DIVORCING EUROPE: REFLECTIONS FROM A SCOTTISH PERSPECTIVE ON THE IMPLICATIONS OF BREXIT FOR CROSS-BORDER DIVORCE PROCEEDINGS

Janeen M Carruthers and Elizabeth B Crawford

ABSTRACT:

This article addresses, from a Scottish viewpoint, the implications of Brexit for cross-border divorce proceedings. It sets out the background to Brexit, and outlines the import of the Repeal Bill for private international law rules concerning matrimonial proceedings. The current constitutional position within the United Kingdom with regard to private international law is explored, and the existing law on cross-border divorce, as it applies to the different types of divorce proceedings which present in British courts, explained. The mapping of existing rules serves as an introduction to the main purpose of the article, which is to speculate and advise on post-Brexit regulation of cross-border matrimonial proceedings. To this end, the authors present a fictional dialogue which discusses the effect of converting Brussels II *bis* into UK law as part of the transfer of the *acquis communitaire*, and debates the respective merits, for the longer term, of the UK Government's seeking to negotiate with the EU an agreement on private international law matters guaranteeing reciprocity, or of refining existing private international law rules contained in the Domicile and Matrimonial Proceedings Act 1973 and the Family Law Act 1986, so as to cater for 'EU divorces' in the same way as 'non-EU', international divorces.

KEY WORDS: Brexit, cross-border divorce, Great Repeal Bill, Repeal Bill, private international law, Brussels II *bis*, Domicile and Matrimonial Proceedings Act 1973, Family Law Act 1986.

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Janeen M Carruthers* and Elizabeth B Crawford**

Introduction

The title 'divorcing Europe' has two meanings. It refers, on one interpretation, to the mechanics of cross-border divorce issues, but clearly, in another sense, encompasses the larger situation concerning the political, legal and economic implications of the United Kingdom's divorce from the European Union, in which, it must be remembered, the UK is the petitioner. The European Union did not initiate divorce proceedings, nor even anticipate them, despite the fact that the UK, in the context of the process of the Europeanisation of private international law, became known for seeking, and receiving, special treatment; the marriage was not without its trouble.

In examining the subject of cross-border divorce, this article is concerned solely with the status aspects of matrimonial causes, principally matters of jurisdiction and recognition of decrees of divorce, annulment and judicial separation. It does not address issues of the validity of a marriage, nor financial provision on divorce, or property and maintenance consequences.

Since 2001 there has been in place among Member States of the European Union, 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'),[1] 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*'),[2] which came into

ǂ This article derives from a paper which the authors were invited to deliver at 'Brexit and Family Law', a joint conference of *Cambridge Family Law* and the *Child & Family Law Quarterly*, at Trinity College, Cambridge in March 2017. The authors were asked to comment from a Scottish viewpoint, and the resultant speech and this article adopt that perspective. The article does not address specialties pertaining to Northern Ireland or Wales.

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[1] OJ [2000] L160/19.

[2] Council Regulation (EC) No.2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No.1347/2000 (variously known as BIIa, and BII revised, but referred to hereinafter as 'Brussels II *bis*').

force on 1 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.[3]

In relation to matrimonial proceedings, the core provisions of Brussels II *bis* are contained in arts 3 (general jurisdiction), 19 (lis pendens and dependent actions), 21 (recognition of a judgment) and 22 (grounds of non-recognition). By art 3, matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State: '(a) in whose territory: - the spouses are habitually resident, or - the spouses were last habitually resident, insofar as one of them still resides there, or - the respondent is habitually resident, or - in the event of a joint application, either of the spouses is habitually resident, or - the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or - the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made, and is either a national of the Member State in question or, in the case of the UK and Ireland, has his or her 'domicile' there;[4] (b) of the nationality of both spouses or, in the case of the UK and Ireland, of the 'domicile' of both spouses.' Article 19 establishes a rule of priority of process, in terms of which, where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before the courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. In terms of art 21, a judgment given in an EU Member State shall be recognised in the other Member States without any special procedure being required; in particular, no special procedure is required for updating the 'civil-status records' of a Member State, on the final award of a judgment from another Member State. However, any interested party may apply for a decision that the judgment be or be not recognised. The grounds of non-recognition are very limited: a judgment relating to a divorce, legal separation or marriage annulment shall not be recognised: (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought; (b) where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to

[3] Protocol No.22 on the position of Denmark (consolidated versions of the TEU and the TFEU [2008] OJ C115/299), in terms of which Denmark shall not take part in the adoption of proposed measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union.

[4] In terms of art.3.2, for the purposes of Brussels II *bis*, 'domicile' shall have the same meaning as it has under the legal systems of the UK and Ireland.

arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally; (c) if it is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought; or (d) if it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

Brussels II *bis* is currently in course of review and revisal.[5] Notably, the changes proposed concern parental responsibility matters, and not matrimonial proceedings. The UK Government, by decision of 5 October 2016, advised that the UK is participating in the recasting exercise,[6] which, at the time of writing, is ongoing.

Brussels II *bis* forms merely one area of the cross-border, European legal landscape, part of the 'Brussels regime' of European private international law regulations concerning jurisdiction and enforcement of judgments, led by the Brussels I Recast Regulation on civil and commercial matters.[7]

The question to be examined here is whether or not the existing UK residual national rules of jurisdiction, and rules of recognition of judgments presently in use in UK courts in cross-border, non-EU matrimonial proceedings can serve in future in *all* cases (i.e. without geographical limitation), or whether the better policy will be for the UK Government to negotiate with the European Union to seek to deliver a Brussels II *bis* simulacrum.

The political background

Many position papers have been published on the subject of the UK's withdrawal from the European Union, beginning with Prime Minister Theresa May's Lancaster House speech of 17

[5] European Commission Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) {SWD(2016) 207 final} {SWD(2016) 208 final} (Brussels, 30.6.2016 COM(2016) 411 final 2016/0190 (CNS)).

[6] Statement by Sir Oliver Heald, Minister of State for Courts and Justice, in House of Commons on 27 October 2016 (WSHCWS225), and corrected statement made on 16 December 2016 (HCWS375). See also st atement made by Lord Keen of Elie (Lords Spokesperson, Ministry of Justice), in House of Lords on 27 October 2016 (HLWS225), and corrected statement made on 19 December 2016 (HLWS378).

[7] Regulation (EU) No 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 (recast) ('Brussels I Recast') OJ L 351, 20 December 2012, pp 1–32.

January 2017, which set out the UK Government's plan for the Brexit negotiations.[8] This speech was swiftly followed by the Government White Paper, 'The UK's exit from and new partnership with the European Union'.[9] Subsequently, of particular relevance to the topic of family law, two parliamentary Committee reports were published, namely, the House of Lords European Union Committee, 17th Report of Session 2016/17, 'Brexit: justice for families, individuals and businesses?',[10] and the House of Commons Justice Committee, 9th Report of Session 2016/17, 'Implications of Brexit for the Justice System'.[11]

Upon notification by the Prime Minister of the UK's proposed withdrawal from the European Union, by means of notice to the President of the European Council on 29 March 2017 under article 50 of the Treaty on European Union, the Department for Exiting the European Union published another White Paper, 'Legislating for the UK's Withdrawal from the European Union',[12] setting out the mechanism for repeal of the European Communities Act 1972, and introducing the legislative vehicle of the (Great[13]) Repeal Bill.

On the European side, the counterweights by which to gauge the European approach to the withdrawal process and wider negotiations are the Council of the European Union's 'Draft Guidelines following the UK's notification under Art 50 TEU',[14] published on 31 March 2017, and the speech delivered by Michel Barnier, EU Commission Chief Negotiator for the Preparation and Conduct of the Negotiations with the UK, on 22 March 2017, on 'The Conditions for Reaching an Agreement in the Negotiations with the UK'.

The (Great) Repeal Bill

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, with the objective of providing 'maximum certainty as we leave the EU. The same rules and laws will apply on the day after

[8]https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech. See section 2 ('Control of our own laws').
[9] Department for Exiting the European Union and The Rt Hon David Davis MP (CM 9417) (2 February 2017).
[10] HL Paper 134 (20 March 2017) (hereinafter 'House of Lords Committee Report').
[11] HC 750 (22 March 2017) (hereinafter 'House of Commons Committee Report').
[12] Department for Exiting the European Union (CM 9446) (March 2017) ('March 2017 White Paper').
[13] Initially designated the Great Repeal Bill, this Bill now is named simply the Repeal Bill: The Queen's Speech and Associated Background Briefing on the Occasion of the Opening of Parliament on Wednesday 21 June 2017. See Introduction by Prime Minister Theresa May MP, at p 5; and, at pp 11 and 17, Her Majesty's Most Gracious Speech to Both Houses of Parliament, Wednesday 21 June 2017.
[14] Brussels, 31 March 2017 (XT 21001/17).

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 scrutiny and proper debate.'[15] The March 2017 White Paper states that the (Great) Repeal Bill 'will convert directly-applicable EU laws into UK law',[16] and 'will also preserve the laws we have made in the UK to implement our EU obligations.'[17] In relation to matrimonial causes, the (Great) Repeal Bill is a political assurance that, on Brexit Day + 1, there will be no vacuum in British law insofar as 'domesticated' rules of jurisdiction and judgment recognition, modelled on Brussels II *bis*, will apply in UK courts.

The constitutional position within the UK

The legal systems of the UK have much in common in private international law,[18] and with regard to the European harmonisation of laws agenda, from its inception, there has been harmony of attitude within the UK towards this ambitious programme. Using the word in its technical meaning, one can say that the UK attitude has been an 'insular' one, involving the main island and Northern Ireland. The metaphorical usage of the word is apt too, for the British approach has been one of measured assessment of the likely advantages and disadvantages of any proposed harmonisation initiative. The UK as a whole has had the invaluable benefit of the discretionary opt-in per Protocol 21 of the Lisbon Treaty on the position of the UK and Ireland in respect of the area of freedom, security and justice,[19] allowing the UK Government to sift and weigh each legislative proposal and make a particularised decision to opt in or not to a given instrument concerning EU justice and home affairs measures.[20] The result is that the UK, as it has transpired, has opted into all the main European private international law instruments concerning civil and commercial matters, but has been more selective and discriminating in relation to family and associated property and succession matters. The UK exercised the right

[15] March 2017 White Paper, Foreword from the Prime Minister, p 5.
[16] Ibid, para 2.4.
[17] Ibid, para 2.5.
[18] EB Crawford and JM Carruthers, *International Private Law: A Scots Perspective* (W.Green, 4th edition, 2015), at para 2-04; and JJ Fawcett and JM Carruthers, *Cheshire, North & Fawcett. Private International Law* (Oxford University Press, 14th ed, 2008), at p 10.
[19] [2008] OJ C115/295. Prior to the Treaty of Lisbon the opt-in was provided by Protocol No.4 on the position of the UK and Ireland [1997] OJ C340/99. See also Protocol (No 22) on the position of Denmark (ex-Protocol No.5 on the position of Denmark [1997] OJ C340/101), in terms of which Denmark shall not take part in the adoption of proposed measures pursuant to Title V of the Treaty on the Functioning of the European Union.
[20] See, for detail, EB Crawford and JM Carruthers, *International Private Law: A Scots Perspective* (W.Green, 4th edition, 2015), para 1-08; L Collins (Gen ed.), *Dicey, Morris & Collins, The Conflict of Laws (Sweet & Maxwell*, 15th edition, 2012), para 11-015; and JJ Fawcett and JM Carruthers, *Cheshire, North & Fawcett. Private International Law* (Oxford University Press, 14th ed, 2008), at p 204.

not to opt into such measures as Rome III,[21] the Succession Regulation,[22] the Regulation Establishing the Justice Programme (2014-2020),[23] and the Matrimonial Property and Registered Partnership Property Regulations.[24]

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.

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.[25] Section 126(4)(a) interprets the civil law of Scotland as a reference to the general principles of private law, including private international law.[26]

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 circumstances.[27] In case of dispute, final adjudication as to characterisation as devolved or reserved is for the UK Supreme Court.[28]

[21] Regulation (EU) No 1259/2010 implementing enhanced co-operation in the law applicable to divorce and legal separation OJ L 343, 29 December 2010, pp 10–16.
[22] Regulation (EU) No 650/2012 of the European Parliament and of the Council 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 OJ L 201, 27 July 2012, pp 107–134.
[23] Regulation (EU) No 1382/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Justice Programme for the period 2014 to 2020, OJ L 354, 28 December 2013, pp 73–83.
[24] Council Regulation (EU) 2016/1103 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 OJ L 183, 8 July 2016, pp 1–29; and Council Regulation (EU) 2016/1104 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 OJ L 183, 8.7.2016, pp 30–56.
[25] Scotland Act 1998, s 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 s 30, Sch 5) are outside Scottish Parliamentary competence.
[26] Family Law (Scotland) Act 2006, s 38 serves as an example of Holyrood utilisation of this competence.
[27] Scotland Act 1998, s 29(3).
[28] Scotland Act 1998, s 33.

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.[29]

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.[30]

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, paragraph 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.[31]

(a) The Repeal 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 should be, and where

[29] Scotland Act 1998, s 29(4)(b). For example, international private law rules concerning intellectual property are reserved.
[30] By way of example, the Civil Partnership Act 2004, 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 Pt 3 (England) and Pt 4 (Scotland).
[31] Separate secondary implementing legislation frequently is required for Scotland and England, respectively, in respect of EU Regulations.

common frameworks covering the UK are not necessary.'[32] 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 would no longer operate appropriately.[33] 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. In the authors' view, 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, paragraph 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 cooperation' 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, it may be assumed that the post-Brexit negotiation and drafting of any agreement to operate between one or more legal systems of the UK and European Union Member States will remain a reserved matter.

(b) The Hague Conference on Private International Law and the position of Scotland

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, and at the time of writing has 81 Member States

[32] March 2017 White Paper, 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, Wednesday 21 June 2017, at pp 11 and 17–18.
[33] March 2017 White Paper, para 4.8.

from all continents and one Regional Economic Integration Organisation, namely, the European Union.[34] 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.

The UK is, and post-Brexit will remain,[35] the Hague Conference Contracting State. Nevertheless, on occasion, as a result of differences in the content of certain areas of the domestic law of Scotland and England, it may happen that the UK will sign a Hague Convention on behalf of one constituent legal system only. An example is the 2000 Hague Convention on International Protection of Adults, which was signed by the UK separately for Scotland and for England, and ratified only for Scotland on 5 November 2003. This is explicable because of the different legal backgrounds which obtained in Scots and English law, respectively.[36]

More pressing is the extent to which Hague instruments to which the UK is a party only by dint of being a European Member State will operate post-Brexit, i.e. how the UK may extricate itself from the EU bloc and re-present as an individual Contracting State to any one or more Hague convention. 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 the EU, 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 Macao[37] in relation to the 1980 Hague Abduction Convention.[38]

[34] On 3 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 1 December 2009, and by Declaration of Succession, the European Union replaced and succeeded the EC as a member of the Conference from that date.

[35] Scotland Act 1998, Part 5, paragraph 7(1).

[36] The Adults with Incapacity (Scotland) Act 2000 was enacted very early in the history of the Scottish Parliament, and was available to provide the implementing legislation for the 2000 Hague Convention in Scotland. The implementing legislation for England and Wales – the Mental Capacity Act 2005 – was not in existence at that point. As things stand, the Convention has not been ratified by the UK for England and Wales.

[37] See also the position of the Czech Republic and Slovakia after the 'velvet revolution' in Czechoslovakia.

[38] 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 1 September 1997, and not the earlier date on which

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 instruments negotiated at the Hague Conference. The existence of Hague Conventions will assist post-Brexit in certain areas of family law (notably the laws concerning children,[39] and maintenance[40]), but, while the overseas divorce recognition rules contained in the Family Law Act 1986 derive from the 1970 Hague Convention on the Recognition of Divorces and Legal Separations, there is no modern Hague instrument concerning divorce jurisdiction. That being the case, attention must turn to the existing 'British' rules in the area of matrimonial proceedings.

Divorce jurisdiction and recognition: the existing law in the U.K.

In examining the implications of Brexit for cross-border divorce proceedings, it is useful to map the types of cases which are potentially affected.

(a) Purely domestic matrimonial proceedings

The 'inner circle' comprises the jurisdiction of courts in the UK in actions for divorce, judicial separation or nullity of marriage, the circumstances of which are internal to the legal system in question, e.g. where both parties to the marriage are, and always have been, resident in Scotland. This category of case currently falls to be determined in the first place by Brussels II *bis*, by virtue of the Domicile and Matrimonial Proceedings Act 1973 (hereinafter 'DMPA 1973'), Part II Jurisdiction in Matrimonial Proceedings (England and Wales)[41] and Part III Jurisdiction in Matrimonial Causes (Scotland).[42]

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the Convention entered into force in the UK. For Macao the date of entry into force is 1 March 1999. The date of entry into force of the Convention is crucial in that, not only 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: *Kilgour v Kilgour* 1987 SLT 568; and *Re H (Minors) (Abduction: Custody Rights)* [1991] 3 All ER 230 HL.

[39] For example,1980 Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction; 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

[40] For example, 2007 Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.

[41] For England and Wales (High Court and Family Court): s 5(2)(a) and (3)(a). For detail, see L Collins (Gen ed.), *Dicey, Morris & Collins, The Conflict of Laws* (Sweet & Maxwell, 15th edition, 2012), para 18R-022 et seq; and JJ Fawcett and JM Carruthers, *Cheshire, North & Fawcett. Private International Law* (Oxford University Press, 14th ed, 2008), p 945 et seq.

[42] For Scotland: s 7(2A) (divorce and separation in Court of Session), s 7(3A) (nullity of marriage in Court of Session); and s 8(2)(a) and s 8(2A)(b) (sheriff court). Special rules of shrieval jurisdiction for actions of declarator

The currently applicable rules for England and Scotland, respectively, are to the effect that the forum has jurisdiction to entertain, inter alia, an action for divorce or separation, if and only if (1) the English or Scottish court, respectively, has jurisdiction under Brussels II *bis*; or (2) the action is an excluded action[43] (i.e. no court of a Contracting State has jurisdiction under the Council Regulation) and either of the parties to the marriage is domiciled in Scotland or England (as appropriate) on the date when the action is begun.

The first point of reference, therefore, in a purely domestic divorce (i.e. having no cross-border factual dimension) is Brussels II *bis*. Even where the matrimonial action has no cross-border element, the putative forum first must consider if it has jurisdiction under the Regulation. In 2001 when Brussels II came into force, many Family Law practitioners in the UK were shocked to find themselves being required to take account, for what they perceived to be 'domestic' Scottish or English divorces, of the complex matrix of rules set down in Brussels II, art 2, to be replaced shortly thereafter by Brussels II *bis*, art 3. Insofar as Brussels II *bis* has become the law, in England and in Scotland, to determine jurisdiction in 'domestic' divorces, it is necessary to ensure that, immediately post-Brexit, rules are in place to regulate the allocation of divorce jurisdiction. This result will be delivered by means of the Repeal Bill and, where necessary, subordinate legislation.

(b) Intra-UK, cross-border matrimonial proceedings

The second type of divorce case potentially affected by Brexit is the intra-UK, cross-border matrimonial proceeding, e.g. where, at the date of proceedings, one party to the marriage is habitually resident in the erstwhile matrimonial home in Scotland, and the other is habitually resident in England.

The subject of the applicability of Brussels II *bis* intra-UK has been a matter of debate, particularly[44] in relation to parental responsibility and related matters.[45] There is no explicit

of marriage are contained in DMPA 1973, s 8(2ZA). For detail, see EB Crawford and JM Carruthers, *International Private Law: A Scots Perspective* (W.Green, 4th edition, 2015), para 12-05.

[43] Scottish terminology: s 7(2A)(b).

[44] But not exclusively – see *JKN v JCN* [2010] EWHC 843 (Fam). See EB Crawford and JM Carruthers, *International Private Law: A Scots Perspective* (W Green, 4th edition, 2015), at para 12-16; L Collins (Gen ed), *Dicey, Morris & Collins, The Conflict of Laws* (Sweet & Maxwell, 15th edition, 2012), at para 18-274; and JJ Fawcett and JM Carruthers, *Cheshire, North & Fawcett. Private International Law* (Oxford University Press, 14th ed, 2008), at p 962.

[45] See, for comment, K Beevers and D McClean, 'Intra-UK Jurisdiction in Parental Responsibility Cases: Has Europe Intervened' [2005] *International Family Law* 129; KJ Hood, *Conflict of Laws within the UK* (Oxford University Press, 2007), 5.38-5.49; JM Scott, 'Choice of Forum – Jurisdictional Issues within the UK' (2007), paper delivered at the Advanced Family Law Conference, Law Society of Scotland; G Maher, 'Parental

provision in Brussels II *bis* stating that a Member State having two or more legal systems shall not be required to apply the regulation to conflicts solely between the laws of such units. Absence of such provision might be said to support the inference that the provisions of Brussels II *bis* apply as between the different legal systems of the UK, but the point has been a subject of debate. First instance judges have reached different conclusions on the question,[46] but opinion seems to have settled[47] on the position that the instrument does not apply within the UK.[48] This point, debated even before Brexit was within anyone's contemplation, has been decided in a manner which, as things turn out, is fortuitous; there will be no legislative gap to fill. The UK's withdrawal from the EU should have no bearing on the intra-UK, matrimonial dimension, which will remain governed by the jurisdiction allocation rules set out in DMPA 1973. These rules include the conflicting jurisdiction rules set out for England in section 5(6) and Schedule 1 (Staying of Matrimonial Proceedings (England and Wales) ('obligatory stays'), and for Scotland in section 11 (sisting of certain actions) and Schedule 3.8 (Sisting of Matrimonial Actions (Scotland) ('mandatory stays')), whereby, in a priority of process approach, a second-seised court in the UK must stay/sist an action of divorce upon evidence, inter alia, that an equivalent action is proceeding in a related jurisdiction within the UK.

In terms of section 44(1) of the Family Law Act 1986, no divorce or annulment obtained in any part of the British Islands[49] shall be regarded as effective in any part of the UK unless granted by a court of civil jurisdiction. Under section 44(2), subject to section 51 of the 1986 Act, the validity of any divorce, annulment or judicial separation granted by a court of civil jurisdiction in any part of the British Islands shall be recognised throughout the UK.

(c) Intra-EU, cross-border matrimonial proceedings

responsibility proceedings: intra UK jurisdiction and the European regulation' 2007 SLT (News) 117-121; G Maher, 'Family law proceedings and intra-UK jurisdiction' 2008 JR 315-317; and A Inglis, 'A Muckle Midden Cleared' 2009 JR 285.

[46] *Re PC, YC and KM (Brussels IIR)* [2013] EWHC 2336 (Fam), *per* Baker J at [11].

[47] *An English Local Authority v X (Child), Y (Mother), Z (Father)* [2015] EWFC 89, *per* Peter Jackson J at [16]. cf the 'orthodox view' referred to in *Re PC, YC and KM (Brussels IIR)* [2013] EWHC 2336 (Fam), *per* Baker J at [11].

[48] In a recent case, *In the Matter of X (A Child), In the Matter of Y (A Child)*, [2016] EWHC 2271 (Fam) the President of the Family Division stated plainly that Brussels II *bis* did not apply as between territories of the UK. The Inner House of the Court of Session takes the same view. In the subsequent Scottish case, *Cumbria County Council, Petitioner* [2016] CSIH 92, Lord Drummond Young stated at [15] (and see also [28]) that the Extra Division of the Inner House is 'in respectful agreement with that conclusion.'

[49] 'British Islands' means the United Kingdom, the Channel Islands and the Isle of Man (Interpretation Act 1978, s 5 and Sch 1, para 1).

In the matrimonial arena, the most significant implications of Brexit will be felt in the matter of allocation of jurisdiction under Chapter II of Brussels II *bis*, and the recognition and enforcement of judgments from EU Member State courts per Chapter III, e.g. where, at the date of proceedings, one party to the marriage is habitually resident in the erstwhile matrimonial home in Scotland, and the other is habitually resident in Germany. As outlined above,[50] the first point of reference in the DMPA 1973 for matrimonial jurisdiction allocation in a British forum is Brussels II *bis*. All European Member State courts must apply the rules contained in art 3 of Brussels II *bis*, as well as the conflict of jurisdiction rule contained in article 19 (a *lis pendens* priority of process rule, which is the same in essence as the mandatory stay/sist rule outlined above).

Commented [PR1]: I understand that you don't want to give a specific example, but I think an example of the type of case would be helpful here

Commented [JC2]: We have inserted an example, as requested.

Intra-EU recognition and enforcement of divorces, legal separations and marriage annulments is afforded by article 21 of Brussels II *bis*, subject to article 22: a judgment given in one Member State shall be recognised in the other Member States without any special procedure being required.[51] No special procedure is required to update the 'civil-status' records of a Member State on the final award of a matrimonial judgment from another Member State.

Upon the advent of Brexit the UK will be excluded from this European system. Although it is envisaged that, by virtue of the Repeal Bill, Brussels II *bis* will 'operate' in the UK as part of the transfer of the *acquis*, British judgments will fall to be recognised or not in other European Member States only on the basis of those States' residual national rules. European Member State courts will not – because they cannot – extend Brussels II *bis* to Third State judgments.

(d) 'International' cross-border matrimonial proceedings

The fourth type of case to be considered for Brexit implications is the international cross-border situation, i.e. a case where no ground of jurisdiction is available under article 3 of Brussels II *bis*. In such cases British courts revert to the residual, national rules contained in the DMPA 1973, namely, that a court in England or Scotland shall have jurisdiction to entertain proceedings for divorce etc only if no court of a European Member State has jurisdiction under

[50] At [**XXX**].

[51] See EB Crawford and JM Carruthers, *International Private Law: A Scots Perspective* (W Green, 4th edition, 2015), paras 12-37-12-40; L Collins (Gen ed), *Dicey, Morris & Collins, The Conflict of Laws* (Sweet & Maxwell, 15th edition, 2012), paras 18-061- 18-062 ; and JJ Fawcett and JM Carruthers, *Cheshire, North & Fawcett. Private International Law* (Oxford University Press, 14th edition, 2008), at pp 989- 992.

Brussels II *bis* and either party to the marriage is domiciled in England and Wales or Scotland (as appropriate) on the date when the proceedings are begun.[52]

In the event of conflicting jurisdictions between a British court and a non-EU court (e.g. where one spouse raises divorce proceedings in London, and the other seeks divorce in Texas, USA), the DMPA 1973 provides a system of rules named, for England, discretionary stays,[53] and for Scotland, discretionary sists.[54] This is a *forum non conveniens* system, based on appropriateness of forum as opposed to a priority of process rule, and is supported and illustrated by a significant body of case law.[55] Where, before trial has begun in any matrimonial proceedings in a UK court, it appears that there are other proceedings relating to the marriage in another jurisdiction and that the balance of fairness, including convenience, between the parties is such that it is appropriate for those other proceedings to be disposed of before further steps are taken in the UK action, the court may order that the proceedings in the court be stayed.[56]

As to recognition of non-EU divorces in the UK, the relevant statute is the Family Law Act 1986,[57] principally section 46. Essentially the overseas divorce must be effective where

[52] Section 12(5)(d) provides that 'excluded action' means an action in respect of which no court of a Contracting State has jurisdiction under the Council Regulation and the defender is not a person who is– (i) a national of a Contracting State (other than the UK or Ireland); or (ii) domiciled in Ireland. See EB Crawford and JM Carruthers, *International Private Law: A Scots Perspective* (W Green, 4th edition, 2015), at para 12-11; L Collins (Gen ed), *Dicey, Morris & Collins, The Conflict of Laws* (Sweet & Maxwell, 15th edition, 2012), at para 18R-022; and JJ Fawcett and JM Carruthers, *Cheshire, North & Fawcett. Private International Law* (Oxford University Press, 14th edition, 2008), at p 945.

[53] L Collins (Gen ed), *Dicey, Morris & Collins, The Conflict of Laws* (Sweet & Maxwell, 15th edition, 2012), at para 18R-268 et seq; and JJ Fawcett and JM Carruthers, *Cheshire, North & Fawcett. Private International Law* (Oxford University Press, 14th ed, 2008), at pp 959-962.

[54] See EB Crawford and JM Carruthers, *International Private Law: A Scots Perspective* (W Green, 4th edition, 2015), at para 12-14.

[55] *De Dampierre* [1988] AC 92; *Chai v Peng (also known as: Peng v Chai*) Court of Appeal (Civil Division) [2015] EWCA Civ 1312); *Wai Foon Tan v Weng Kean Choy* [2014] EWCA Civ 251.

[56] DMPA 1973, Sch 1, para 9 (England and Wales), and Sch 3, para 9 (Scotland). See R Schuz, 'The Further Implications of Spiliada in Light of Recent Case Law: Stays in Matrimonial Proceedings' (1989) 38 ICLQ 946. See operation of the plea in the following (English) cases: *Shemshadfard v Shemshadfard* [1981] 1 All ER 726; *De Dampierre v De Dampierre* [1987] 2 All ER 1; *Thyssen-Bornemisza v Thyssen-Bornemisza* [1986] Fam. 1; *Breuning v Breuning* [2002] 1 FLR 888; *A v S (Financial Relief after Overseas US Divorce)* [2002] EWHC 1157 (Fam); *B v B (Divorce: Stay of Foreign Proceedings)* [2002] EWHC 1711 (Fam); [2003] 1 FLR 1; *O v O (Appeal against Stay: Divorce Petition)* [2003] 1 FLR 192; *T v M-T* [2005] EWHC 79 (Fam); *Ella v Ella* [2007] EWCA Civ 99; *M v M* [2010] EWHC 982 (Fam); *AB v CB (Divorce and Maintenance: Discretion to Stay)* (also known as *Mittal v Mittal*) [2014] Fam 102; and *Chai v Peng* [2015] Fam Law 37.

[57] The Family Law Act 1986 repealed *in toto* the Recognition of Divorces and Legal Separations Act 1971, but to a large extent replicated (and expanded to include recognition of foreign annulments) the provisions of the 1971 Act, which itself was passed to implement in the UK the 1970 Hague Convention on the Recognition of Divorces and Legal Separations. There are 20 Contracting States to the 1970 Convention, including among them some, but not all, EU Member States.

obtained; and there must be a personal law connection between the issuing court and one or both parties (depending on the nature of the divorce as 'proceedings' or 'non-proceedings'), by virtue of domicile, habitual residence or nationality.[58]

In the matter of recognition of a British divorce in a non-EU Member State, the parties are at the whim of the foreign legal system's own recognition rules, and limping status is always a risk.

The implications of the Repeal Bill for cross-border matrimonial proceedings

The Repeal Bill will have the effect of converting directly applicable EU law into UK law. What is the import of this for the area of law under discussion? The effect of the UK Government's strategy is that a domesticated, EU-derived version of Brussels II *bis* will (purportedly) continue to apply in UK law until legislators in the UK decide otherwise.[59]

Insofar as European instruments create unilateral obligations, it is meaningful to say that the *acquis* will be converted into domestic law. Reciprocity is not necessary in relation to the operation of certain private law instruments, such as the Rome I[60] and II[61] Regulations. 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. Technically, the jurisdiction allocation provisions contained in article 3 of Brussels II *bis* are unilateral in nature, and there should be no bar, therefore, on UK courts continuing to apply such rules. However, to apply article 3 in isolation from its ancillary *lis pendens* rule in article 19 (which rests upon mutuality) produces a skewed result insofar as the Brussels scheme envisages the jurisdiction allocation rules and the *lis pendens* rule to be part of a single scheme. With regard to bilateral or reciprocal private international law arrangements, it is meaningless, indeed delusional, to say that the UK shall convert the *acquis* into British law.

[58] See EB Crawford and JM Carruthers, *International Private Law: A Scots Perspective* (W Green, 4th edition, 2015), at paras 12-28 – 12-32; L Collins (Gen ed), *Dicey, Morris & Collins, The Conflict of Laws* (Sweet & Maxwell, 15th edition, 2012), at para 18R-063; and JJ Fawcett and JM Carruthers, *Cheshire, North & Fawcett. Private International Law* (Oxford University Press, 14th ed, 2008), at p 992 et seq.
[59] March 2017 White Paper, para 2.8.
[60] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ L 177, 4 July 2008, pp 6–16.
[61] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) OJ L 199, 31 July 2007, pp 40–49.

Unilateral conversion cannot bring about the required reciprocity or mutuality that lies at the heart of the Brussels regime. While, in the event of conflicting matrimonial proceedings in a British court and a European Member State court, a second-seised court in the UK might be prepared, through operation of article 19 of Brussels II *bis* (or a nationalised, EU-derived version thereof) to defer to an earlier-seised French court, the converse would not necessarily apply.[62] Likewise, a British court might be willing, through operation of article 21 of Brussels II *bis* (or domesticated version thereof) to recognise and enforce without question a French judgment, but there would be no obligation on a French court to reciprocate vis-à-vis a British decree. The Brussels scheme of rules is couched in the language of 'other Member State', and without express agreement between the UK and the European Union, other European Member State courts will be unable, post-Brexit, to extend the operation of Brussels II *bis* to conflicting, concurrent proceedings in the UK, or to judgments emanating from a British court.[63]

The Government's March 2017 White Paper acknowledges the fact of loss of reciprocity, noting that, 'A significant amount of EU-derived law, even when converted into domestic law, will not achieve its desired legal effect in the UK once we have left the EU.'[64] Action will be needed to ensure continuing effectiveness.[65] Although the Government recognises the problem, there is no indication in its White Paper, nor in the evidence which the Minister of State for Courts and Justice gave to the House of Lords European Union Committee,[66] about how the continuing effectiveness of 'EU law' is to be secured. The mere reiteration on UK statute books of European measures cannot facilitate the operation of significant proportions of EU/EU-derived law.[67] Since the Repeal Bill cannot deliver reciprocity, only the negotiation process can work to supply the lack.

The post-Brexit regulation of cross-border matrimonial proceedings

There is an immediate threat to the legal services market in the UK, at least on the civil and commercial side, from the current lack of certainty.[68] Uncertainty creates anxiety and the

[62] It might apply by dint of residual national rules on conflicting jurisdictions.
[63] Though as in n 62, above, the operation of residual national rules might result in recognition.
[64] March 2017 White Paper, para 1.14.
[65] Ibid, para 3.2.
[66] Evidence of The Rt Hon Sir Oliver Heald QC, Minister of State for Courts and Justice, Ministry of Justice, (http://www.parliament.uk/brexit-civil-justice-cooperation/), Qs 38 - 46.
[67] March 2017 White Paper, para 3.5.
[68] House of Lords Committee Report, para 40.

danger is that parties who use the UK legal services market will take their business elsewhere. The 'macro' aim of the British Government in its Brexit negotiations is to avoid the UK's sustaining political and economic harm, but there is, or at least should be, a 'micro' aim of avoiding harm being sustained by the legal profession and the legal services infrastructure in the UK.

In the matrimonial and family law sphere, as in the civil and commercial law arena, identity of forum is highly significant, and the matter of portability of judgments throughout Europe and the rest of the world (and, in the family law context, universality of status) of great importance.[69]

It is imperative that there is certainty as to the immediate, post-Brexit state of the law. Adequate, 'fit for purpose' rules must be available with regard to matrimonial jurisdiction and judgment recognition to avoid the problem of limping status. It is likely that there will be a deadline of spring 2019 for finalising the withdrawal agreement, which will encompass disentangling the UK from the EU treaties, and securing an orderly Brexit. But a longer period of time is likely to be required in order to finalise arrangements for the future relationship between the UK and the European Union.

Moreover, if the short-term solution is to be different from the ultimate position, there will be a need for interim, transitional arrangements to regulate matters until the so-called 'landing zone' is reached. There will be difficult transitional problems, e.g. what solution should be adopted in the event that a French court, following withdrawal by the UK, is required to decide a question of recognition of a Scottish divorce handed down prior to withdrawal?

The March 2017 White Paper envisages a 'holding position', noting that European law will 'continue to apply until legislators in the UK decide otherwise'.[70] The remainder of this paper debates the question whether or not, in the mid to long term, it would be wise for the UK Government to seek to negotiate with the European Union a special arrangement regarding the operation of Brussels II *bis* in the context of wider negotiations concerning the portfolio of European measures introduced *sub nom* judicial cooperation in civil and commercial matters. Can Brussels II *bis* (and other judicial cooperation measures) be extended to apply as among EU Member States and a country which, post-Brexit, will be a Third State? For cross-border

[69] See, in civil and commercial law, *Ministry of Justice Analytical Series Paper*, 'Factors Influencing Litigants' Decisions to Bring Commercial Claims to the London Based Courts' (2015), at p 15.
[70] March 2017 White Paper, para 2.8.

matrimonial proceedings, there is an alternative, namely, the authorisation by the Westminster Parliament and, where appropriate, by devolved administrations, of use by British courts of the 'non-EU' rules of private international law currently applicable in 'non-EU cases', or a modernised version thereof. The merits and demerits of these opposing solutions are explored below, through the device of an imaginary dialogue between Pallas Athene[71] and Boadicea.[72]

Boadicea. I take the part of advocate for the clean-break from the European Union, confident that the rules of jurisdiction and recognition outlined for use in international (i.e. non-EU) cross-border matrimonial proceedings will amply supply a set of rules sufficient for the new post-Brexit situation, cleaving to the argument that in matters of divorce, the legal systems of England and Scotland can, and should, cope without the Brussels regime or any copycat version of it.

Pallas Athene. I put forward the view that the UK has benefitted greatly from the rules contained in Brussels II *bis*. It provides a clear, rapid, refine-able system, admittedly civilian in nature, to regulate matters of jurisdiction, including conflicts of jurisdiction, and to guarantee mutual recognition and enforcement of judgments intra-EU. It is in the interests of the UK and the European Union to seek to maintain a variant of the Brussels system, as near as possible to the existing framework. Achieving a *bilateral* agreement between the UK and the European Union, similar to that currently in place among EU Member States, must be the objective.

Reciprocity is crucial, and operates to the great mutual benefit of the citizens and denizens of all European Member States. Due appreciation of this shared advantage will assist negotiations. Think not only of the 1.2 million UK citizens living elsewhere in the European Union, but also of the 3 million citizens of other European Union Member States living in the UK.

The Repeal Bill, we have been told, will have three primary elements.

> 'First, it will repeal the European Communities Act 1972, and in so doing, return power to UK politicians and institutions. Second, the Bill will preserve EU law where it stands at the moment before we leave the EU. Parliament (and, where appropriate, the

[71] Greek goddess of reason, wisdom, intelligence and skill, renowned as a great tactician and strategist.
[72] Or Boudica, queen of the British Celtic Iceni tribe who led an uprising against the occupying forces of the Roman Empire in c AD 60.

> devolved legislatures) will then be able to decide which elements of that law to keep, amend or repeal once we have left the EU. The UK courts will then apply those decisions of Parliament and the devolved legislatures. Finally, the Bill will enable changes to be made by secondary legislation to the laws that would otherwise not function sensibly once we have left the EU, so that our legal system continues to function correctly outside the EU.'[73]

It is essential to secure certainty and stability, and the best way to achieve this, in the first instance, is to preserve European law by converting it into domestic law, and thereby to ensure that all European laws continues to be directly applicable in the UK. In the immediate post-Brexit aftermath, continuity is important for families. On Brexit Day + 1, we must have in place a body of rules which will confer jurisdiction on UK courts. Importing Brussels II *bis* into British law, by transfer of the *acquis communitaire* under the Repeal Bill, so that it continues to exist, from a British point of view at least, is the first step. As the Government has indicated, 'It will be open to Parliament in the future to keep or change these laws.'[74]

B. Brussels II *bis* can continue to exist on paper, and so far as any unilateral provision or obligation is concerned. Brussels II *bis* can be carried over, but that exercise is futile so far as the instrument depends on mutuality and membership of a club, of which the UK will no longer be a member on Brexit Day + 1.

While courts in the UK might be prepared on a Brussels II *bis* principle to recognise without question a French decree of divorce, there would be no obligation on French courts to reciprocate vis-à-vis an English or Scots decree.[75] Indeed other Member States will not be able, post-Brexit, to extend the operation of the regulation to judgments emanating from courts in the UK.

PA. That's why it is right to ensure ongoing effectiveness of the current reciprocal system by seeking to negotiate an agreement with the European Union parallel to Brussels II *bis* (or future

[73] Government White Paper, 'The United Kingdom's exit from and new partnership with the European Union' Department for Exiting the European Union and The Rt Hon David Davis MP (CM 9417) (2 February 2017), p 10. 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, Wednesday 21 June 2017, at pp 17–18.
[74] Ibid.
[75] Though as stated at n 63, above, the operation of residual national rules might result in recognition.

recast version). Our aim must be for the UK Government to strike with the European Union a bilateral agreement to secure a 'package', encompassing the Brussels portfolio in commercial law[76] and in family law[77] and in matters of procedure.[78] For the purpose of our immediate discourse, however, let the arguments be restricted to matrimonial proceedings.

B. But Prime Minister Theresa May has declared that the UK is,

> '… taking control of our own affairs, as those who voted in their millions to leave the European Union demanded we must. So we will take back control of our laws and bring an end to the jurisdiction of the European Court of Justice in Britain. Leaving the European Union will mean that our laws will be made in Westminster, Edinburgh, Cardiff and Belfast. And those laws will be interpreted by judges not in Luxembourg but in courts across this country. Because we will not have truly left the European Union if we are not in control of our own laws.'[79]

To negotiate a bespoke arrangement, which is a fairly close copy of the Brussels regime, is a cheat on the British people, and unacceptable politically. The British people will find it hard to understand why the Government is actively seeking cooperation with the European Union, while at the same time seeking to escape European legal domination.

PA. If the British people knew what was good for them legally at a time of marital upset, they would fight to keep a version of Brussels II *bis*. There is a need for a tailor-made UK-EU agreement which will secure the same end. Although it might be naïve to imagine that matters of private international law will have a high political priority in the withdrawal negotiation,

[76] In relation to jurisdiction and judgment enforcement, Brussels I Recast and its progeny, including Regulation 861/2007 creating a European small claims procedure [2007] OJ L199/1; and Regulation 805/2004 creating a European Enforcement Order for uncontested claims [2004] OJ L143/15; and Regulation 1896/2006 creating a European order for payment procedure [2006] OJ L399/1. In relation to choice of law, Rome I and Rome II.
[77] Brussels II *bis*, and Council Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1.
[78] E.g. matters covered by Regulation 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] OJ L174/1, and Regulation 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters [2007] OJ L324/79 (replacing Regulation 1348/2000 [2000] OJ L160/37).
[79] Lancaster House speech (17 January 2017), setting out the UK Government's plan for the Brexit negotiations; Section 2 ('Control of our own laws') (https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech).

cross-border legal disputes are inevitable in business and family matters alike, and the Minister of State for Courts and Justice, Sir Oliver Heald, has confirmed that the content of Brussels II *bis* will 'form part of the forthcoming Brexit negotiations'.[80] Likewise, the House of Lords European Union Committee has urged the Government to 'keep as close to these rules as possible when negotiating their post-Brexit application.'[81] Given commercial priorities, however, it is probable that the commercial law agenda will lead, and family law follow.

Let an agreement be struck, whereby the essence of Brussels II *bis* (or recast, as appropriate) can operate among Member States of the European Union and the UK. The model can be the EC/Denmark Agreement,[82] which extended as between the European Community and Denmark the provisions of the Brussels I Regulation,[83] with certain amendments of a fairly minor nature.

B. But the EC/Denmark Agreement relates only to instruments concerning civil and commercial law. There is no counterpart agreement for family law; there has been no agreement to extend the operation of Brussels II *bis* to relations between the European Union and Denmark.

PA. If there is negotiating will, something akin to the Agreement could be drafted of new to operate in matrimonial matters.

B. But there's a snag. In her Lancaster House speech, Prime Minister Theresa May said that, for the future, we 'will … bring an end to the jurisdiction of the European Court of Justice in Britain.'[84]

[80] See House of Lords Committee Report reference to evidence of the Rt Hon Sir Oliver Heald QC MP, Minister of State for Courts and Justice, Ministry of Justice, at para 83.
[81] House of Lords Committee Report, para 23; cf House of Commons Committee Report, para 25.
[82] Agreement between the European Community and Denmark on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2005] OJ L299/62.
[83] Council Regulation (EC) No.44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L12, 16 January 2001). See further Council of the European Union Press Release 8402/06 (re Luxembourg meeting, April 2006), noting agreement concerning the extension to Denmark of the Brussels I Regulation (Decision 6922/06); and The Civil Jurisdiction and Judgments Regulations 2007 (SI 2007/ 1655). In terms of art 3.2 of the EC-Denmark Agreement, whenever amendments were adopted to the Brussels I Regulation, Denmark was required to notify the Commission of its decision whether or not to implement the content of such amendments. By letter of 20 December 2012 Denmark notified the Commission of its decision to implement the contents of Brussels I Recast, and so the recast regulation applies to relations between the EU and Denmark (Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L79/4, 21 March 2013).
[84] Lancaster House speech (17 January 2017), setting out the UK Government's plan for the Brexit negotiations; Section 2 ('Control of our own laws') (https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech).

The UK Government has assured us that, 'The Great Repeal Bill will not provide any role for the CJEU in the interpretation of [such new law as may be passed post-Brexit by the UK and devolved legislatures], and the Bill will not require the domestic courts to consider the CJEU's jurisprudence.'[85]

Admittedly, the position is not as clear cut as might at first appear: for reasons of certainty and continuity the UK Government accepts that, '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.[86] … [T]he Bill will provide that historic CJEU case law be given the same binding, or precedent, status in our courts as decisions of our own Supreme Court.'[87]

CJEU case law, as it exists on Brexit Day, will continue to be relevant in British courts. But this will not infringe the autonomy of the UK Supreme Court for it may treat historic decisions of the CJEU as being subject to the same rule as was adopted in the Practice Statement of the House of Lords in 1966, to the effect that, 'while treating its former decisions as normally binding, it will depart from its previous decisions "when it appears right to do so".'[88]

With regard to the negotiation of any agreement between the European Union and the UK on the portfolio of Brussels instruments, or any single instrument, the conceding, or not, for the *future*, of the jurisdiction of the Court of Justice of the European Union ('CJEU') is likely to be a major stumbling block.

PA. On an EC/Denmark Agreement model, the great benefit would be that the UK would be required, when interpreting the agreement, only to take 'due account of' the rulings contained in CJEU case law. In considering how much respect must be accorded to CJEU interpretative jurisprudence, article 6.2 of the EC/Denmark Agreement is a useful template:

> Article 6 Jurisdiction of the Court of Justice of the European Communities in relation to the interpretation of the Agreement
>
> …

[85] March 2017 White Paper, para 2.13.
[86] March 2017 White Paper, para 2.15.
[87] March 2017 White Paper, para 2.16.
[88] Ibid.

> 2. Under Danish law, the courts in Denmark shall, when interpreting this Agreement, take *due account* of the rulings contained in the case law of the Court of Justice in respect of provisions of the Brussels Convention, the Brussels I Regulation and any implementing Community measures.[89]

Alternatively, one can look to the Lugano II Convention[90] as the guide, namely, the 2007 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark.[91]

With regard to interpretation of Lugano II, the wording in the Lugano model is similar, but not identical, to the EC/Denmark Agreement model. Article 1 of Protocol 2 on the Uniform Interpretation of the Convention and on the Standing Committee[92] provides that any court applying and interpreting Lugano II shall pay due account to the principles laid down by any relevant decision upon the Lugano I or II Conventions, and the Brussels I Regulation and amendments thereof, rendered by the courts of Lugano Contracting States and by the Court of Justice of the European Communities.

With regard to any bilateral UK-EU Agreement in relation to the Brussels portfolio of instruments, use of the words 'due account' would afford a measure of discretion to UK courts to decline to follow decisions of the CJEU. Paying 'due account' leaves open a window of opportunity for a British court to examine a CJEU decision, but decide to disregard it.

B. 'Due account'? Weasel words. While 'due account' may provide an escape route, why should the European Union negotiators, all of whose Member States' legal systems are required to submit to the compulsory jurisdiction of the CJEU and are bound by its decisions, accept a

[89] Emphasis added.
[90] A parallel scheme of rules of jurisdiction and judgment enforcement was brought into force for the European Free Trade Association area (comprising, for the instant purposes, Iceland, Norway and Switzerland; the principality of Liechtenstein, an EFTA Contracting State, did not ratify the Lugano I or II Conventions) by the 1988 Lugano ('Parallel') Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, which was extended to operate in the UK by means of the Civil Jurisdiction and Judgments Act 1991. Lugano II replaces the 1988 Lugano Convention in terms which, in general, are parallel to those contained in the Brussels I Regulation.
[91] Signed on behalf of the European Community on 30 October 2007. See Decision 2007/712/EC on the signing, on behalf of the Community, of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L339/1; and Decision 2009/430/EC concerning the conclusion of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2009] OJ L147/1. See also Civil Jurisdiction and Judgment Act 1982, as amended by the Civil Jurisdiction and Judgments Regulations 2009 (SI 2009/3131).
[92] Protocol 2 on the uniform interpretation of the Convention and on the Standing Committee (OJ L339/27) (21 December 2007).

special UK position in relation to interpretation? One can't leave a club, and stop paying membership subscriptions, and expect to retain benefits better than those who continue as members of the club.

PA. Looking to the future, a UK-EU Agreement would be a new arrangement. As far as interpretation is concerned, it is in the nature of things that European regulations are interpreted differently in different Member States; rules are composed of words, not mathematical formulae.

B. On that point, if there is no overarching court having mandatory jurisdiction, how far and how quickly would a British version of Brussels II *bis* (either a domesticated, EU-derived version, applicable from Brexit Day in terms of the Repeal Bill, or a renegotiated version in terms of a UK-EU Agreement) diverge from the instrument as known and interpreted among European Member States? Such divergence, over time, may make a Brussels II *bis* simulacrum increasingly less valuable as its common core weakens.

PA. If the UK Government adheres strongly to its view that the CJEU can exercise no oversight on the interpretation and development of principles of law in this area, this will cut down negotiating options, for some degree of CJEU oversight of interpretation is likely to be a red line for negotiators for the European Union.[93]

B. But when the UK leaves the European Union, there will be no UK judge on the CJEU to influence interpretation. Why should the UK hitch itself to a wagon without knowing where, or being able to control where, that wagon is going?[94] There is no need for a system with an overarching court. Systems of international regulation created by the Hague Conference on Private International Law do not have such a court.

Let me put the case for the alternative. The UK will have some sort of solution on Brexit Day + 1 in the form of a domesticated, lop-sided version of Brussels II *bis* (or Recast) applicable in UK law. But I contend that the medium and long-term aim is to strive for a bolder, more satisfactory solution, untrammelled by CJEU jurisdiction and Brussels-inspired rules.

[93] Cf House of Lords Committee Report, para 142.
[94] Cf Evidence of Patrick Robinson, Partner, Linklaters LLP, to House of Commons Justice Committee during evidence session on 20 December 2016 regarding investigation into 'Implications of Brexit for the Justice System'.

As regards matrimonial jurisdiction of the English and Scottish courts, the currently applicable, residual national rules of jurisdiction could apply in all cases, to the (simple) effect that a Scots or English forum would have jurisdiction to entertain an action for divorce or separation, if either party to the marriage is domiciled in Scotland or England (as appropriate) on the date when the action is begun.[95]

PA. That would reduce the opportunities for parties to have their proceedings heard in the UK, an outcome which would be regrettable from the perspective of many litigants; easy access to British courts is advantageous for many parties. Brussels II *bis* offers, through article 3, seven potential bases of jurisdiction. It would be a retrograde step to revert to using 'domicile' as the connecting factor, and more so as the sole connecting factor. Retaining multiple bases of jurisdiction will safeguard the legal services market in the UK.

B. It will help the legal services market in London, but will it bring much business to other parts of the country? Some of the family law issues which Brexit raises concern the position of London as a pre-eminent forum in divorce litigation. As far as Scotland is concerned, why have seven grounds of jurisdiction, with overlap among them, when there could be a more straightforward, streamlined approach? It is desirable to simplify the rules of jurisdiction.

I admit that confining jurisdiction to cases where one party at least is domiciled in England or Scotland would restrict jurisdiction options from the parties' points of view, and would reduce business in the British courts. I might even concede that, since prior to the coming into effect of Brussels II *bis*, the rule in UK courts was based upon either party's domicile in the putative jurisdiction, or on his/her having been habitually resident there for a period of one year immediately prior to the date on which the action was begun,[96] and since UK courts now are very familiar with the concept of 'habitual residence', a more contemporary approach than adherence to the tool of domicile might be the adoption as the relevant connecting factor of habitual residence of either party in Scotland or England on the date when the action is begun. But I hold to my contention that loss of article 3 of Brussels II *bis* would be no real loss; the Regulation, and article 3 in particular, have been subject to legitimate criticism.[97]

[95] DMPA 1973, Part II Jurisdiction in Matrimonial Proceedings (England and Wales) and Part III Jurisdiction in Matrimonial Causes (Scotland). See p **XX** [***Purely domestic matrimonial proceedings***], above.
[96] EB Crawford, *International Private Law* (W Green, 1st edition, 1998), at para 10.07; L Collins (Gen ed), *Dicey & Morris on the Conflict of Laws* (Sweet & Maxwell, 13th edition, 2000), at para 18R-001 et seq.
[97] See for example EB Crawford and JM Carruthers, *International Private Law: A Scots Perspective* (W Green, 4th edition, 2015), at paras 12-07-12-10; L Collins (Gen ed), *Dicey, Morris & Collins, The Conflict of Laws* (Sweet & Maxwell, 15th edition, 2012), at paras 18-005-18-006; JJ Fawcett and JM Carruthers, *Cheshire, North &*

Bear in mind the problem of conflicting jurisdiction. As a result of the UK's being subsumed into a civilian-inspired system, British judges have had to become attuned to a system of priority of process,[98] while being uneasy about the impact of such a mechanical rule upon the subtleties of resolving inter-spousal disputes. This is an opportunity to abandon the rule of 'first come, first served', and revert to a system of adjudication in the most appropriate forum.

PA. The *lis pendens* rule is straightforward and clear, and easy for parties to understand and judges to apply.

B. There is a veneer of clarity, but difficult interpretative issues have arisen.[99] Better by far to apply to the resolution of all cases of conflicting jurisdiction the exercise of judicial discretion in the award of a discretionary stay or sist, in the manner of the House of Lords in *De Dampierre v De Dampierre*,[100] where acceptance of the plea of *forum non conveniens* delivered a fair solution.

PA. A fair solution, but only after an expensive and lengthy litigation. One can expect many more cross-border conflicts of jurisdiction than were met with in the 1980s because of the increase in international families and international family break-up. The family court system in England would not be able to cope with the expected increase in volume and complexity of litigation.[101] Another thought is that the national, residual private international law rules of most EU Member States in the matter of conflicting, concurrent matrimonial proceedings will be a *lis pendens* rule not a *forum non conveniens* rule. The UK ought to align with that approach.

B. Turning to the recognition of overseas foreign divorces, there is no reason why the UK should not apply, in all cases, the rules currently used in non-EU, cross-border matrimonial proceedings. Recognition of divorces emanating from EU Member State courts, in future,

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Fawcett. Private International Law (Oxford University Press, 14th ed, 2008), at p 946; and M Ni Shuilleabhain, *Cross-Border Divorce Law Brussels II bis* (Oxford University Press, 2010), ch 1.

[98] Art 19, Brussels II *bis*.

[99] See for example *C v S (Divorce: Jurisdiction)* [2010] EWHC 2676 (Fam); *H v W (divorce; jurisdiction)* [2010] All ER (D) 70 (Sep); *S v S (Brussels II Revised: Articles 19(1) and (3): Reference to ECJ)* [2014] EWHC 3613 (Fam); [2015] Fam. Law 130; *Jefferson v O'Connor* [2014] EWCA Civ 38; and *Ville de Bauge v China* [2014] EWHC 3975 (Fam). See EB Crawford and JM Carruthers, *International Private Law: A Scots Perspective* (W.Green, 4th edition, 2015), at para 12-15; L Collins (Gen ed.), *Dicey, Morris & Collins, The Conflict of Laws* (Sweet & Maxwell, 15th edition, 2012), at para 18-273; JJ Fawcett and JM Carruthers, *Cheshire, North & Fawcett. Private International Law* (Oxford University Press, 14th ed, 2008), at pp 957 – 958.

[100] [1988] AC 92.

[101] House of Lords Committee Report, para 136; cf Bar Council Brexit Working Group, *Brexit Papers – Paper Six: Family Law*, paras 8 and 9.

would be best regulated by the Family Law Act 1986, section 46, with the content of which essentially 'pro-recognition' rules there has never been serious complaint.

PA. The system of recognition incorporated in the 1986 Act is a unilateral system. It cannot provide for the recognition by European Member State courts of a British decree; recognition would depend on each Member State's own residual, national rules. At present, mutual recognition delivers uniformity of marital status across Europe. Portability of judgments – the 'export' of British orders – is very important in family law and is an inestimable benefit of the Brussels system.

B. In practice a decree emanating from the domicile of one or both parties (or, were the connecting factor to be modernised, from either party's habitual residence) would be likely to be recognised by other European Member State courts given the strong connection between a party and a forum which domicile constitutes.

PA. Our positions are opposed; agreeing to differ will not advance matters. We are at one in our desire to achieve the best outcome in private international law terms for parties engaged in cross-border matrimonial disputes. We may attempt to read the runes, but at this juncture we are necessarily equally ignorant of the outcome of the political machinations, and can but speculate.

Epilogue

The authors, adopting the role of narrators, and looking to the future relationship between the UK and the European Union in judicial co-operation in private international law matters, hope that the UK Government, using the strategic wisdom and skill of Pallas Athene, will be successful in securing a solution whereby the observable, reciprocal benefits of the Europeanisation of private international law – generally, and in the specific context under discussion in this article – can be retained. If such a solution is beyond reach because of negotiating 'red lines' such as UK refusal to submit to the jurisdiction of the CJEU, may the spirit of Boadicea imbue the UK Government and, where appropriate, the devolved legislatures, with the resolve to fashion a system of rules based on established law apt for the new circumstances.

(12,888 words)