between the UK and the EU*, 22 September 2017.

³⁴ European Council, Guidelines EUCO XT 20004/17 of 29 April 2017, *Special Meeting of the European Council (Art. 50)* and European Council, Guidelines EUCO XT 20011/17 of 15 December 2017, *European Council (Art. 50) meeting*.

³⁵ M. BARNIER, *Speech Delivered at the Plenary Session of the European Committee of the Regions*, 22 March 2017.

³⁶ M. BARNIER, *Speech Delivered at the Centre for European Reform*, 20 November 2017.

³⁷ European Commission, Directorate-General Justice and Consumers, *Notice to Stakeholders*, cit.

tions where both the EU (or EU Member States) and the United Kingdom are contracting parties".³⁸

On 8 December 2017, in a *Joint Report from the Negotiators of the EU and the UK Government on Progress during Phase 1 of Negotiations under Art. 50 on the UK's Orderly Withdrawal from the EU*,³⁹ the negotiators indicated that sufficient progress had been made on Phase 1 to enable moving to Phase 2 – namely, preliminary and preparatory discussions on the framework for a future relationship. Both parties recognised that,

"On cooperation in civil and commercial matters there is a need to provide legal certainty and clarity. There is general consensus between both Parties that Union rules on conflict of laws should continue to apply to contracts before the withdrawal date and non-contractual obligations where an event causing damage occurred before the withdrawal date. There was also agreement to provide legal certainty as to the circumstances under which Union law on jurisdiction, recognition and enforcement of judgements will continue to apply, and that judicial cooperation procedures should be finalised".⁴⁰

While the sum of these papers, UK and EU, offers a veneer of clarity, there is a vast amount of detail yet to be worked out regarding any future relationship between the UK and EU27 on the subject of judicial cooperation in civil and commercial matters.

V.2. THE EUROPEAN UNION (WITHDRAWAL) BILL

One repercussion of the repeal of the European Communities Act 1972 would have been the denuding of legal effect in the UK of European private international law instruments. The same will be true of international agreements concluded by the EU on behalf of Member States, such as the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which operates among the European Community and Iceland, Norway, Switzerland and Denmark ("Lugano II Convention"), and the 2005 Hague Convention on Choice of Court Agreements.

However, the UK Government's March 2017 White Paper set out the Government's plan to convert the *acquis* – the body of existing EU law – into British law,⁴¹ with the objective of providing "maximum certainty as we leave the EU. The same rules and laws will apply on the day after exit as on the day before. It will then be for democratically elected representatives in the UK to decide on any changes to that law, after full scruti-

³⁸ *Ibid.*, pp. 1-2.

³⁹ European Commission, *Joint Report from the Negotiators of the EU and the UK Government on Progress during Phase 1 of Negotiations under Art. 50 on the UK's Orderly Withdrawal from the EU*, 8 December 2017.

⁴⁰ *Ibid.*

⁴¹ UK Government, Department for Exiting the European Union, *Legislating for the United Kingdom's Withdrawal from the European Union*, cit., para. 2.4.

ny and proper debate".⁴² The premise is that there will be no void in British law insofar as "domesticated" rules of jurisdiction and judgment recognition, modelled on existing EU Regulations, will apply in UK courts.

Therefore, although, strictly, EU Regulations – in the form at least of EU instruments – will cease to apply in the UK upon UK withdrawal from the EU, the UK Government's express intention is that a *domesticated* version of those very same rules should continue to apply in UK law post-Brexit, in order to avoid any legal vacuum. Explicitly, the UK Government aim is that, as the European Communities Act 1972 is repealed, directly applicable EU laws will be converted into UK law, and that the Withdrawal legislation will "preserve all the laws which have been made in the UK to implement EU obligations".⁴³ By clause 3 of the *European Union (Withdrawal) Bill* (entitled *Incorporation of direct EU legislation*): "(1) Direct EU legislation,⁴⁴ so far as operative immediately before exit day, forms part of domestic law on and after exit day".⁴⁵

VI. THE POSITION OF SCOTLAND WITHIN THE UK IN THE MATTER OF PRIVATE INTERNATIONAL LAW

Account must be taken of the fundamental constitutional change effected by the Scotland Act 1998 (as amended), as a result of which matters of Scottish civil law fall within the legislative competence of the Scottish Parliament.⁴⁶ Section 126(4)(a) interprets the civil law of Scotland as a reference to the general principles of private law, including private international law.⁴⁷

An Act of the Scottish Parliament is not law insofar as any provision thereof is outside the legislative competence of that Parliament; reserved matters are expressly excluded from its legislative competence. The question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined by reference to the purpose of the provision, having regard, inter alia, to its effect in all the circum-

⁴² *Ibid.*, p. 5.

⁴³ UK Parliament, *European Union (Withdrawal) Bill, Explanatory Notes*, 13 July 2017, para. 23.

⁴⁴ Defined in clause 3, para. 2, of UK Parliament, *European Union (Withdrawal) Bill*, cit., as meaning: "(a) any EU regulation, EU decision or EU tertiary legislation, as it has effect in EU law immediately before exit day and so far as – (i) it is not an exempt EU instrument (for which see section 14(1) and Schedule 6), (ii) it is not an EU decision addressed only to a member State other than the United Kingdom, and (iii) its effect is not reproduced in an enactment to which section 2(1) applies".

⁴⁵ For problems resulting from this strategy, see section VII, below.

⁴⁶ Scotland Act 1998 (1998, chapter 46), section 29 (legislative competence) establishes what the Scottish Parliament may not do rather than what it may do. Section 29(2)(b) provides that reserved matters (in respect of which, see section 30, Sch. 5) are outside Scottish Parliamentary competence.

⁴⁷ Family Law (Scotland) Act 2006 (2006, Act of the Scottish Parliament 2), section 38 serves as an example of Holyrood utilisation of this competence.

stances.⁴⁸ In case of dispute, final adjudication as to characterisation as devolved or reserved is for the UK Supreme Court.⁴⁹

Although international private law generally is a devolved matter falling within the legislative competence of the Scottish Parliament, the private international law aspects of reserved matters likewise are reserved.⁵⁰

By constitutional convention, it is possible for the UK Parliament, with consent of the Scottish Parliament, by legislative consent motion (previously a “Sewel motion”) to legislate for Scotland in devolved matters.

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, but, if that is the case, Parliament strives to ensure that the legislation demonstrates internal UK coherence.⁵¹

In terms of section 57 of the Scotland Act 1998 (“EU law and Convention rights”), despite the transfer to the Scottish Ministers of functions in relation to implementing obligations under EU law, any function of a Minister of the Crown in relation to any matter shall continue to be exercisable by him as regards Scotland for the purposes of section 2(2) of the European Communities Act 1972. In this context, therefore, there is “shared power” between Scottish and UK Ministers. Furthermore, Schedule 5, Part 1, para. 7 of the 1998 Act reserves foreign affairs, including relations with the European Union, but excepting implementation of international obligations, obligations under the Human Rights Convention and obligations under EU law.⁵²

VI.1. THE EUROPEAN UNION (WITHDRAWAL) BILL AND THE SCOTTISH DEVOLUTION SETTLEMENT

The March 2017 White Paper indicates that, in parallel with the withdrawal negotiations, the UK Government will undertake discussions with the devolved administrations “to identify where common frameworks need to be retained in the future, what these

⁴⁸ Scotland Act 1998, section 29(3).

⁴⁹ *Ibid.*, section 33.

⁵⁰ *Ibid.*, section 29(4)(b). For example, international private law rules concerning intellectual property are reserved.

⁵¹ By way of example, the Civil Partnership Act 2004 (2004, chapter 33), which affects reserved matters as well as devolved matters, was referred to Westminster by means of a Sewel motion. The Act, however, makes bespoke provision for the different legal systems within the UK. Compare the (pre-devolution) Matrimonial and Family Proceedings Act 1984 (1984, chapter 42), Part 3 (England) and Part 4 (Scotland).

⁵² Separate secondary implementing legislation frequently is required for Scotland and England, respectively, in respect of EU Regulations.

should be, and where common frameworks covering the UK are not necessary".⁵³ The Government's expectation is that the outcome of the Brexit process will deliver increased decision-making power to the devolved administrations. In particular, where a matter is devolved, the repatriation of powers will deliver to the devolved administrations the power to amend the law governing such matters where, after Brexit, an unamended law no longer would operate appropriately.⁵⁴ This anticipated enlargement of powers could open up the possibility of increased divergence between the private international law of England and Wales, on the one hand, and that of Scotland, on the other. Marked divergence among the private international law rules of the legal systems of the UK – i.e. Scottish rules of private international law concerning (devolved) Scottish civil law differing from English rules – would be capable of destabilising the situation which currently obtains in conflict of laws matters *within* the UK, and the authors hope that the devolved administration in Scotland will not act so as to introduce significantly different measures than pertain under Westminster legislation.

Since, by Part 5, para. 7(1) of the Scotland Act 1998, international relations, including relations with territories outside the UK, the European Union (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation will continue (in the absence of amending legislation) to be reserved matters, any "international relation" or "international co-operation" will be conducted, post-Brexit or in anticipation of Brexit, by the UK Government, albeit, it is hoped, fully informed by due consultation with interested parties/stakeholders as to the positions prevailing in the legal systems of the devolved administrations. While implementation of international obligations will continue to be a devolved matter, the post-Brexit negotiation and drafting of any agreement to operate between one or more legal systems of the UK and EU27 will remain a reserved matter.

VII. THE PROSPECTIVE REGIME: WHAT SHOULD BE THE UK'S AIM?

The current European harmonised system operates to the great mutual benefit of the UK and the other EU Member States, there being not only 1.2 million UK citizens living elsewhere in the EU, but also 3 million EU citizens living in the UK. The Brussels regime offers easy access to UK courts (which is good for the British legal services market), and portability of judgments across Europe. It would be legally expedient from UK and EU27 perspectives to seek to retain a reciprocal system which ensures virtually automatic

⁵³ UK Government, Department for Exiting the European Union, *Legislating for the United Kingdom's Withdrawal from the European Union*, cit., para. 4.4. See, subsequently, *The Queen's Speech and Associated Background Briefing on the Occasion of the Opening of Parliament on Wednesday 21 June 2017, Her Majesty's Most Gracious Speech to Both Houses of Parliament*, 21 June 2017, www.gov.uk, pp. 11, 17-18.

⁵⁴ UK Government, Department for Exiting the European Union, *Legislating for the United Kingdom's Withdrawal from the European Union*, cit., para. 4.8.

recognition of judgments across the EU. 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; the same is likely to be true in reverse. 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 all litigants.

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 under the EU regime.

From the UK perspective, adequate, “fit for purpose” international private law rules must be available immediately post-Brexit to deal with jurisdiction allocation and judgment recognition and enforcement in civil and commercial matters, and in family law also. It is highly questionable whether the UK Government’s strategy of converting *all* existing EU regulations into “domestic” versions thereof is realistic. Two particular problems arise.

VII.1. UNILATERALISM

Insofar as European instruments create unilateral obligations, it is meaningful to say that the *acquis* can be converted successfully into domestic law. Reciprocity is not necessary for the operation of certain private law instruments, such as the Rome I and Rome II Regulations on choice of law concerning the law of obligations. With regard to such instruments, the UK can act unilaterally since the agreement of other Member States or European institutions is not required in order to adopt the terms of such instruments autonomously into British law, or to operate them. As matters stand, interpretation in future would become a local matter, ultimately for the UK Supreme Court, which, it seems would honour historic CJEU decisions.⁵⁵

However, with regard to bilateral or reciprocal international private law measures, it is meaningless, indeed delusional, to say that the UK will convert the *acquis* into British law. Unilateral conversion cannot bring about the required reciprocity or mutuality, which lies at the heart of the Brussels and Lugano regimes. While courts in the UK might be prepared, through operation of Arts 36 and 39 of Brussels I Recast (or a domesticated, EU-derived version applicable per the European Union [Withdrawal] Bill), to recognise and enforce, e.g., a French judgment, there would be no obligation on, nor authority for, a French court to reciprocate *vis-à-vis* a British decree.

⁵⁵ *Ibid.*, para. 2.14: “To maximise certainty [...] the Bill will provide that any question as to the meaning of EU-derived law will be determined in the UK courts by reference to the CJEU’s case law as it exists on the day we leave the EU. Everyone will have been operating on the basis that the law means what the CJEU has already determined it does, and any other starting point would be to change the law”. See section VIII.1, below.

The Brussels rules, in the main, are couched in the language of “other Member State”, and without express agreement between the UK and EU27, a court in an EU27 Member State in which litigation has been raised will be unable, post-Brexit, to apply, for example, the *lis pendens* provisions in Arts 29-32 of the Recast regulation to conflicting proceedings in the UK (i.e. the priority of process rule which operates where two sets of proceedings are initiated on the same or related matter in the courts of more than one Member State). EU Member State courts, faced with conflicting proceedings in a UK court, will be required to treat the UK as a Third State,⁵⁶ subject, therefore, to the provisions contained in Arts 33 and 34 of Brussels I Recast. Likewise, courts in another Member State will be unable, post-Brexit, to apply the provisions in Chapter III of the Recast regulation to the recognition and enforcement of UK judgments.

The European Union (Withdrawal) Bill *cannot* deliver reciprocity with regard to Brussels I Recast or any other regulation based upon mutuality.

VII.2. DIVERGENCE

The second problem that springs to mind from the UK Government’s proposed strategy of converting directly-applicable EU law into domestic law is that EU law will continue to develop, and change from time to time, as interpreted by the CJEU and EU national courts, whereas, after Brexit, interpretation of the scope and content of the rules as translated into UK law will be a matter for the UK Supreme Court and British courts lower in the hierarchy. Over time, diverging interpretations of the “same” body of rules will emerge as between the UK and the rest of Europe, meaning that the identity of forum in any cross-border civil and commercial or family law dispute will take on a new significance.

If, for example, in family law, the UK applies a domesticated version of Brussels II *bis* and the Maintenance Regulation, how far and how quickly will the UK version of these instruments diverge from those applied and interpreted among EU27? Divergence, over time, will make a “look-a-like” BII *bis* or a “look-a-like” Maintenance Regulation less attractive and less valuable.

Brussels II *bis* is currently undergoing revision – a process in which the UK, wisely, is participating – with the result expected in 2019. In due course, BII *bis* will be replaced by a Recast instrument. If the Recast Regulation should come into force *before* the UK’s withdrawal from the EU, it *will* apply in the UK, as it will apply in the other EU Member States, up until the point of UK withdrawal. More likely, however, the Recast Regulation will come into force *after* the March 2019 withdrawal. That being so, on the “domesticated legislation” strategy, the UK will convert Brussels II *bis* into domestic law, and continue to apply it, even after the rest of Europe is transposed to the Brussels II *bis* Recast

⁵⁶ As stated in section V.1 above, the European Commission, Directorate-General Justice and Consumers, *Notice to Stakeholders*, cit., advises that as of the Withdrawal date, the EU rules in the field of civil justice and private international law will no longer apply to the United Kingdom.

regime. Choosing to apply “old” EU law is a very undesirable state of affairs, 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.

Even in the apparently more straightforward cases of the Rome I and Rome II Regulations, inevitably there will be divergence in application of the instruments.⁵⁷

VIII. A POSSIBLE COMPROMISE SOLUTION: A BESPOKE UK/EU27 AGREEMENT

The probable deadline for concluding the withdrawal agreement (i.e. disentangling the UK from the EU treaties) is 29 March 2019, but a longer period is likely to be necessary for finalising arrangements for the future relationship, including private international law co-operation (if any), between the UK and the EU. If the short-term solution should be different from the ultimate position, there will be a need for transitional arrangements to regulate matters until the so-called “landing zone” is reached.

It would be prudent for the UK Government to seek to negotiate with EU27 (EU competence meaning that the UK cannot do business with any individual Member State) a bespoke arrangement, namely, a tailor-made UK/EU27 agreement on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which is a close copy of the existing Brussels regime. 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 in the UK. There is a strong argument that the UK should seek to negotiate an agreement with EU27 to deal with the suite of EU private international law instruments as a package – albeit the scale of the negotiation task would grow exponentially. However, it must be acknowledged that EU27 may not countenance any such overture by the UK, and that the notion of the UK's seeking some parallel agreement may be optimistic.

If EU27 should prove willing, a suggested blueprint for an agreement in relation to civil and commercial jurisdiction and judgment recognition and enforcement (and, in turn, in relation to family and associated matters) is the Agreement between the European Community and Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which extended as between the EC and Denmark the provisions of the Brussels I Regulation, with certain amendments of a fairly minor nature. Since 2012, Brussels I Recast has applied to relations between the EU and Denmark.

Negotiating a parallel agreement would require unanimity among the remaining EU Member States. Achieving unanimity in the current political climate is anything but a given. However, as noted, reciprocity is in the interests not only of the citizens of the UK,

⁵⁷ E.g. in relation to Art. 3, para. 4, Rome I Regulation, and Art. 14, para. 3, Rome II Regulation, both of which preserve in the forum operation of “provisions of Community law”. Clearly there may also be divergence in the interpretation of core provisions such as Art. 3, para. 3 and Art. 9, para. 3, Rome I Regulation, and Art. 4, Rome II Regulation.

but also of all 27 continuing EU Member States. The “Brussels system”, or a variant thereof, is the best vehicle by which to offer certainty and predictability to *all* European citizens. The UK could seek to retain some of the benefits of the existing EU regulations, by allowing, on a reciprocal basis, those in the 27 continuing Member States to exercise their “EU” international private law rights in a post-Brexit UK.

VIII.1. THE FUTURE ROLE AND JURISDICTION OF THE CJEU

While securing a bespoke agreement may sound attractive in principle (to the UK Government and UK citizens, at least), marked difficulty is likely to be presented by the fact that the UK Government appears resolved to rid the UK of any continuing obedience to the jurisdiction of the CJEU. As observed, there is one interesting concession in the March 2017 White Paper, namely that “The [Great Repeal] Bill will provide that historic CJEU case law be given the same binding, or precedent, status in our [UK] courts as decisions of our own Supreme Court”.⁵⁸ More contentious would be the future role of the CJEU in respect of any bilateral UK/EU27 treaty. Continuing CJEU jurisdiction in this, or any, area could be deemed to be a cheat on the British electorate, and unacceptable politically to the UK Government. From the perspective of EU27, however, the role of the CJEU may be a political red line; it will be asserted that to be party to a European agreement invariably entails that the CJEU is the court of overarching jurisdiction.

Potentially using an EC/Denmark Agreement model, the UK, under a parallel agreement on jurisdiction and judgment recognition and enforcement, could be required, when interpreting that agreement, (only) to take “due account of” the rulings contained in the case law of the CJEU. This could satisfy the UK political position if the CJEU were to have no mandatory jurisdiction in respect of cases litigated pursuant to a parallel agreement, and if CJEU jurisprudence were to have only persuasive, rather than decisive, effect as far as the UK is concerned. EU Member States and institutions, though weary of the concept of a “special UK position”, have already accepted a similar, “diluted” approach in respect of Denmark.

IX. AN ALTERNATIVE POSSIBLE COMPROMISE SOLUTION: A LUGANO II TEMPLATE

If a bespoke UK/EU27 agreement on Brussels I Recast (and related instruments) should prove impossible to achieve – either as a matter of principle, or if, for example, the CJEU jurisdiction point should prove intractable – another option to consider would be the Lugano prototype. Lugano II will cease to have effect in the UK upon Brexit.⁵⁹ The UK

⁵⁸ UK Government, Department for Exiting the European Union, *Legislating for the United Kingdom's Withdrawal from the European Union*, cit. para. 2.16.

⁵⁹ Art. 216, para. 2, TFEU, and European Communities Act 1972, section 2(1).

could seek to enter into a new treaty with EU27 and the EFTA states to adhere to Lugano II, under the mechanism for Third State accessions. This, of course, would require the consent of all existing Lugano II Contracting States. Existing EFTA states would be unlikely to object, and it is hoped that there would be no objection from the European Commission, on behalf of the 27 continuing Member States.

Undoubtedly, 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. Politically, from the perspective of EU27 at least, the Lugano II model might have more prospect of success than would seeking to secure a bespoke UK/EU27 agreement on jurisdiction and judgment recognition and enforcement. A Lugano II model would entail treating the UK akin to an EFTA state, i.e. as a Third State, rather than akin to an EU Member State.

IX.1. THE ROLE OF THE CJEU IN THE LUGANO REGIME

With regard to interpretation of Lugano II, the CJEU will have a continuing role. As a result of Lugano II having become part of Community rules (the Convention having been signed and ratified by the Community, and succeeded to by the European Union), the CJEU has jurisdiction to give interpretative rulings on its provisions upon application by the courts of EU Member States.

The wording in the Lugano II regime is similar to that in the EC/Denmark Agreement, but not identical: Art. 1 of Protocol 2 (on the uniform interpretation of the Convention and on the Standing Committee) requires any court applying and interpreting Lugano II to pay due account to relevant jurisprudence on the Lugano and Brussels instruments, handed down by the CJEU and courts bound by these instruments. Use of the phrase “due account” would afford a measure of discretion to UK courts to decline to follow decisions of the CJEU, and would leave open a window of opportunity – if opportunity it be – for a British court to examine a CJEU decision, but decide to disregard it. From the EU angle, agreeing a “due account” arrangement at least would result in the continued advantage of ongoing access to UK markets.

The EU Justice Sub-Committee of the House of Lords EU Committee has urged the UK Government not to take too rigid a position in relation to CJEU jurisdiction.⁶⁰ If the UK Government adheres inflexibly to its stated policy, it will severely constrain the range of adequate, alternative arrangements in the field of civil and commercial jurisdiction and judgment recognition and enforcement.

⁶⁰ House of Lords EU Committee, EU Justice Sub-Committee, 17th Report of Session 2016/17, *Brexit: Justice for Families, Individuals and Businesses?*, cit., para. 127.

X. FAILING UK/EU27 AGREEMENT...

The UK Government must face the prospect of possible (some might say probable) failure to negotiate a bespoke UK/EU27 arrangement for the post-Brexit era. Whatever may transpire by way of UK “domesticated” EU legislation, it must be appreciated that any corpus of rules which is intended by the UK Government, naively, to take effect in a reciprocal manner with EU27 will be a pipe dream, and at best having lop-sided effect. Schemes of jurisdiction (notably the problem of conflicting concurrent jurisdiction, solved in the EU schemes principally by a priority of process rule) and rules of recognition and enforcement will be particularly adversely affected.

Courts in the UK, while their inclination in relevant cases might be to draw back to pre-existing national rules of private international law (i.e. those rules currently applicable *vis-à-vis* non-EU Member States), will need to attempt to operate the “domesticated” rules on a strained basis unless and until corrective legislation is provided.⁶¹

XI. THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

On a more positive note, the EU is not the only engine for international law reform. The Hague Conference on Private International Law is an inter-governmental body, founded in 1893, dedicated to the harmonisation of the private international law rules of different legal systems, and the development and service of multilateral legal instruments. In 1955 the Conference was put on a statutory footing. Based in the Netherlands, it has potentially global, not just regional, reach. At the time of writing, it has 82 Members from all continents and one Regional Economic Integration Organisation, namely, the European Union.⁶² Its formal remit is as an international forum for the development and implementation of common rules of private international law, to promote international judicial and administrative co-operation in the fields of family law, commercial law, and civil procedure.

Although the EU’s membership of the Hague Conference does not supplant the membership of individual EU Member States, shared competence in projects falling within the expanding EU remit means that participation by individual EU Member States in Hague Conference projects is correspondingly inhibited. In future, the UK, being excluded from regional European Union harmonisation measures, may be best advised to participate in international harmonisation initiatives by way of multilateral harmonisation in-

⁶¹ One could conjecture in the distant future a legislative outcome whereby English courts will be authorised to exercise discretionary powers in jurisdiction currently available in clearly non-EU cases.

⁶² On 3rd April 2007, the European Community was admitted to membership of the Hague Conference as a Regional Economic Integration Organisation. With the entry into force of the Treaty of Lisbon on 1st December 2009, and by Declaration of Succession, the European Union replaced and succeeded the EC as a member of the Conference from that date.

struments negotiated at the Hague Conference. The UK, and not the constituent legal systems thereof, is, and post-Brexit will remain,⁶³ the Hague Conference Contracting State.

In UK law, several fairly recent statutes relating to cross-border child and family law owe their existence, at least in part, to acceptance by the UK of Hague Conventions: principally, the Child Abduction and Custody Act 1985,⁶⁴ and Part II of the Family Law Act 1986, as well as the Wills Act 1963, and the Adults with Incapacity (Scotland) Act 2000.⁶⁵

Greater complexity will attend those Hague instruments to which the UK is a party only by dint of being a European Member State, i.e. how may the UK extricate itself from the EU bloc and re-present as an individual Contracting State to any one or more Hague convention? By virtue of the UK's status as an EU Member State, the UK is bound by the 1996 Hague Child Protection Convention, upon which Brussels II *bis* is modelled.⁶⁶ With regard to maintenance, the UK is bound by the EU Maintenance Regulation and by the 2007 Hague Maintenance Convention. The 2007 Convention was signed by the EU on 6 April 2011 and came into force in EU Member States, including the UK, on 1 August 2014. After Brexit, the UK will require to take steps to remain a party to these conventions by signing and ratifying them.⁶⁷ 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 could be lodged with the Convention depositary (the Ministry of Foreign Affairs of the Kingdom of the Netherlands). A precedent is provided by the position of Hong Kong and Macao⁶⁸ in relation to the 1980 Hague Abduction Convention.⁶⁹

⁶³ Scotland Act 1998, Part 5, para. 7(1).

⁶⁴ See N. LOWE, *What Are the Implications of the Brexit Vote for the Law on International Child Abduction*, in *Child and Family Law Quarterly*, 2017, p. 253.

⁶⁵ Exceptionally, the UK may sign a Hague Convention on behalf of one constituent legal system only, as happened in relation to the 2000 Hague Convention on International Protection of Adults, simply because there happened to be a suitable act of the Scottish Parliament on the matter in place.

⁶⁶ Constitutional complications caused by the UK's decision to deem the 1996 Hague Convention an EU Treaty as defined by the European Communities Act 1972 (so as to be able to ratify it without primary legislation) will have to be addressed: repeal of the 1972 Act will necessitate primary legislation to clarify the status of the Convention in domestic law.

⁶⁷ See generally P. BEAUMONT, *Private International Law Concerning Children in the UK after Brexit: Comparing Hague Treaty Law with EU Regulations*, in *Child and Family Law Quarterly*, 2017, p. 213.

⁶⁸ See also the position of the Czech Republic and Slovakia after the "velvet revolution" in Czechoslovakia.

⁶⁹ Agreement having been reached between the UK and the People's Republic of China regarding the continuing operation of the 1980 Convention in Hong Kong and Macao following the UK's 1997 transfer of sovereignty to the People's Republic of China, a note was lodged with the Convention depositary, to the effect that the Convention would continue to apply for Hong Kong and Macao. The Hague Conference website states the date of entry into force of the Convention for Hong Kong as being 1st September 1997, and not the earlier date on which the Convention entered into force in the UK. For Macao the date of entry into force is 1st March 1999. The date of entry into force of the Convention is crucial in that, not only

In the commercial arena, in the absence of any UK/EU27 agreement on Brussels I Recast, or a UK/EFTA/EU treaty on Lugano II, the UK might be left with the option of acceding to the 2005 Hague Convention on Choice of Court Agreements. The 2005 Convention applies among the EU Member States, Mexico and Singapore. It takes effect in the UK through Art. 216 TFEU, and will cease to apply post-Brexit unless there is individual ratification by the UK. The 2005 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. It is an attempt to solve one particular problem pertaining to exclusive choice of court clauses, and the scaled-down provisions of the Convention represent what could be salvaged after the failure of deliberations for a worldwide judgments convention.⁷⁰ In no way can the 2005 Convention be compared with the sweep of jurisdiction and judgment enforcement rules contained in the Brussels I Recast regulation, but it is a potentially useful instrument nonetheless.

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.

Looking to the future, global, multilateral co-operation and agreement appears to be the best strategy for the UK.

must the circumstances of a child's alleged abduction fall within those covered by the instrument, but also the date of those circumstances must post-date the coming into effect of the instrument in the relevant country or countries: Scottish Court of Session (Outer House), judgment of 24 December 1986, *Kilgour v. Kilgour*, 1987 SLT 568; and UK House of Lords, judgment of 13 June 1991, *Re H (Minors) (Abduction: Custody Rights)*[1991] 3 All ER 230 HL.

⁷⁰ A project which, however, has been resuscitated: see www.hcch.net.