European and External Relations Committee

The EU referendum and its implications for Scotland

Written submission from Professor J M Carruthers, Professor E B Crawford

We refer to the Committee’s Call for Evidence pertaining to the EU referendum and its implications for Scotland.

The Committee is conducting an inquiry into the implications for Scotland’s relationship with the EU of the referendum result. Our purpose in submitting this evidence is to draw attention to certain legal implications of a withdrawal by the UK from the EU, namely, its effect on that body of law known as international private law or private international law (‘IPL’).

The IPL implications of UK withdrawal from the EU

IPL is the branch of the law of any system which is applied to determine questions involving foreign elements. More particularly, it is the branch of the private law of any legal system which consists of the rules enabling its courts to determine:

(a) the rules of jurisdiction to be followed by its courts;
(b) the system of law which is to be applied by those courts to determine the rights of the parties in cases involving foreign elements (“choice of law”); and
(c) the extent to which recognition is to be given by those courts to decrees of foreign courts, and the manner of enforcement of such recognised decrees, if enforcement be necessary; and conversely, the extent to which recognition of its own decrees and, if need be, enforcement thereof is to be accorded elsewhere.

The content of Scottish and UK IPL rules in matters ranging across the spectrum of private law subjects (from commercial topics, including property and insolvency, to family law such as recognition of divorces, and all manner of decisions concerning the wellbeing of children) is largely contained in European regulations, the operation of which in the UK can be presumed to come to an end upon UK withdrawal from the EU.

As well as dealing with jurisdiction and judgment enforcement in civil and commercial matters and in family law, the EU has enacted a number of important procedural law instruments, pertaining to civil and commercial litigation, such as regulations on the taking of evidence abroad, and the service of documents. Additionally, regulations have been enacted with the aim of accelerating enforcement of Member State decrees which in their nature are uncontroversial, such as small claims and uncontested claims.

Chief among the EU regulations directly applicable at present in the UK are:-
Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (‘Brussels II bis’) (with recast in view at present: see European Commission proposal of 30 June 2016);

- Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (‘Rome II’);
- Regulation (EC) No 593/2008 on the law applicable to contractual obligations (‘Rome I’);
- Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (‘Brussels I recast’); and

A further raft of significant regulations includes:-

- Council Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters;
- Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested Claims; and

Currently, the UK enjoys an advantage over most other EU Member States in that 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, the UK enjoys a right not to participate in EU justice and home affairs (JHA) measures.\(^1\) In terms of this Protocol, the default position for the UK 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, the UK does not participate in it unless it chooses to exercise its right to opt in. Until recently the UK opted in to the major advances in the IPL harmonisation programme in the matters of civil and commercial jurisdiction and applicable law. Only since the programme ventured into private law fields in respect of which, from

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\(^1\) See, for detail, E B Crawford and J M Carruthers, *International Private Law: A Scots Perspective*, 4\textsuperscript{th} edition (2015), W.Green, para 1.08 et seq.
the common law UK perspective, there is no perceived advantage in participating, has the UK refrained from opting in.

It is important to emphasise the nature of the advantages enjoyed by UK citizens as a result of the UK’s being part of this ambitious and successful Europeanisation plan. The construct of EU harmonised rules enables Scottish businesses and individuals to know where they may pursue legal proceedings, and be pursued, among the legal systems of the EU; further, to anticipate which country’s law(s) will determine the dispute; and to enjoy the benefit of certain common procedural rules. Upon obtaining a judgment from the court of one EU Member State, the enforcement thereof in another Member State is greatly facilitated by the regulations currently in place. This basic system of reciprocity operates not only in the civil and commercial law sphere, but also in family law matters such as divorce and parental responsibility orders.

It is essential that in Brexit negotiations proper attention is paid to this branch of law. The UK and Scottish governments must be clear on the post-Brexit status and applicability in the UK (including as between/among the legal systems of the UK) of EU rules of private international law; and, in the event of the non-applicability of those rules, on the content of the national IPL rules which are to apply by way of substitute for the European rules. Such national rules as emerge, or re-emerge, will be required to regulate our cross-border legal relations with each EU Member State and with the wider world, and intra-UK. There must be clarity as to the content of these national rules immediately upon withdrawal from the EU, in order to avoid a legal vacuum.

Looking beyond the parameters of Europe, each EU Member State, as a result of the European harmonisation scheme, has lost its capacity to act autonomously in any matter concerning judicial cooperation in civil law which falls within EU competence. Therefore, in addition to the European regulations mentioned, regard must be had to the post-Brexit applicability in the UK, including Scotland, of certain international instruments by which the UK currently is bound, not as a signatory, but as a Member State of the EU on behalf of which the EU has become a contracting party:

- Hague Convention on Choice of Court Agreements (2005);

The position of Scotland within the UK in the matter of IPL

Fundamental constitutional change was effected by the Scotland Act 1998 (as amended by the Scotland Act 2012), as a result of which matters of Scottish civil law fall within the legislative competence of the Scottish Parliament. Section 126(4)(a) interprets the civil law of Scotland as a reference to the general principles of private law, including private international law. Although IPL 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 (s 29(4)(b)).

In terms of s 57 of the 1998 Act (“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 s 2(2) of the European Communities Act 1972. In this context, therefore, there is “shared power” between Scottish and UK Ministers. With regard to the EU IPL harmonisation agenda, the privilege of discretionary opt-in to proposed instruments is one extended not to individual legal systems of the United Kingdom, but rather to the United Kingdom as a whole, as the EU Member State. Furthermore, Schedule 5, Part 1, para.7 of the 1998 Act reserves foreign affairs, including relations with the EU, but excepting implementation of international obligations, obligations under the Human Rights Convention and obligations under EU law. Separate secondary implementing legislation frequently is required for Scotland and England, respectively, in respect of EU regulations. Within the UK, therefore, legislative vires in this area is to some extent shared.

In the Brexit negotiations, Scotland’s legal interests must be informed by the contribution of Scottish experts to the UK’s external (i.e. vis-à-vis the EU) negotiating position. Separately, with regard to formulation of national IPL rules operative post-Brexit within the UK, there is an obvious need for Scottish legal expertise and participation by Scottish legal experts in the internal UK process. Insofar as is possible, efforts should be made to retain the benefits conferred by the Europeanisation programme, e.g. clarity in the matter of jurisdiction allocation; and the free flow of judgments across EU Member States.