OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 30 January 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 30 January 2018

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JUSTICE COMMITTEE
4th Meeting 2018, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*George Adam (Paisley) (SNP)
*Maurice Corry (West Scotland) (Con)
*John Finnie (Highlands and Islands) (Green)
*Mairi Gougeon (Angus North and Mearns) (SNP)
*Daniel Johnson (Edinburgh Southern) (Lab)
*Liam Kerr (North East Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Liam McArthur (Orkney Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Paul Beaumont (University of Aberdeen)
Professor Janeen Carruthers (University of Glasgow)
Lucia Clark (Morton Fraser)
Jason Freeman (Competition and Markets Authority)
Juliet Harris (Together (Scottish Alliance for Children's Rights))
Frank Johnstone (Dentons)
James Mure QC (Faculty of Advocates)
Graeme Paton (Society of Chief Officers of Trading Standards in Scotland)
Janys Scott QC (Faculty of Advocates)
Peter Sellar (Faculty of Advocates)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 30 January 2018

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Margaret Mitchell): Good morning and welcome to the Justice Committee's fourth meeting of 2018. Agenda item 1 is a decision on taking item 6, which is a discussion on the committee's work programme, in private. Are we agreed?

Members *indicated agreement.*

Brexit (Family Law)

10:00

The Convener: Item 2 is a round-table evidence session on Brexit and family law. The purpose of the session is to explore issues around family law in the context of the United Kingdom's withdrawal from the European Union.

I welcome all the witnesses. We will start with introductions round the table. I am convener of the committee.

Gael Scott (Clerk): I am one of the clerks to the Justice Committee.

Gillian Baxendine (Clerk): I am also one of the clerks to the Justice Committee.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I am the member of the Scottish Parliament for Coatbridge and Chryston.

Janys Scott QC (Faculty of Advocates): I am an advocate who practices in family law, including international issues.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): I am the MSP for Edinburgh Northern and Leith.

Lucia Clark (Morton Fraser): I am a partner at Morton Fraser and I specialise in family law.

John Finnie (Highlands and Islands) (Green): I am an MSP for the Highlands and Islands.

Juliet Harris (Together (Scottish Alliance for Children's Rights)): I am director of Together, the Scottish Alliance for Children's Rights.

Liam McArthur (Orkney Islands) (LD): I am the MSP for Orkney.

Liam Kerr (North East Scotland) (Con): I am an MSP for the North East Scotland region.

Maurice Corry (West Scotland) (Con): I am an MSP for the West Scotland region.

Professor Paul Beaumont (University of Aberdeen): I am professor of EU and private international law at the University of Aberdeen.

Mairi Gougeon (Angus North and Mearns) (SNP): I am the MSP for Angus North and Mearns.

George Adam (Paisley) (SNP): I am Paisley's MSP.

Professor Janeen Carruthers (University of Glasgow): I am professor of private law at the University of Glasgow.

Daniel Johnson (Edinburgh Southern) (Lab): I am the MSP for Edinburgh Southern.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I am the MSP for Strathkelvin and Bearsden and deputy convener of the committee.

The Convener: The purpose of a round-table discussion is to have a more informal setting. Evidence will be recorded and put out there in the public domain, but the discussion will allow a freer exchange of views between witnesses and members. We can keep control of the discussion if you always speak through the chair. Witnesses need not worry about microphones or pressing any buttons; when it is your turn to speak, the microphone will come on automatically, as if by magic.

I thank all the witnesses who have provided written evidence; a lot of work has gone into the submissions.

The session has potential to be complicated and technical and not achieve very much. In essence, we want to have a round-table discussion from which the man in the street could understand the extent of the problems, the options that are available and where we can go from there.

We will start by looking at the extent of the problem for various aspects of family law. I ask Lucia Clark to kick off, as she puts the issue in context in her written submission.

Lucia Clark: My submission starts with the figures, which come from various papers. The international cases include 140,000 international divorces and 1,800 cases of child abduction in the European Union each year. I do not have specific figures for the UK or Scotland. We are all aware that families and people move about, and those issues are likely to increase rather than decrease as families have people and assets across borders.

The Convener: Would somebody like to pick up on those areas and look at the potential impact and the size of the problem?

Professor Carruthers: I begin with the convener's point that this area of law is potentially technical. That is true, but people did not identify it as a possible area of controversy in the Brexit negotiations after the referendum. It has been dressed up as technical and procedural but, as Lucia Clark pointed out, if one pares it back, there are significant practical implications for people who live in families, which we will look at in this session, and for businesses, consumers, employers and employees, which will be discussed in the next session.

We can look at three particular areas of private international law, which is basically the area of law that we are concerned with. First, questions of jurisdiction arise. Which court is competent to hear a particular dispute involving a cross-border family? Secondly, there are questions of applicable law. What law will the court that is exercising jurisdiction apply? Which country's law will it apply to determine the dispute? Thirdly, there is the question of the recognition and enforcement of overseas judgments. To what extent will a Scottish court recognise judgments from overseas and vice versa? The rules of private international law dictate how those three problems of jurisdiction, applicable law and recognition and enforcement of judgments should be determined.

On the advent of Brexit, the European Communities Act 1972 will be repealed, and with that the private international law landscape will change dramatically, because the private international law landscape in Scots law is currently European in character. Various European regulations are applicable, and the operation of those instruments will be in question on the advent of Brexit.

The Convener: That is helpful. Can we look at the kinds of issues that arise? We are talking about family law.

Janys Scott: Let me give you an example. Last year, I was asked to litigate a case for a wife who was in Scotland and a husband who was living in France, and there was concern about what law would apply. The EU instruments do not govern for us what law is applicable—they govern the court.

The Convener: Can I ask what the case was about? Was it about divorce or custody or—

Janys Scott: It was a divorce case, and we were concerned about the money aspects. We deliberately started proceedings in Scotland in order to secure priority for the wife's divorce and the Scottish rules for financial provision. Under the current EU provisions, the court that starts first carries the case and no other court within the EU can then intervene.

Under the European Union (Withdrawal) Bill, if I had the same case and I started in Scotland, I could not guarantee that the French court would not start, because it would not recognise that a Scottish court had started first. The problem that we will face if we implement the provisions in the withdrawal bill as it is currently drafted is that we will carry on with the EU rules and will recognise a court that starts first, but no other court in Europe will recognise it if we start first.

We therefore have a problem with such cases, and we could get two courts—expensively—both conducting the litigation and coming to conflicting decisions. I would have thought that the committee will be concerned to prevent that.

The Convener: We have already heard that private international law will dictate what happens

in this area. Is there a recognised international agreement or specific EU agreements?

Janys Scott: In that scenario, it is the EU. There is no international agreement on priority of court in relation to divorce.

The Convener: Okay. Are there other comments? Liam Kerr has a supplementary question, and then I will bring in Professor Beaumont.

Liam Kerr: I actually want to bring Professor Beaumont in. From reading the papers, I could see a community view emerging, but it seemed as though Professor Beaumont has a slightly different interpretation of what might happen. I just wondered if he might come in on that.

The Convener: That is very kind of you, Liam. You just took five minutes instead of us hearing directly from Professor Beaumont, but thank you for that. [*Laughter*.]

Professor Beaumont: It was very kind indeed—thank you.

Janys Scott made the point in relation to divorce, which is one of the few areas where there is no international regime. She is quite right. She selected an area where there is a problem, but my evidence suggests that there is not really a problem in most areas. People are worrying but, to quote Shakespeare, I would say that it is "much ado about nothing" in most cases. However, we can have a debate about that.

On divorce, Janys Scott is right, but I must put the opposite point of view, which is that we have a problem with the current regime. Most people acknowledge that. There is European Court of Justice case law on the problem. Because it is a first-come, first-served regime, there is a pattern whereby the husband in couples who have been in England or Scotland during their married life but one of whom is from France or Italy—it is usually the husband—will try to instigate proceedings first in France or Italy to reduce the amount of money that he has to pay to his wife, and we have to recognise that if he gets in first. The first-come, first-served regime is a swings-and-roundabouts arrangement. It can suit the wife if she gets in first and it can hammer her if she does not.

If we stop applying the EU instruments unilaterally, the fallback position in this context is the common law, not an international regime. Our fallback is Scotland's proudest development in that area of law, which is forum non conveniens. We are the architects of a concept that has now been accepted throughout the common-law world—in the United States and all the Commonwealth countries. It is one of the few things that we can say is a product of Scottish legal endeavour. Therefore, it would not be shocking to apply a system of forum non conveniens, which would involve our courts making the assessment as to whether there is a more appropriate forum to deal with the matter and declining jurisdiction in favour of that more appropriate forum.

The sad thing is that continental European countries do not apply that concept. Normally, under their common law, they apply a lis pendens rule, so if we were seized first, they would respect that. That is their normal approach outside the EU rules.

You can take your choice. I have never been a big fan of lis pendens. In fact, I do not like it at all. It is arbitrary. It is all about who is best advised and gets in first. A better justice system is one in which judges make discretionary decisions about whether the court is the most appropriate forum to deal with an international case.

Mairi Gougeon: Janys Scott spoke about two courts running in parallel on a divorce agreement. Post Brexit, if both courts reached a decision, what overarching body could there be to deal with that?

Janys Scott: There is not one.

Mairi Gougeon: If both courts came to a decision, how would the decision be enforced in either country?

Janys Scott: That is precisely the danger, and it is what the EU instruments were designed to deal with. I understand why Paul Beaumont has reservations about lis pendens—we all do. One cannot defend the EU regime as being perfect. One can say that it was a work in progress, but it was better than what we had before. It prevented parties from having to litigate in two places at once because they both thought that they had the right regime, which then meant that there was a problem with enforceability.

I suggest that, given the increased movement of persons and the existence of international families, one cannot really tolerate that previous situation in the modern world. One has to have a regime, even if it is not the one that one would ideally want to advance. I understand Paul Beaumont's reasons as to why forum non conveniens is a civilised concept. On the other hand, one has to have determination and finality to reduce expense and distress for families.

Professor Beaumont: The trouble is that it is not true that the lis pendens system works for divorce. Let us be candid. If we consider it technically, it does not work for that because the Brussels 2a regulation relates only to the divorce action and not to financial provisions. Those are governed partly by the maintenance regulation and partly by instruments to which we are not party, which are the matrimonial property enhanced co-operation regulations.

Therefore, a French proceeding could continue in opposition to the Scottish proceeding because half of it relates to matrimonial property and not to maintenance and the French courts are not bound by the regulation to defer to the Scottish proceedings. They are bound to defer only on the question of divorce and not on the financial provisions. They would technically be bound to defer on the maintenance aspects but, viewed from a French perspective, that is a small part of the overall package. We will not get the solution that we think we will get if the French court plays hardball, which it is perfectly capable of doing, and the Court of Justice would not prevent it from doing so because it is not a lis pendens situation.

Janys Scott: I accept that there are deficiencies. Janeen Carruthers might want to respond to that.

10:15

Professor Carruthers: I share Professor Beaumont's pride as an academic in the wonderful export of the principle of forum non conveniens. However, it is a discretionary system that is expensive and particularly lengthy to litigate for clients who have to pay for the dispute to be settled somewhere. Those considerations have to outbalance the pride in the academic export.

The Convener: Are you speaking about the financial settlement, which seems to be separate from the divorce itself? I recently attended a conference on arbitration at which Lord Glennie suggested that arbitration could be recognised internationally and worldwide so that there would be no disputes about the regulations to settle matrimonial property or finance. What are the panel's comments on that suggestion?

Professor Carruthers: The Brussels 2 bis regulations restricted the jurisdiction, recognition and enforcement of judgments in matrimonial matters: divorce, nullity, judicial separation and matters of parental responsibility. As Professor Beaumont said, that does not extend to the financial implications.

The separate regulation that we have focused closely on is concerned with the financial aspects of parent and child or spousal maintenance. The problem that has been highlighted is that those proceedings are not necessarily streamlined in one set. Strictly, Brussels 2 bis deals with the recognition of the divorce but not necessarily with its financial implications.

Professor Beaumont: Arbitration is an interesting idea. It could not deal with the divorce itself because that is a status issue, but in principle there is no reason why couples, if they agree, could not put the financial aspects of their divorce to arbitration. I do not think that the practice is common in international matters, but those witnesses who are in practice might be able to alert me if it is. It tends to be used more in the commercial context than in the family context.

Janys Scott: We are very keen to see it developed in the family context. We have been working on that approach for the future, but we will have to take a slightly different view of it post-Brexit than we might have taken otherwise.

Lucia Clark: As Janys Scott said, arbitration is interesting for practitioners and academics, but it is not widely known about or used. The couple would need to agree to it, so it does not solve the problem, which is about a couple whose dispute is about where to divorce and where to sort out the finances, and not just about how to divide their assets, which can be done by negotiation and does not need to go near a court except for the divorce to be finalised.

George Adam: Janys Scott spoke about the written evidence that family law is the point at which Brexit becomes personal. From the simple perspective of a constituency MSP, my interactions with the issue have usually been with one party when someone has taken flight to another country, sometimes with their children. Nine times out of 10, divorces are not amicable. There will always be problems, which are not just about who is right and who is wrong. If we make the system more complex, might one party start a divorce in Scotland and the other start in France, with the complexity being used to make the case take longer and the heartache in the family being made even worse?

Janys Scott: You are absolutely right, which is why EU instruments that bring certainty are helpful to the parties. We can at least tell them which court will determine their dispute. With divorce comes the financial elements. What is proposed would send us off into the wilderness of uncertainty in family proceedings, whereas we were on a course that was bringing us towards greater certainty. Albeit that it was not perfect, we were definitely working on it.

I was very enthusiastic about working on making the EU instruments work better for families. I am on the family law committee of the Council of Bars and Law Societies of Europe, and we were very keen to do that. It was a co-operative and collaborative exercise in which family lawyers were trying to make the process more straightforward for families, and I confess that, personally, I am hugely disappointed that we have pulled the plug on it.

The Convener: Juliet Harris has not said anything yet, so let us have her contribution.

Juliet Harris: I want to reflect on George Adam's point. I come at this not from a legal

perspective, but from a children's rights perspective, and I want to put across the experience of children and young people in proceedings relating to family breakdown. It is obviously a really difficult and traumatic time for children and young people.

I think that more of these cases will be brought to constituency MSPs because the uncertainty that Brexit brings for families with EU connections is absolutely massive. Research that has been carried out with children and young people shows that even now there are implications for their mental health from not knowing what will happen next in terms of Brexit and their rights. Research that we conducted last year identified that 10 per cent of the babies born in 2016 have a parent from the EU, so we are talking about a lot of children and families who will be affected by that uncertainty—more than 5,000 babies who were born in 2016 will be affected by it.

As a reflection on what Janys Scott said about the developments in the EU, our research showed the added value that comes from the EU in terms of children and young people's rights. The framework that we are talking about at the moment is actually stronger than the Hague framework that we would fall back on. It is, for example, very clear about the need for children and young people to have their voice heard in court proceedings, it emphasises their best interests and it talks about the timescale for those proceedings, which is so important in a child's life. Those things need to be sorted out quickly and effectively to provide certainty.

Janys Scott touched on developments in the EU in the recasting of the Brussels regulation, drawing on the United Nations Convention on the Rights of the Child—to which I know that, across all parties, the Scottish Parliament has made a strong commitment—to make sure that the rights of the child are absolutely central in judicial proceedings. We are getting buzzed and brain fried with the number of regulations that affect children and young people, but they do not care about that; they care about their right to have their voice heard, about not having to speak out in front of their parents, about their right to privacy, and about certainty. Certainty is the most important thing and it is what we are all lacking at the moment.

The Convener: Does Professor Beaumont want to come in?

Professor Beaumont: Yes—on a lot of points. I advised the Commission on revising Brussels 2a—I was on the expert group. We looked at issues concerning the rights of the child, which are, indeed, being reinforced in the current recast. The trouble is that there is a big difference between theory and reality. We might think that the EU is wonderful, but when we do some research on what actually happens with the application of the right of the child to be heard—as we did, funded by the Nuffield Foundation—the evidence is appalling.

We looked at child abduction cases. Under EU law, there is an override system that allows the courts in the child's country of habitual residence before the abduction to override a decision made by the courts in the country of refuge not to return the child. That system requires the child to be heard before it can operate, yet the evidence showed that, in most EU member states, the children are not being heard and override orders are being issued in complete and utter ignorance of the rights of the child.

There is a world of difference between the EU's aspirations and the reality on the ground in member states. We have to be much more savvy about that. When research such as ours is done to look at what is actually happening in member states, the picture is often that there is the aspiration but then there is the reality. Whether or not we are in the EU, that will be the picture in most situations.

I honestly believe that, for children who have been abducted, the Hague regime is better than the EU regime because of what I have just told you. The EU regime gives left-behind parents false hope that they will be able to get their children back using the override mechanism, when all the evidence shows that that mechanism simply does not work because the states will not apply it properly and will not enforce it.

For all the talk of having powerful enforcement mechanisms in the EU, enforcement does not happen. The Commission never brings enforcement action against member states for non-compliance in that area of law. That has never happened, and the Commission has no intention of doing it. I have pushed it hard and told it that it should use enforcement actions but it ignores me and does not do it. That is a political decision on the Commission's part. It is not a priority area for EU law enforcement from the Commission's perspective. Therefore, there is no guarantee that abducted children will have their rights under EU law enforced because nobody ensures that those rights are enforced.

I am afraid that that is the harsh reality in which we live. It is better to have the clarity of the Hague convention, which operates in 90-odd states, not just 28 EU states. Why have a separate regime in Europe unless it is an improvement on the international regime? In child abduction, I am sure that it is not an improvement.

In relation to other areas of child law, the Hague regime is, as I have explained in my submission,

just as good as, if not better than, the alternative. I negotiated the EU maintenance regulation and the Hague convention for the UK and Scottish Governments—I was a consultant to both in those pleasant days when they co-operated. In our negotiation of the Hague maintenance convention, we produced a good international regime for child support. The US has now joined it, I am delighted to say, and the EU is a party to it, so we have a good international regime that works in terms of getting child support. We do not need the EU maintenance regulation for that; it does not add any value. That is my honest assessment as someone who negotiated both.

We can be thankful that the EU has ensured that the Hague maintenance convention applies to spousal support when it is independent of child support, even though that is not a fundamental requirement of the convention. It is an option that the EU has exercised. Therefore, if the UK were a third state applying the maintenance convention with the EU, our spousal support financial orders would be recognised in the European Union because the EU has an obligation to do so under the convention. In effect, that puts us in the same position as we are in under Brussels 2a—the position is no different.

The only slight difference, as Janys Scott has pointed out, relates to conflicts of jurisdiction. To be frank, you can legitimately take a different view on whether a race to the court is better than a race to judgment. That has always been a debate and there is no absolute clarity that one is better than the other.

Juliet Harris: The UK Government and the House of Commons Justice Committee have recognised that the EU regulations are stronger. The UK Government says that they provide

"more sophisticated and effective interaction, based on mutual trust between legal systems".

I can send the papers to the committee afterwards if that would be helpful. The fact that that point has been raised by the UK Government and the House of Commons Justice Committee reaffirms to me that there is real strength for children and young people in the gloss that the EU system adds.

The EU system is constantly evolving. The EU Agency for Fundamental Rights published a really interesting report in the spring of last year on children's views and professionals' experience of the justice system. The learning from a lot of that research is going into the development of the recast of Brussels 2a.

Things are not perfect at the moment; there is a lot to criticise in the EU process. However, the EU is reviewing, revising and learning, and that is going into the recast. Scotland would be missing out if we did not look at what is happening in the recast, such as the added value in relation to the experience of our children and young people in very difficult situations, and we should incorporate that into our learning and thinking.

10:30

The Convener: Do you have experience of children not being heard and being more or less overruled, as Professor Beaumont said?

Juliet Harris: Yes, definitely. It does happen. We have not got it right at all so far. Whether under the EU process or under the Hague conventions, there are problems with children getting heard in the courts.

The Convener: Would you like to go next, Professor Carruthers? I would like to hear from the panel as much as possible and then I will come back to committee members.

Professor Carruthers: In support of what Professor Beaumont said, it is absolutely true that with regard to parental responsibility and maintenance, in the event of a cliff-edge Brexit, there is an alternative international regime that operates under the Hague conventions. The Hague maintenance convention, the 1980 Hague abduction convention and the 1996 Hague child protection convention are alternative instruments that we could rely on.

We could sit here and do a line-by-line, word-by-word comparison of the various instruments. On some points, we might say that the Brussels regime is better and, on others, we might say that the Hague regime is better, but there is no great purpose in doing that at this point because it will be a matter of judgment on fine points of interpretation. It is important to recognise that there is an alternative regime in those areas.

However, the Hague regime is not entirely comprehensive. On maintenance, the Hague regime is less good than the EU regime, in so far as there are no direct rules of jurisdiction. On the allocation of jurisdiction—which court can exercise competence over various matters—there are differences between the Hague and EU systems. The fact that the Hague system does not give us direct rules of jurisdiction is possibly of particular relevance. The lack of those rules is more significant than certain other aspects.

One also has to bear in mind that the UK is bound by those international instruments—those Hague conventions—by dint only of its membership of the European Union. Steps would have to be taken, and taken quickly, in the immediate aftermath of Brexit to ensure the continuity of application of those international Hague instruments and that there was no hiatus.

Rona Mackay: It is really important that we talk about how children will be affected, but I will ask questions about that a bit later.

I come back to Janys Scott's example, in which two cases are being heard in different courts. What are the different options to counteract that situation? Presumably, the legal profession has been pondering that since June 2016. You have highlighted what might happen, but has anything been formulated to try to make the best of the situation if there is a cliff-edge Brexit?

Janys Scott: A group of English family law organisations—including my colleagues at the English bar in the Family Law Bar Association, Resolution, which is an organisation for English family law solicitors, and the International Academy of Family Lawyers—took the view that we should not rush to ditch the EU instruments if there is a cliff-edge Brexit or a withdrawal bill that gives us the worst of all possible worlds.

The solution that the group proposed, which has been endorsed by the bar in Scotland, is to see whether we can continue with the current position on at least a transitional basis to give us breathing space to ensure that families know where they stand for two or three years. The fear is that we will suddenly be left in a quandary, particularly if the withdrawal bill does not recognise that these are reciprocal arrangements and tries to implement unilaterally what we have been doing reciprocally. Our proposal to the committee, if you would care to adopt it, is that, in family law at least, we should have a longer breathing space with transitional provision.

Rona Mackay: How confident are you that that will be acceptable to everyone involved?

Janys Scott: That is more of a political question than a legal question. I have told you the solution that was proposed by the lawyers. The big political issue relates to the European Court of Justice.

The Court of Justice is not involved in substantive family law, as far as we are concerned; it is simply concerned with assisting us with disputes that arise in relation to implementation, procedure and enforcement. That is not particularly unacceptable, politically, and part of what we have been proposing is that the Court of Justice should continue to do that, at least during the transitional period, so that we make sure that we are in conformity with all the other jurisdictions that implement the regulations. We are asking you please just to give us a breather.

Rona Mackay: Just to get back to basics, in a case such as the one that you talked about, which you said might be heard in France or here, if the father had custody of the child in France and the mother wanted custody here, in which court would the action start? Who would hear the case?

Janys Scott: There are a variety of answers to that. The basic provision under all international instruments is that the most appropriate place is the place where the child is habitually resident. There is an issue in divorce proceedings where people agree to decisions about children being taken in the court that heard the divorce proceedings. In the case that I described, I was more concerned with the divorce and the financial remedies that follow.

Rona Mackay: Is custody outside that?

Janys Scott: It can be, yes.

Rona Mackay: Okay.

Lucia Clark: One of the things to bear in mind is that there are lots of different areas and aspects of family law. There is parental responsibility—which is what you have been talking about; the old word for that is "custody", and it relates to where the child lives—child abduction, where a parent takes a child across a border, and divorce and the money aspects that go with that.

In my written evidence I tried to make clear that there is a range of answers for those different areas. In sum, as Professor Beaumont pointed out, there are Hague conventions that can step in and take the place of EU law if EU law falls away entirely. There are some differences between the Hague conventions and EU law, but they cover substantially the same areas. We could quibble among ourselves about which we like better, but it is the case that child abduction and parental responsibility are, to an extent, covered by a different international treaty.

I deal mainly with divorce and financial matters, and my main concern is how that area will be impacted, because there is no international treaty that springs into place to deal with it. The difficult question is what we can do. There is a range of options, but none is ideal or even great. The current system is not ideal.

I do not want to speak on anyone else's behalf, but I think that it is possible that most of the panel members agree that the route down which we are heading with the European Union (Withdrawal) Bill is the worst of all possible options for a solution to divorce and financial matters. What the bill will achieve is the replication of the EU law in our national law, but the EU law works only because it is reciprocal, and we will be making it entirely one-sided. The Scottish court will need to pay attention to and defer to the other 27 courts, but those courts will not have to defer to or pay attention to us. That is a problem. On the face of it, the bill might seem to contain a solution—"Oh, let's just replicate the law all over"—but it is not a solution.

The question then is what else we can do. Do we keep things going for a transitional period, as

Janys Scott suggested? Do we keep things going permanently, as Resolution and some of my English colleagues have suggested? They suggest that we just replicate EU law and keep it going on a reciprocal basis; negotiation will be needed to achieve that. Do we just let EU law fall away and fall back on the old Scots law of forum non conveniens? Do we try to deal with things in that way?

We can debate the pros and cons of that. In part it depends on the political will and what is politically achievable. We can tell you what the legal pros and cons are, but perhaps we cannot tell you what is politically achievable. When I deal with divorce and financial cases, I love arguing forum non conveniens—it is really interesting. However, it is expensive and can be quite time consuming, and it is discretionary, so there is no clear answer. I cannot tell a client at the start of the process, "We'll be dealing with this in the court in Aberdeen rather than in the court in Munich." I cannot make that call; people have to argue the case in that regard.

The balance in the legal system, for a lot of issues, is between clarity and fairness. Do we have a system that is very clear and gets us to a fixed outcome that can be predicted, or do we have a system that is weighted more towards individual discretionary fairness on a case-by-case basis? It is a difficult balance to achieve. Forum non conveniens is fairer but less clear.

The Convener: I will bring in Professor Beaumont again. Daniel Johnson, Ben Macpherson and Liam Kerr are on the list to ask questions, but we want to hear predominantly from the witnesses.

Professor Beaumont: Thank you. Lucia Clark is right in what she has just said. I will add a gloss from my experience as a negotiator for both the UK and the EU on different issues, although I am currently negotiating only for the EU in a commercial context.

It seems unlikely that we will get a bespoke deal simply on Brussels 2a in the future. Why would the EU agree to that? Why would the UK agree to it? The fundamental problem is that, in the long run, doing so would mean accepting the jurisdiction of the European Court of Justice when we do not have a judge on that court. It does not seem to be a very rational solution.

We can argue about a transitional arrangement, as it is obvious that there will be a transitional period unless there is a no-deal scenario. In that transitional period, Brussels 2a and the other regulations will continue to operate. However, at some point they have to stop operating if we do not stay in the European Union—staying in it is a different proposition. If Brexit is to continue, it makes no sense whatsoever to try to negotiate a bespoke bilateral deal between the UK and the EU on some aspects of family law.

The forum for that kind of agreement should be the Hague, and we should try to have an international agreement on divorce issues there, if we want one, and those issues should be revisited there. The only reason for doing that would be if the UK wanted to remain, in the long run, a closely associated state of the EU in relation to the European Economic Area. That is a political decision. However, even EEA states do not have bespoke deals on family law—let us be blunt about that. Norway does not have one; Switzerland does not have one; Iceland does not have one. It would be unique and highly unusual for the UK to get one, and I do not think that the EU would invest the time and energy in trying to negotiate it. That is not realistic.

As I said, I think that reverting to the common law in the sphere of divorce would not be a huge problem. Remember that people would be in exactly the same position that they are in currently with regard to being able to get a divorce judgment recognised and enforced elsewhere. That is absolutely clear for financial provisions, because the Hague maintenance convention is exactly the same in its scope as the EU maintenance regulation. We are not part of the EU matrimonial property regime, which is an enhanced co-operation regime, and we have no intention of becoming part of it. Therefore, whether or not we are in the EU, the capacity to get divorce financial provisions recognised and enforced in EU states will be exactly the same after Brexit as it is now. That is the reality.

The only difference, which Janys Scott pointed out, is on conflicts of jurisdiction. That is the only substantive difference and yet, sadly, the UK committees did not point that out. They did not do a proper job. Their evidence was not very good—nobody asked me, for example. They did not come to an objective analysis of the relative merits of the two systems. They were driven, in my humble opinion, by politics, and that is not a good thing.

On this point we should be objective, not driven by our pro or anti-European views. For the record, I voted for remain and I am a committed European, but when I look at this issue, I wear an objective, analytical hat. I do not let my politics drive my analysis.

Janys Scott: I want to make one small point in reply. If one is looking at maintenance, one has a question about what maintenance is. A very helpful decision of the European Court of Justice says that maintenance is anything that is awarded having regard to needs and resources for somebody's support. It is not just how much

someone gets per month. It can be a lump sum or the provision of a house.

There is nothing similar in relation to Hague. There is no court that can determine between nations what a particular concept means for the purpose of Hague. That is where the EU regime wins out over the Hague regime—there is nothing supranational to resort to. I do not know exactly what will be packed into the concept of maintenance. I know what is packed in at the moment in the European regulations—and I know that I can go to the Court of Justice if I want further clarification of that in Scots terms. However, there is a problem there, and I lack confidence in the solutions that are being put forward.

10:45

Daniel Johnson: People will not suddenly start getting divorced from other people living outside the EU if we leave the EU—I say "if" because I am optimistic. What happens currently? What are the practicalities of that for Scots who are divorcing people from other parts of the world? What issues do they face? "Hague" has been referred to quite a bit. I am sure that I am not the only one who is probably not as up to speed with that as they would like to be, so if somebody could explain it, that would be quite useful.

Mairi Gougeon: I was going to ask about that earlier. A lot of terms are bandied about. It would be useful to have the Hague and the Brussels 2a maintenance regulations that we are dealing with laid out in as plain English as possible. One of the problems that we talked about is how people pick up such things. It is vital that we look at it. Part of the reason why understanding is lost is that we bandy about terms without laying out as clearly as possible what they all mean.

Liam McArthur: I was going to ask about the Hague convention. You have described a dynamic process in relation to the EU Brussels regulations. It would be helpful if an explanation of Hague included a description of how dynamic that process is. I think that the conventions that have been referred to date from the 70s and 80s, but I presume that there is a process whereby updates can be taken on board where that is felt necessary.

Professor Beaumont: I have been going to The Hague and to Brussels for 20-odd years, so I will try to answer on the basis of having quite a lot of experience of working in both organisations. The Hague conference is the Hague Conference on Private International Law. It is the international organisation that deals with private international law—it is the private international law's United Nations—and it encompasses the whole world. At the moment, not all states in the world are party to the Hague conference—about 80 states are. Some of the most successful conventions have even more parties than that; the child abduction convention has more than 90 contracting states. It dates from 1980 and deals with cases where parents abduct a child from one contracting state to another. It is a system that, in principle, requires the child to be returned to the country from which he or she has been abducted, and it works very well. A sophisticated set of case law has been developed not by a unified court but by the senior courts throughout the world. We have clear jurisprudence from the UK Supreme Court, the US Supreme Court, the Canadian Supreme Court, the Australian High Court and the French Cour da Cassation—the highest courts in all the major countries in the world.

We develop uniform jurisprudence in interpreting international treaties through careful interaction between the highest courts. In the European context, it is sad that even when the Court of Justice is interpreting international conventions it does not look at the jurisprudence from other countries; it takes a unilateralist, Europeanist position. It is not notably internationalist. I say that with a heavy heart, but it is the truth, and sometimes we have to speak the truth to power. That is the problem with the European Union. The Court of Justice views everything from the perspective of European integration. It is politically driven; it is driven by an agenda of a federal Europe. You might or might not believe in that, but that is its raison d'être. Even when it interprets international treaties, it does not look for a uniform international interpretation; it looks for the interpretation that best suits European integration, which is a bit of a conflict of interest in our area.

Child abduction is dealt with by the 1980 convention. Parental responsibility and access is dealt with by the 1996 Hague convention, adhesion to which is growing, although there is still a long way to go—more than 40 states are signed up, including all the states of the European Union. Brussels 2a is modelled on the 1996 convention. It gives a perfectly workable regime for recognising and enforcing orders in relation to parental responsibility and access in the 40-odd countries that are party to it. Post-Brexit, if we did not have a bespoke arrangement, all the EU states would apply Hague 1996 and Hague 1980 to us. That is part of the EU acquis, which it will not abandon. That will stay in place, so there is no cliff edge.

We move on to maintenance, which is covered by a more modern convention: the 2007 Hague convention, which I negotiated. We then built the EU maintenance regulation 2009 on the back of that. Janys Scott is right to say that it basically follows the convention with additional direct jurisdiction rules. However, I do not see great

value in direct jurisdiction rules. We can have our own direct jurisdiction rules, but the EU direct jurisdiction rules are not going to change.

We know what rules the EU operates and we can operate either exactly the same rules or similar rules. There is no big certainty problem there, because clients will know what the rules are in Europe because they are what is in the EU regulation. You can take your choice. It is not a big problem whether we are in or out—it makes no difference.

Those are the three areas of family law that are covered by conventions. The maintenance convention is growing in popularity—as I said, it was recently ratified by the US and Brazil. Globally, there are several countries that are coming on board. All the EU countries are party to it because it is part of the EU acquis, so they will stay party to it post-Brexit.

Janys Scott is right that we have to become an independent contracting state to the maintenance convention because at the moment we are only party to it as a member of the EU. I know that the UK Government is committed to doing that. There is a technical problem in relation to a transitional issue, but given that we have a transitional arrangement, I hope that we will be able to make that work. That should be okay.

In family law in relation to children, we have three international regimes, with many international parties, which will apply to the UK. We have a separate, different regime that we operate with the EU. If we leave the EU and do not continue with those arrangements, we will continue to operate the international regime with the rest of Europe. It will be easier for students, practitioners and most other people to deal with. You have to ask very hard questions about whether there is sufficient added value in the EU system to justify having a totally separate regime, which would have boundary issues in its application.

Divorce is the one area in which we do not have a successful international regime. There is a Hague convention on divorce and several EU states, including the UK, are party to it, but it covers only the question of recognising the divorce itself, which is rarely controversial even without any sort of treaty regime, because states have their own unilateral rules on recognition and enforcement. It is highly unlikely that any divorce decree granted in Scotland or the rest of the UK will not be recognised in another European country post-Brexit in the absence of any treaty framework.

That means that we are really talking about money, because custody is dealt with under the 1996 convention. As I said earlier when we were talking about money, spousal support, which is covered by EU law, is also covered by the maintenance convention. That is a fact. The dividing line between matrimonial property and maintenance, which the Court of Justice has outlined in several cases—including Van den Boogaard v Laumen—will be the starting point for the Hague, too, because those who negotiated the Hague convention understood what the current concepts were on the division between maintenance and matrimonial property. It is in the explanatory report. I do not see any difficulty in thinking that the Court of Justice's broad view of maintenance will be maintained.

In the future, I worry that the adoption of the enhanced co-operation matrimonial property regulation by many member states, but not the UK, will mean a slight diminution of the definition of maintenance in the EU, because they may put more back into the matrimonial property side. That would be a bad problem for us even within the EU, because we are not in the matrimonial property regulation.

The Convener: That is a very full explanation. I am sure that others will want to pick up on it.

Rona Mackay and Ben Macpherson want to come in, so I will bring them in and then some more witnesses.

Rona Mackay: You were in danger of losing me there, I am afraid, Professor Beaumont. I want to pick up on your point that it does not really matter which regime we choose to use, because there is very little difference. However, what do you say to the points that we have heard about there being no reciprocity, that the situation is all very one sided and that while we might do something, others do not necessarily have to agree to it?

Professor Beaumont: That is a good point. You are right: I did not get to that.

On reciprocity, I would not continue unilaterally to apply a lis pendens rule that the other side is not applying. I do not see any advantage in that. If we have conflicts of jurisdiction in divorce cases, I would like to see us move back to forum non conveniens, make our own decision and encourage reciprocity in the international sphere. That will take a long time; I do not pretend that it will be sorted out quickly. However, there is room to revisit the issue of divorce in the international sphere and to try to get a better regime on conflicts of jurisdiction. That would be the ideal solution.

On a unilateral basis, we should accept that there is quite strong evidence. I can refer the committee to cases in which, as I said earlier, people have been exploiting the lis pendens rule because the provision on divorce in different systems in Europe is markedly different. Even in

the UK, that is a problem. Practitioners tell me that there is a big incentive for women to go to England rather than Scotland, if they can, because the English financial provision tends to be more generous to wives than that in any other European regime. There is therefore a well-documented tendency for people to exploit the race to court and to use the fairly generous jurisdiction rules that exist on divorce to enable, in the one case, women to go to England, predominantly, and, in the other case, men to go—or to escape—to France, Italy or some other European country

That is a real problem, which was identified in the commission's expert group. One solution would have been to create a transfer provision, as we have for child cases, whereby we can transfer a case from one court to another. I had better be careful in what I say. There were a number of people in our expert group who favoured such a provision. In the end, the commission did not introduce any changes on divorce in the Brussels 2a regulation. That was for political reasons. It was frightened about certain eastern European countries raising the question of same-sex relationships. Although there is a dynamic approach to family law in the EU, it is tricky because it requires unanimity. Therefore, in order to get any development there, all 27 states—if Denmark were out, but the UK were to opt in—would need to agree. The dynamism of the EU in this area is not an easy matter, because it is driven by unanimity in exactly the same way as the consensus-based system of the Hague conference.

The Convener: There was quite a lot in that. I would like to direct a question to you, Professor Beaumont, but it would be good if Lucia Clark could come in.

Ms Clark, I think that, in your submission, you mention both mutuality and reciprocity. Is there a difference?

Lucia Clark: I think that I mainly mentioned reciprocity.

The Convener: Perhaps someone could explain the difference. The two terms are used somewhere.

Lucia Clark: I want to pick up on Mr Johnson's question. He asked how we deal with divorce cases involving a Scottish person and another country that is outwith the EU. I deal with those quite a lot. The answer is that such cases are quite difficult and problematic.

There is a variety of ways in which we can try to sort things out. We can hope that everybody will be sensible and agree, in which case we can just negotiate a deal and not argue about which court should deal with the case.

It is problematic if there is a link to a middle-eastern country—for example, if the husband is living somewhere like Dubai or Abu Dhabi. In such a case, he might try to use a very quick system to get a divorce, in which the wife does not have an opportunity to participate. He might get something through very quickly, without financial provision for her—perhaps through something similar to the Islamic regimes. In such cases, we are left with trying to race to get a decree of divorce here. There is a competition over who can get to the end goal most quickly. It is not about who can start proceedings in court first, but who can get to the point of having a divorce and financial orders.

11:00

Daniel Johnson: Can you give a specific comparison with jurisdictions that are more similar to ours—for example, Norway or the United States?

Lucia Clark: Yes. A case in America, for example, might involve an argument about forum non conveniens regarding what is the most convenient forum and the best place to hear the case, given where the assets and witnesses are and where the parties have the most links. We can also run that argument in the Scottish court, which can say "Yes, we agree we're the best place to deal with the case" or "No, we're not." However, one of the difficulties with that kind of argument is that a court in, say, Alabama is not bound to follow it and might say "No, actually. You may think that you're best placed to deal with it, but we don't agree and we're going to keep ploughing on and run the divorce here." The result would be parallel proceedings, which are expensive and difficult.

Daniel Johnson: Proximity must exacerbate that risk. I am thinking about Ireland, which is probably one of the jurisdictions where the issue would come up most. It might be quite difficult to determine where people are living and where the assets are because people could be living between two places.

Lucia Clark: Ireland currently uses the lis pendens system—first past the post—but if it went back to forum non conveniens and people with quite equal links were split between countries, it would become a judgment call. I have also had cases where, frankly, it has just become a stalemate because nobody can afford to run those kinds of jurisdiction arguments, which are very interesting to lawyers but not very interesting to the spouses, and the case just sits there until somebody eventually gives in. There is no effective way of looking at that.

How big a problem would it be if we were operating that within the European Union? As you said, the countries are closer, so we could argue

that the problem would be bigger. I wonder, though, whether Scots tend to emigrate to other places rather than to places within the EU. I am not certain, but I would be interested to know how big a problem in terms of numbers of cases it would be. There would certainly be more cases clogging up the courts and making very interesting work for lawyers, but that would not be so interesting for the families involved in such cases.

I return to a point that Professor Beaumont raised about England and Scotland. I am dual qualified in Scots and English law and I deal with cases that go through both the English courts and the Scottish courts. There are a lot of cases where, for example, husbands would quite like to be dealing with things in Scotland and wives would quite like to be dealing with things in England. It is occasionally the other way round, but that is the stereotype. The EU rules do not operate between England and Scotland comprehensively through the regulations, so the Brussels 2a regulation, which deals with where people can divorce, does not operate between England and Scotland; instead, there is an internal UK law that states that the place where the couple last lived together determines where the case will take place. That is a definite, fixed rule that works quite clearly and well.

However, the maintenance regulation, because of the way in which that has been implemented between Scotland and England as an internal UK matter, operates between Scotland and England, which causes some problems. There are currently cases where divorce and division of assets are being dealt with in a Scottish court and spousal maintenance is being dealt with in a court south of the border. That makes very little sense to me, but that is something that we can fix internally.

I know that this is not the purpose of this evidence session, but the flaws and discrepancies in how things work between Scotland and England are a real, day-to-day bugbear in my job. How we implement the EU law between our respective countries and how that flows is not well thought through.

The Convener: I will bring in Ben Macpherson then John Finnie. It would be good if you could bring your questions together.

Ben Macpherson: I will try to bring the theoretical and practical together in my questions. My questions are directed specifically to Professor Carruthers and Janys Scott QC.

Juliet Harris stated that the European Union (Withdrawal) Bill will have disadvantages for individuals who have a family dispute going through the Scottish courts. Does the bill have any other theoretical or practical disadvantages?

Professor Beaumont's points on the Hague conventions were interesting. Is there clarity on how they can guarantee protection for Scots on exit day? I do not want to quote selectively, but he stated that, although a number of areas should be okay, there would be a gap with regard to divorce.

My understanding on reciprocity is that a number of changes to family law at an EU level are expected to commence weeks or months after exit day. What challenges would divergence present?

The Convener: Before I bring in John Finnie, I say that we aim to conclude the session at about 11.15.

John Finnie: I have a brief question about two terms that the committee hears quite often: access to justice and legal certainty. In the present situation, is the panel's view that there is access to justice because there is legal certainty?

The Convener: I will also bring in Mairi Gougeon to ask just a little question.

Mairi Gougeon: I will try to make it little, but a lot has been raised in the meeting. Even if I cannot get answers to the questions, it is important to ask them anyway. A lot of the points that I was going to ask about have been covered.

How much of Scotland's domestic law, especially family law, is based on EU regulation or directives? What impact will that have when we leave? The negotiations are taking place at the UK level, but we have a separate legal system in Scotland. If an agreement is reached for the UK as a whole, what impact might that have on Scots law and the development of law in the future? I was interested to hear of Professor Beaumont's input to directives—it seems that the UK plays an important role in the formulation and direction of law. Moving into the future, how can we have an impact on that?

We have heard that there will be gaps in relation to the European Union (Withdrawal) Bill. How confident are panellists that the issues that they have raised are being looked at? Are they able to feed in to the process? Is there anything that we can do to influence the situation in relation to Scottish law?

The Convener: We will try to attend to all the questions that have been asked. The first was Ben Macpherson's question about the practical and theoretical disadvantages of Brexit for this area.

Janys Scott: There is a lot to talk about. I urge the committee to look at the profile of family law. It is a long way down the list, compared with trade negotiations and so on, but it is important for citizens in Scotland and the UK. Can we raise the profile of family law, please?

We are looking at procedure: where to litigate and what happens at the end of the litigation. We have no challenge to the integrity of Scots law as it is administered in Scottish courts in the middle of that. However, family law, as the committee will be aware, is a fast-moving field and there is rapid development of what is viewed as the shape of modern families. Our issue is how responsive our procedures are to that development. Professor Beaumont spoke eloquently about the Hague conference, which is a group of people who formulate a treaty internationally to which member states can sign up or not. Some treaties are more successful because they are well signed-up to, whereas others have few signatories. Those are on very contentious areas.

In Europe we have a more hands-on position where there are fewer states. Admittedly, it is very hard for the 27 states to formulate a position on some of the issues, but we have got to a point where there is greater legal certainty and therefore, as Lucia Clark was explaining, less distress, because you can tell people what the situation is.

One thing that has been left out from the academic perspective is the number of times I can sit down with a person and say, "This is what will happen—don't waste your money." You do not see those sorts of negotiations and advice in the international research on the cases that are launched. Such things have a big effect behind the scenes.

On the recasting of Brussels 2a, there is a third development in the way that the regulation is going, with regards to procedure and enforcement. As Juliet Harris has eloquently explained, a lot of the issues arising from the UN Convention on the Rights of the Child have been taken on board. It would be difficult to go back into those issues in the Hague.

There was a really bright point there and we do not know where we will stand with that recasting because we do not know when it will come into force, we do not know how it will be dealt with in terms of the withdrawal bill, and we do not know whether we will be ossified in the current regulation or whether we will be able to take on board the developments that Juliet was talking about.

I do not know whether that gives some of the answers.

The Convener: That is good. Does anyone else want to comment on access to justice and legal certainty?

Professor Carruthers: In response to Mr Macpherson's question about the impact of the withdrawal bill from the UK citizen's point of view, I will emphasise something that we have already mentioned: there will be a loss of reciprocity on the existing solution because the UK will apply a lopsided version of the Brussels 2 bis regulations on parental responsibility and maintenance.

Based on current drafting, we will continue to honour our existing obligations but the other member states will not because they cannot, in terms of the wording of those regulations, be reciprocal in their application. That will be a disadvantage to UK citizens.

The second potential disadvantage is that on the basis of the withdrawal bill, we will take a snapshot of those regulations as they stand on exit day, but EU law is not fixed in tablets of stone. It will change from time to time. We will have a version of it as it stands in March 2019 while all the other jurisdictions develop in line with case law and other regulations that they might decide to recast.

The lopsided nature of the situation will give a very imbalanced set of rights to UK citizens. In contrast to what Professor Beaumont said, but in line with what the House of Commons Justice Committee report and the House of Lords EU Select Committee report said, I would very much favour an attempt by the UK Government to negotiate some agreement with the EU27, not just on Brussels 2 bis—I think that it is, as Professor Beaumont said, completely naive to imagine that the EU would enter into a bespoke agreement on one regulation.

We have a whole suite of EU regulations in this area that have given us a very sophisticated set of rules for cross-border problems, not only for families but for consumers, employees and businesses. Looking in the round at that suite of regulations, it would be possible—in line with what the House of Lords and House of Commons committees have favoured—to try to negotiate some sort of bilateral solution whereby we retain all the great benefits of speed and more limited costs that the EU regulations have brought. I would support that as the current negotiating position.

Ben Macpherson: Would there be a guarantee on the Hague conventions available to Scots on exit day if there was a hard Brexit?

Professor Carruthers: There is no guarantee in terms of the operation of the Hague conventions; there is no single court of overarching interpretative jurisdiction in the way that we have the Court of Justice of the European Union for the European regulations. No guarantee can be given; all the courts of contracting states could be trusted to implement and operate the Hague conventions as they have been doing to this date but I would not give a guarantee on it.

11:15

Lucia Clark: I want to pick up on two points. The first is on Mr Finnie's question of whether there is greater access to justice at the moment because there is certainty.

As I tried to point out earlier, where there is a discretionary system about fairness, it is easy to laud that and say how wonderful it is, but if it means that clients coming through my door cannot afford to litigate, there is little point in having it. I see that situation because I deal with English cases, which are much more discretionary, and Scottish cases, in which the domestic law is much more certain. I sometimes have English cases in which I think that somebody would have a wonderful case if they could afford £10,000 to take it to a final hearing, but they cannot, so the Scottish system is able to serve them better because it is more certain.

That is a comparison on that point. We can extend that out and ask whether the first-past-the-post rules give greater access to justice because they are clearer and everybody knows where they stand, even if it is perhaps not the fairest system case by case. They arguably do. Having said that, I do not like that system. It is not fair but it might be the best of a bad set of options.

Juliet Harris: All these conversations are about the experiences of children and young people. We are talking about children being taken to another country, being separated from their parents and going through really traumatic points in their lives. Whether we are talking about the Hague conventions or Brussels 2a, a really important point for the committee to consider and the UK Government's negotiations to address is where the child is in the discussion. How can we ensure that, whatever procedures are in place, the child's views are heard and taken into account and their best interests are central to proceedings? We know that that produces the best outcomes for children and young people and that it is the best thing for your families and constituents.

I agree with Janys Scott and urge the committee to raise the profile of family law in the Brexit discussions. Raise the profile of children and young people because their voices are not being heard and they are essential in family law processes.

The Convener: Are there any final words?

Professor Beaumont: I was asked earlier about the dynamic nature of the Hague conference and I did not answer. The Hague conference will not constantly revise its conventions because that is not the way that it operates and it is not the way that international law tends to operate.

I accept that one of the advantages of the EU system is that we can constantly revise if we remain in the EU. However, we cannot do bespoke deals with the EU on the basis of constant revision. Let us be honest: either we are in the EU, are able to do all those things and can be a full player or we are not. If we are going to have Brexit, there are implications. We cannot mimic the EU from the outside. That is the reality. Some people are trying to mimic it but, in the long run, that will not work. That is why, in the long run and putting transitional arrangements to one side, we have to get used to the idea that we will not operate an EU-based system in family law. The rational thing is to operate an international system and try to make it work well.

I am involved in the Hague conference as the chair of an expert group that is trying to get a convention based on a radically new idea to promote family agreements, which are not good within the EU system or the international system. An opportunity exists to try to get a new convention that would encourage family agreements, which are the real way to protect children's rights. The idea is for parents not to fight or have disputes but to resolve matters as sophisticated adults whose own relationship has broken down but who, for the sake of the children, will sort things out properly. Such a convention would provide a system whereby family agreements would be recognised and enforced throughout the world, which we do not have at the moment. We have no system of promoting agreements within the EU or externally. That is the reality and we need to try to improve it. The one forum that is considering it at the moment is the Hague conference, not the EU.

The Convener: We will leave it there, as the clock has beaten us. One thing is crystal clear: if anyone thought that family law would not be contentious, we now know that that most certainly is not the case.

I thank all the witnesses for their evidence, which is invaluable to the committee. We will use it to consider how we move forward.

I suspend the meeting to allow for a change of witnesses and a five-minute comfort break.

11:19

Meeting suspended.

11:28

On resuming—

Brexit (Civil, Commercial and Consumer Law)

The Convener: Item 3 is a round-table evidence session to explore issues of civil, commercial and consumer law in the context of the United Kingdom's departure from the European Union. I welcome all the witnesses—I start, as I did in the previous session, by asking everyone to introduce themselves. I am Margaret Mitchell, the convener of the committee.

Gael Scott: I am one of the clerks to the committee.

Gillian Baxendine: I am also a clerk.

Fulton MacGregor: I am the MSP for Coatbridge and Chryston.

Jason Freeman (Competition and Markets Authority): I am a legal director at the Competition and Markets Authority, and I deal mainly with consumer law.

Ben Macpherson: I am the MSP for Edinburgh Northern and Leith.

Frank Johnstone (Dentons): I am a partner with Dentons.

John Finnie: I am an MSP for Highlands and Islands.

Graeme Paton (Society of Chief Officers of Trading Standards in Scotland): I represent the Society of Chief Officers of Trading Standards in Scotland.

Liam McArthur: I am the MSP for Orkney.

James Mure QC (Faculty of Advocates): I am from the Faculty of Advocates.

Peter Sellar (Faculty of Advocates): I am an advocate with the Faculty of Advocates.

Liam Kerr: I am an MSP for North East Scotland.

Maurice Corry: I am an MSP for West Scotland.

Professor Beaumont: I am professor of EU and private international law at the University of Aberdeen.

Mairi Gougeon: I am the MSP for Angus North and Mearns.

Professor Carruthers: I am professor of private law at the University of Glasgow.

Daniel Johnson: I am the MSP for Edinburgh Southern.

Rona Mackay: I am the MSP for Strathkelvin and Bearsden, and I am deputy convener of the committee.

11:30

The Convener: I thank all the witnesses for their written submissions. I noticed someone trying to press their microphone button—you do not need to do that; as soon as I call your name, your microphone will come on automatically. As in the previous session, we are hoping for a good dialogue between witnesses, so you can add to, challenge or question whatever someone else has said. We are aiming for an evidence session that is flowing and flexible, rather than rigid, although obviously everything that is said is in the public domain. In order to ensure that the session does not deteriorate into a shambles—I am sure that it will not—I ask everyone to speak through me as the convener, as that would be helpful.

As with family law, which we discussed in the previous session, issues of EU law in relation to Brexit are very technical and potentially very complicated, so we aim to distil them into a conversation that is reasonably easy to understand, and which will allow us to gather good evidence to enable us to move forward.

I begin by asking the witnesses to explain, in their opinion, the size of the issues around civil, commercial and consumer law in the context of Brexit, and what they consider to be the likely impact on consumers and businesses in Scotland. Who would like to start?

Professor Beaumont: I cannot begin to give you an answer on the scale of the problem—I am not a practitioner, so that would be a little presumptuous of me—but I can outline the legal issues from a private international law perspective. Other witnesses, such as the witness from the Competition and Markets Authority, can describe some of the issues that do not relate directly to that area.

In private international law, the issues—as Professor Carruthers said in the previous session—always involve three points. First, there is jurisdiction, or which court will hear a case; secondly, there is applicable law, or which law will govern the dispute; and thirdly, there is the basis on which foreign judgments are recognised and enforced. In that sense, private international law is really quite simple.

In the civil and commercial field, the rules in those areas are harmonised across Europe. There is one instrument—the Brussels 1a regulation, as it is now—that deals with jurisdiction and recognition and enforcement of judgments, and two instruments that deal with applicable law: the Rome 1 regulation on contracts and the Rome 2

regulation on non-contractual obligations. The EU regime began with the Brussels convention in 1968 and has developed over many years, so there is a long history in this field.

On applicable law, the regime began with the Rome convention in 1980. When the treaty of Amsterdam was signed in 1997, there was a move away from conventions and treaties between EU states towards EU regulations, which is why this area is now governed by EU regulations in the form of Brussels 1a, Rome 1 and Rome 2. The system for jurisdiction and recognition and enforcement of judgments is very simple because of the progress that has been made over the years in the context of Brussels 1a, and we have clear rules for applicable law in Rome 1 and Rome 2.

The effect of Brexit will depend, of course, on the nature of the deal that might be done. If we assume that, after any transitional period, there is no special deal between the EU and the UK in this area, what would happen? We would potentially fall back on a broader European regime—the Lugano convention—that applies to some European Free Trade Association countries. The UK, as an EU member state, is currently a party to the Lugano convention, which applies to Norway, Switzerland and Iceland as well as to all EU states. If we want to remain a party to the convention, which is current UK Government policy—that is in the public domain—we will need the consent of all the other contracted states. The easiest route in that regard would be for the UK to become a member of EFTA.

If we were in the Lugano convention, the changes in comparison with our current adherence to the Brussels 1a regime would not be enormous. Lugano is based on the Brussels 1 regulation from 2001, whereas we now have in Europe a modified version of that regulation in the form of the Brussels 1a regulation of 2012. We would, therefore, basically be going back to the law as it was in 2001. On most matters, that is not a big deal, but there is one important area to consider.

I negotiated the Brussels 1 and Brussels 1a regulations for the Scottish and UK Governments in the Council of Europe. The big change that we won, and were pleased to win, in Brussels 1a was to do with choice-of-court agreements. Let us imagine that two parties have agreed to resolve their dispute in Edinburgh, but one of the parties reneges on the deal and goes to Italy to try to litigate there in the hope of drawing out the whole process and getting a settlement, because Italian courts are slow. Under the new Brussels 1a system, the Scottish court can go ahead and hear the case, and the Italian court has to stop hearing the case until the Scottish court has made its decision, because the Scottish court was originally chosen. Under the Lugano convention, the system operates under the traditional first come, first served approach in Europe, whereby if the Italian court receives the case first, it decides whether the choice-of-court agreement is valid. The process is slow, and can take years. That is an important difference between the Lugano convention and the Brussels 1a regime, and it would certainly be a disadvantage in that respect if we were to operate under the former regime rather than the latter.

The area of applicable law is not a problem, because Rome 1 and Rome 2 are applied by EU states unilaterally and universally. The rules in Rome 1 and Rome 2 that identify which law applies to a dispute will be applied in the future by EU states in the same way as they are now, whether or not we are a member of the European Union. We can unilaterally continue to apply Rome 1 and 2, which is the current plan, so there would be no change. There is no conceivable problem on applicable law; the problems relate to jurisdiction and recognition and enforcement of judgments.

To complete the picture, I should point out that we may not be able to stay in the Lugano system. That is a possibility, given that there are voices—Professor Hess from Germany has been raising his voice, for example—that are saying, “We do not want the UK in Lugano, because if it is not a full member of the EU, it will not comply with ECJ decisions”. However, as a professor, I was recently invited by the Swiss Government to attend an official Lugano experts meeting, and I did not hear such voices being raised there. In all honesty, I would say that there is, among the states that were represented at that meeting, more of an openness to the idea of the UK staying in the Lugano convention, and I hope that that would remain the case if the UK decided to try—as it currently wants to—to stay in Lugano and to work out how to make that happen.

If, for some reason, we are not in Lugano, what do we have? We currently have only one bit of an international regime in that regard, which is the Hague convention on choice-of-court agreements. That means that, where there is an agreement between the parties as to jurisdiction, it will be respected vis-à-vis the EU, because the EU is a party to that convention. If we leave, we will become a party to the convention—that is current Government policy—and therefore it would apply to arrangements between the UK and the EU. However, that leaves all the cases in which the parties have not made a choice-of-court agreement, and there are currently no international rules for recognition and enforcement of our judgments in the rest of Europe that would cover that scenario.

I am currently, as an independent expert for the EU, negotiating in The Hague a new convention on recognition and enforcement of judgments. The

process is at a fairly advanced stage—there is one more special commission and then a diplomatic session to come, so it should finish next year. The EU's current policy is to support the new convention, and I therefore have every reason to believe that, in due course, it will be ratified by the EU, and—I hope—by the UK in its new out-of-EU form. We would then have between the UK and the EU a perfectly workable recognition and enforcement regime to ensure that judgments that are given in Scotland are recognised in Germany, and vice versa. However, the new convention will not be in place immediately following Brexit, as that will take a few years, so if we have a hard Brexit there will be a gap in relation to the recognition and enforcement of commercial judgments that are not based on choice-of-court agreements.

The Convener: I am tempted to ask you what you do in your spare time, but I will not.

Professor Carruthers: In the current wording of the European Union (Withdrawal) Bill, the effect of the repeal of the European Communities Act 1972 will be that the European private international law regulations will "cease to have effect" in the UK. The most significant of the instruments to which Professor Beaumont referred is the Brussels 1 recast regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Looking at the matter practically from the point of view of a UK business, consumer or employee, it is clear that the Brussels framework provides great advantages for such parties. The Brussels regime, which was designed to support the internal market, constitutes a set of agreed rules of jurisdiction in civil and commercial matters and, flowing from that, it sets out the principle that a judgment on a civil and commercial matter that is issued by a court in one member state will be recognised and enforced in all other member states. There are certain exceptions, but the principle is basically to provide for reciprocal recognition and enforcement, which allows for the portability of a judgment. For example, if a Scottish consumer, employee or business gets a judgment in a court in one member state, that judgment is portable and can be enforced across the EU. That is a great advantage.

When Brexit happens, even if the UK adopts the wording of the recast regulation in domestic law, we cannot bring about the reciprocity that we currently enjoy. Even if a Scottish court is prepared to recognise a judgment that is issued by a French court, for example, we cannot ensure that a French court will reciprocate vis-à-vis a Scottish judgment. The consequences of that for businesses and consumers—people who currently operate under the terms of the recast regulation–will be prejudicial.

The current scheme as outlined in the withdrawal bill will not be effective in ensuring reciprocity for businesses and consumers, which is a flaw in the current proposals as far as private international law is concerned. That involves a focus on the recast Brussels regulation; one could point to a raft of other regulations that deal with more procedural matters and to instruments such as the insolvency regulation, on which the same reciprocity cannot be brought about simply by the UK Government taking action alone. If there was any hope of preserving the benefits of the European regulations, action would have to be undertaken bilaterally with the EU 27—it is not something that can be achieved through the withdrawal bill alone.

Ben Macpherson: I take the point about the potential for commercial and consumer uncertainty as a result of the European Union (Withdrawal) Bill as it is currently drafted. Graeme Paton states in his written submission:

> "At the point of Exit, the UK's participation in the Rome Convention may cease and these protections will no longer be available to UK consumers. This could have a major impact on consumer confidence to buy goods and services from Europe."

I am interested in hearing more about the impact on consumers in Scotland and across the rest of the UK.

I also have a question for Frank Johnstone. As a representative of a commercial law firm who is involved in drafting commercial contracts, will you tell me what impacts there currently are on solicitors who are trying to agree transactions for clients? How is the current uncertainty affecting the economy and transactional activity? What considerations have to be taken into account in drafting contracts to try to mitigate the vast uncertainty that the EU withdrawal bill has created?

11:45

Frank Johnstone: As I made clear when I accepted the invitation to speak to the committee, my interest is primarily in consumer law in a domestic UK context. However, I am aware that commercial enterprises in particular have been—and are—looking at how they can safeguard and achieve a degree of certainty when they enter into contracts. That is certainly not the case for consumers, who are less able to take positive steps to secure their interests.

Going back to a point that both Professor Carruthers and Professor Beaumont made, I reiterate that the ability to enforce a judgment abroad is critical for the consumer interest. I think

it was Lord Stair who said that a right without a remedy is like a bee without a sting. A right without an effective, accessible and cost-effective remedy is really not sufficient to safeguard the consumer interest.

Graeme Paton: I made that point about the jurisdiction of consumer contracts in my submission purely because, as trading professionals, we advise consumers on their rights and remedies under the law as it stands. Jason Freeman probably has a good deal more knowledge in this area than I do, but my understanding of the jurisdiction of consumer contracts under the Rome conventions is that, under the current arrangements, a consumer has the right to raise an action against a European business in their own court, but they keep their domestic rights under consumer contracts rather than taking on those that are offered in the foreign jurisdiction. If that changes, consumers' rights will differ depending on where they buy goods from. That presents the danger of divergent rights for consumers as we leave the EU. It also raises issues for us in trying to advise consumers, depending on the jurisdiction from which they bought products.

The Convener: Does Jason Freeman want to add anything?

Jason Freeman: It would be useful to make a couple of points at this stage. First, we should take a step back, look at the whole corpus of consumer law and emphasise the widespread harmonisation that has taken place in that field at the EU level. A huge amount of harmonisation has been achieved of the substance of the existing law across the UK, particularly through the unfair commercial practices directive, but also through other instruments such as the consumer rights directive, which has harmonised cross-border and domestic distance contracts and laid down various other rules. In addition, there are other, more sector-specific harmonised laws.

In principle, all those laws will, as I understand it, be transferred into UK law at the point of exit. However, the UK Government will be able to diverge from those laws, and the reality after Brexit may be a divergence between UK law as it is at the date of exit and EU law as it develops. A number of legislative proposals—and some policy proposals that may become legislative—are in train that are likely to change EU law. That will mean that the UK will have a choice between implementing those changes, which we would be able to do as a sovereign country, or not implementing them, which would result in divergence.

Is that going to be important? In the context of purely domestic transactions, it would not make a huge difference; our law would remain the same and there would be less cost to business if we did not implement those changes. However, businesses that deal into the EU would have to deal with different systems.

Where there are such differences and a consumer is dealing with a business that is based outside the UK in the EU—for example, a big online platform such as Amazon or eBay, which is domiciled in Luxembourg—there would be a question over which law applies to the contract and how the consumer would go about enforcing their rights in the event of a problem. Would UK law apply, so that the consumer would be able to bring their case in the UK courts, or not? Others have addressed that point already.

The other point that is worth talking about concerns cross-border public enforcement. As we understand it, the rules under the Rome and Brussels regulations will apply to public enforcement on the basis that our enforcement action is brought under part 8 of the Enterprise Act 2002 and would be a civil and commercial matter. It would therefore be covered by the rules that give the UK courts jurisdiction where UK consumers are affected and that, generally speaking, apply UK law, except in the context of a contract in which a choice-of-law clause has been agreed, under which, as Graeme Paton mentioned, the system cannot deprive a consumer of their mandatory protections under UK law.

The Court of Justice of the European Union made that finding in a case called Verein für Konsumenteninformation v Amazon EU Sàrl, in which it looked at the position for Austrian consumers, but the facts would apply in the same way to UK consumers. In that context, if we or trading standards departments wished to bring proceedings against a business that was based elsewhere in the EEA, we would, subject to funny little differences between the Lugano convention and the other laws, expect to be able to do so in the UK, serving out of our jurisdiction and being able to enforce our judgment without any problems.

Having said that, we in the CMA do think about whether we can give effect to UK rulings without needing to rely on international conventions or regulations, because we may wish to bring proceedings against a company that is not in the EU. We think about the possibility of serving outwith the court's permission. Generally speaking, we think that we can do so if we believe that UK courts would be prepared to accept jurisdiction where there are UK consumers and a foreign business involved. We do not believe that the UK courts would decline jurisdiction in that situation.

Given the realities of modern international trade, it is likely that UK-based intermediaries could be

prevailed upon to disrupt a business's activities, particularly if we have obtained a court order against that business, which means that we would not necessarily have to serve or enforce any judgments overseas. For example, that might involve being able to take down a website or ask for a website to be blocked or for the payment process to be disrupted as part of the usual enforcement of an injunctive-type remedy. Those provisions exist in UK civil procedure rules, and I believe they would also pertain under the Scottish procedure rules.

We have looked at the position of public enforcement in the absence of international conventions. It is not as bleak as it might otherwise be, as we would, generally speaking, be able to extend reach.

I am happy to answer questions on all of that, because I appreciate that there was quite a lot of material there.

The Convener: Absolutely. Before I bring in Liam McArthur, James Mure wants to come in.

James Mure: I want to introduce one or two points. The issue of confidence is key. I am afraid that the great majority of consumers are unaware of their rights under most of the provisions that have been mentioned, although businesses are perhaps more aware of their obligations to consumers.

I looked at the statistics on the number of cases about enforcement of judgments and so on that come into the Scottish jurisdiction. They barely figure at all, even as a little pimple in the bar charts that are published annually. It seems, therefore, that the CMA's international perspective and its ability to co-operate with other regulatory agencies around the EU will be key, because there must be some element of consumer confidence.

The concern is that, if the transitory provisions are not clear and effective, the pass may have been sold by the time we are definitely out of the EU. That is an issue not just for Scots consumers but for Scots businesses. If I am a consumer in Germany who is thinking of flying to Scotland, am I going to use a UK-based airline or would I prefer to use Lufthansa or another German airline so that I understand the position and am clear about what I will be able to do?

All those issues of confidence are key, so the way in which the negotiations are handled in the next 12 months, the outcome of the withdrawal agreement and what happens looking forward seem to be key.

The Convener: I will bring in Liam McArthur before I bring Professor Beaumont back in.

Liam McArthur: My question follows on a little from the point that has just been made, but it is more in response to what Professor Carruthers said earlier. The committee has heard in previous evidence sessions that there is an incentive for both sides, and a mutual benefit to be gained, in continuing to collaborate in the sphere of criminal justice. It is less clear to me whether something similar exists in relation to what we are discussing today, but the comments that James Mure has just made suggest that perhaps it does.

I am interested to hear from the experts who are here whether there is more of an incentive to find some form of agreement post-Brexit, whether through Lugano or whatever, than we have perhaps been led to believe by some of the evidence that we have received.

Professor Carruthers: One consideration is the question of what makes a particular jurisdiction attractive for people to litigate in, or to agree to litigate in at some point in the future, even if they do not actually bring a matter to litigation. The British Institute of International and Comparative Law in London has done quite a lot of research on what makes places attractive to litigate in, and the possibility of securing a judgment in one jurisdiction and being able to take it to another country and enforce it abroad makes a court, as a forum, particularly attractive. That is one consideration, although there are many others.

From a UK perspective, what makes Scotland, or England in a higher number of cases, an attractive forum in which to litigate is the fact that people can take the judgment and—in principle, or in theory, at least—enforce it elsewhere. From the legal services sector perspective, there is a sense that, if we take away the ability through the European scheme to enforce a judgment across the EU, that might make Scotland or England a less attractive forum in which to litigate.

The practitioners are probably better placed to say whether that impact is already being seen: whether it is having a significant effect on Scotland when people look at and draft commercial contracts, and whether it is a concern for clients. It is a consideration in theory, but whether it is so in practice is for others to comment on.

Professor Beaumont: I will deal first with the consumer point. It is important to clarify that the Rome convention does not apply to any contract after 2009—let us be clear about that—and that it applies only to applicable law; it has nothing to do with jurisdiction.

Under the current regime, as Jason Freeman outlined, consumer contracts are governed by the Brussels 1a regulation in terms of jurisdiction and recognition and enforcement, and by the Rome 1 regulation in terms of applicable law. The

combination means that a consumer can indeed sue a business in his own habitual residence, and he can normally apply his own law, unless he agreed to a contract that gave the business a choice-of-law clause, in which case a combination of the foreign law—let us say Luxembourg law, if the business is Amazon—and the mandatory aspect of Scots law will apply. The system is extremely complicated, but it is the one that we have.

What would be the system post Brexit? Unilaterally, we would continue to apply Brussels 1a and Rome 1. The consumer would still be able to sue Amazon in Scotland; they would be applying Scots law in combination with Luxembourg law, if that was the law that was chosen in their agreement, in the same way that they currently do. The only thing that would change is whether that judgment would be capable of being recognised and enforced in Luxembourg.

In practice, as Jason Freeman pointed out, consumers do not engage in such litigation as it is too expensive—it just does not happen. Let us be blunt: private litigation for consumers is a non-issue. Only Jason Freeman can help consumers, through public litigation, and that will continue. As he rightly points out, public litigators are big and strong enough to be able to enforce an English or Scottish judgment against a European company without needing to take the judgment to Luxembourg. Again, in practical terms, I do not see any likelihood of a serious diminution in the rights of consumers because of Brexit.

12:00

If we are talking about commercial transactions between two companies, let us be honest: there is not that much international business coming to Edinburgh because of choice-of-court clauses. It goes to London on a vast scale, and that was happening long before we were a member of the European Union. London is the global capital of commercial litigation; it has been so since before we joined the European Union, and in my view it will continue to be so after we leave. We are envied by our partners in Europe, who would like a share of the business that goes to London, either for arbitration or through choice-of-court clauses that involve big commercial transactions. No European centre can attract that business because none of them currently offers English-language litigation, which is the key. Dublin might be able to do that, but not on the same scale as London.

Liam McArthur: I want to probe a little further on that. It seems, from what you describe, that there is almost an in-built incentive for the other 27 member states to expose as big a difference between the UK and EU approaches as possible, in order to claw back some of the commercial advantage.

Professor Beaumont: That is what Professor Hess would like, as I mentioned. It is true that there is an incentive for Europe to play hardball to prevent us from getting our judgments recognised and enforced in the EU, which would mean keeping us out of Lugano and not giving us a bespoke deal. That is the hardball approach, but not everyone plays hardball. Plenty of people out there would like to co-operate with us and would want us to continue to be partners in Lugano.

To be frank, I do not see much of a reason for a bespoke deal. In order to get such a deal, we would have to accept the binding jurisdiction of the ECJ, which would, in my view, be a mistake. Again, I say that as a committed European: a country should accept the binding jurisdiction of the ECJ only if it is a full member of the EU, and it has a judge on the court and influences its development. It makes no sense for a country to be in such a position when it is outside the EU.

The Lugano convention is a compromise in which countries such as Norway and Switzerland take due account of ECJ rulings but are not bound by the court's decisions and do not always follow them. That is the reality. Therefore, there is a good case for the current UK Government position, which is that commercial business should stay in Lugano so that business will be confident in continuing to use English choice-of-court clauses.

My view is that that is not a big deal. With regard to choice-of-court clauses in which businesses choose London, we have the Hague convention, which is just as good as—in fact, marginally better than—Lugano, although it is not quite as good as Brussels 1a. To be frank, however, Brussels 1a is not an option, in my view, unless we stay in the EU. The real options in the real world are Lugano or the Hague convention. If that is the choice, and we want to protect the London market—we are talking about London in this case, not about Edinburgh or Scottish businesses—for commercial court business, I would argue that the Hague convention is a better solution than Lugano. All the EU partners are party to the Hague convention, so they have to recognise and enforce a judgment that comes from London based on a choice-of-court clause, and they have to give way to London. Under the Lugano convention, as I explained earlier—because of the decision in Gasser v MISAT—they do not have to give way to London. From the point of view of party autonomy, there is no big value in staying in the Lugano system. From that point of view, I am an advocate for a hard Brexit, if you like, in which we stay out of the civil judicial co-operation mechanism and fly in the international

scheme because we—not in Scotland, but in London—are big enough to play in that scheme in a justice context. That is my honest assessment.

Peter Sellar: I want to pick up on a couple of Professor Beaumont's points. He mentioned that there was not likely to be much of a diminution in consumer rights, which goes back to the idea of the average consumer—an individual person—taking a case to court in Scotland. The question of access to justice is as much to do with how much it costs to take a case to court, as was highlighted in the previous session. A small point is the fact that, in Scotland, we pay a lot to the courts for our day in court, whereas people pay nothing in the European courts. I realise that the circumstances would be different, but there are no court fees for people to have their day in court there.

I agree entirely that the choice-of-courts issue is a London matter. Scotland sometimes attracts business, but the service—in my view, anyway—is predominantly England driven, which is something that we know that the UK Government is rather keen to champion. I say that because the official paper from the UK Government mentions UK law, UK jurisdiction and UK courts, which—as a sensitive Scots lawyer—I realise is not quite right; the focus is clearly on London courts and English law.

We have to stand back from the question of what an average consumer or private individual would be doing, and bring back in the public law remedies and the public enforcement powers. At the EU level, the private consumer can rely on a complex matrix of myriad powers and enforcement mechanisms, whether those operate through the European Commission, co-operation via national authorities or other methods. Those powers are almost a fail-safe mechanism to protect the consumer—either the individual goes to court, unlikely as that is, or they rely on what has been decided from a regulatory and a public enforcement point of view and they can call on authorities to come in on their side.

I raise the question of what we are losing when we Brexit, and what reciprocity we will lose. Will we be able to continue to piggyback on the RAPEX recall system and to participate in the SOLVIT system? Will we have access to all the information on biocidal products, cosmetics, chemicals, toys and so on? What will happen after Brexit? Those aspects are as much a part of consumer protection as the ability for individuals to assert their rights in a court.

The Convener: Could you elaborate on SOLVIT and the other acronym that you mentioned? We are not well versed in those details.

Peter Sellar: Of course. There are a few EU directives and regulations that put in place harmonised systems for co-operation among all the member states. For example, if a good that is made by an Italian producer and sold throughout the European Union turns out to be faulty, it will appear in a weekly bulletin. There are updates, and every day you can go on to the website and it will show you exactly which products have problems. I checked it yesterday; a children's toy with funny eyebrows is being recalled—it is flammable, apparently. A statutory recall process is put in place so that all retailers have to take measures to recall the offending item. The producers—or the importers, because if the product is made by an American producer, the importer will be on the hook—have to take measures. RAPEX—the rapid alert system for dangerous non-food products—is an example of a harmonised system that is there to protect the consumer from dodgy, faulty or defective products.

The Convener: Thank you—an example is always good.

Jason Freeman: I thought it would be helpful if I went into a little bit more detail on the existing provisions for cross-border enforcement collaboration and the existing opportunities that enable us to enforce UK rights and UK law overseas. A number of years ago, the EU devised a piece of legislation called the injunctions directive, which came into force in 2000 and was updated in 2009. It created the enforcement regime under part 8 of the Enterprise Act 2002, and it permitted the CMA and other public enforcers to have standing in courts elsewhere in the European Economic Area so that we could bring cases overseas to enforce rights at a collective level.

It is important not to overemphasise the importance of that directive. The only enforcer that has brought a cross-border case in that way is the Office of Fair Trading, which did so in Belgium and in the Netherlands—those were difficult and expensive cases. Although the directive is a useful fall-back position, it is not ideal. Indeed, the European legislator accepted that, and devised the consumer protection co-operation regulation, which is in the process of being revised. The regulation lays down several features that have been implemented in UK law, including a minimum set of investigation powers and the requirement to collaborate with other enforcers. In the event that we wish to request investigative assistance, there is a mutual obligation to collaborate and to carry out that investigation. For example, if a business that is based in Slovakia is sending mass-marketed mailings to the UK, and we want to know what is going on in its office, we can request that the Slovak consumer protection authority carries out an on-site inspection and finds out what is going on there. We could, if we decided to do so, request that the Slovak authority brings

enforcement proceedings against the business to stop it sending misleading mailings to the UK.

The system is a reasonably effective bilateral cross-border enforcement mechanism, and we are hopeful either that it will remain available to the UK after Brexit or that a similar bilateral arrangement will be put in place between the UK and the EU. An enforcement gap, whereby British businesses would be able to mislead French consumers without there being any mechanism for cross-border enforcement, would be in nobody's interest. The replication of those provisions should be negotiable as we move forward.

The consumer protection co-operation network has recently been developing a way of working together in which we tackle a common problem, such as a big issue with business that is going on across the EU and on which we need to co-ordinate at a European level. Four such joint actions have taken place so far: three on games and apps for children, car rental and social media, and a slightly more light-touch joint action on airline terms and conditions, which was not co-ordinated at the same level. Those are useful ways of tackling things at a regional level, and likewise it should be reasonable to negotiate continued access to that sort of collaboration as we move forward so that we can continue to deal effectively with big problems that affect consumers across Europe.

The Convener: Can you explain the difference between directives and regulations? Does one trump the other? Does it make a difference, in considering the impact of Brexit, whether the legislation that we are looking at is a regulation or a directive?

Jason Freeman: The differences can be quite technical. A regulation is directly applicable across the European Union, and specific legislation tends not to be required for its implementation unless a particular mechanism is necessary. For example, with the CPC regulation, we had to implement the powers provisions—the regulation said that member states have to ensure that the powers exist, but it did not give the enforcers the powers. A directive is binding as to the effect that it seeks to achieve, but it usually requires implementation by the UK, so there is a slightly different legal framework.

In practical terms, if the unfair commercial practices directive had been a regulation, like the geo-blocking regulation, it would probably have been drafted in exactly the same way, so the effect would not have been hugely different.

The Convener: Thank you for clarifying that.

Daniel Johnson: I remind the committee of my entry in the members' register of interests: I am a director of a company with retail interests in the west end of Edinburgh. I state that fact because, although we have talked a lot about consumers and big business, I want to ask—following on from James Mure's comment about whether a German traveller would use a UK website to book his flight—about online trade and small and medium-sized businesses. The UK's online retail offer is much better developed than is the case in the rest of the EU. Last time I checked, I found that the proportion of our retail sales that are made online is double the proportion in the rest of Europe. What are the implications of the proposed changes for online retail and for small and medium-sized businesses that want to sell into Europe? At present, if a business complies with UK regulations, it knows that it can just sell away. What perspectives do you have on the impact of Brexit in that regard?

12:15

Frank Johnstone: That is an interesting point, because sales within Europe and abroad to consumers in the UK are increasingly affected online. There are challenges in regulating that sector, especially if we are no longer part of a larger geographic and economic group. That relates to the point that Jason Freeman made. Where there are risks, and emerging risks, emanating from abroad, it is very helpful if those can be dealt with at source through organisations such as the consumer protection co-operation network, which allows national enforcement bodies to speak to each other and share information and intelligence to address issues of consumer harm at source in the country from which they emanate.

Graeme Paton: I will answer Daniel Johnson's question, but first I want to elaborate on Peter Sellar's point about RAPEX, which is the system that we, in representing the enforcement and market surveillance departments of 31 local authorities in Scotland, use to identify consumer products with which there is a problem. There is another system called ICACS—the Consumer Contracts (Information, Cancellation and Additional Information) Regulations 2013—which allows us to see activities by market surveillance authorities across Europe so that their work can inform what we do. There is also a system called RASFF—the rapid alert system for food and feed—which is similar to RAPEX. We get alerts from RASFF that there may be a problem with animal feed, and we can take action to remove certain products from the marketplace.

I crave your indulgence, convener—there are further bodies which we currently rely on for consumer protection and trading standards to underpin the relevant regulations. One example is WELMEC, which is the western European legal

metrology co-operation body; it sets standards for legal metrology. There is also CEN—the European committee for standardization—and CENELEC, which is the European committee for electrotechnical standardization. Those bodies all create standards that underpin our product safety and legal metrology laws.

If we leave the EU, will we still participate in those bodies, which set the technical standards that underpin our legislation and our ability to enforce it? That brings us back to Daniel Johnson's point. If we cannot participate in those standards bodies, and the standards cease to apply in the UK while they continue to apply in the EU, there are two positions that we can take.

If standards diverge between the EU and UK, there will be, in effect, two different sets of standards for the same piece of legislation, which—as far as I can see—would place a burden on businesses, because they would need to meet a different standard in order to trade in Europe.

At present, the customs union allows businesses to import goods to the EU. Once goods have been checked at the first point, they can go anywhere in the EU. If we are no longer in the customs union, any goods that come into the UK will possibly be redirected to a UK port to be assessed for compliance with British law before they can be sold in the country. Small businesses and enterprises would therefore become importers or exporters, whereas they may not currently be defined as such. That could create an additional burden, which small businesses may not yet appreciate. I make that point more lucidly at paragraph 20 of my written submission.

The Convener: We can refer to paragraph 20 of your submission when we look back at the *Official Report* of the meeting.

Peter Sellar: I endorse what Graeme Paton said. It will depend on the product that Daniel Johnson produces in the west end of Edinburgh and sends to a consumer in France. At present, a business can do that relatively seamlessly if the product is regulated. A lot of the products that we make, such as toys and cosmetics, are now highly regulated.

When we are outside the EU, we will be a third-country exporter, which brings us to the import-export issues. The difference in statute will be significant, because a business will no longer be a distributor throughout the EU; it will be an exporter into the EU, and it will have to change its relationship—to go back to a previous question about commercial contracts—with the importer. The person in Rotterdam or Antwerp who receives the products and makes the customs declaration will become the importer. Their job will no longer simply be that of an onward distributor—they will have a load of different obligations, depending on what the law is.

In the world that I inhabit—a bit too often—we deal with the biocidal products regulation, which concerns products such as mosquito repellent, Dettol and anything that kills things when it is not being applied to a field for agricultural purposes. If a business is selling mosquito repellent in the EU, it is highly regulated and has to go through all sorts of hoops and hurdles. If it does not do so, it is committing a crime.

In a post-Brexit world, the importer will have to adopt all those obligations, and they will need to have the paperwork to show the relevant authority—in Belgium, it would be shown to the Belgian authorities, for example—that they have complied with the BPR.

We have had a lot of discussions with people in Helsinki, because that is where the European Chemicals Agency, which has a role in looking after biocidal products, is based. There is a whole different dynamic that raises issues around a business's legal responsibilities and obligations and the question of whom it has to discharge them to beyond, and in addition to, the requirement to make a customs declaration and pay a tariff.

The Convener: Having looked at some of the problems around the legislation, perhaps we can move on.

Rona Mackay: We have heard about the current situation and the consequences of Brexit. Is there a plan? Are there a suite of options for how we will deal with those matters after Brexit? How far advanced are our plans? Are we able to look at the options and decide what the best option will be to deal with the changes that are going to take place? Are there any options? That might be an impossible question.

The Convener: There are certainly some options in the submissions from the witnesses.

Frank Johnstone: I have a point to make that concerns the regulatory aspect rather than the legal aspects. I am thinking about what might happen in certain sectors. The financial services sector, for example, is regulated by the Financial Conduct Authority. It seems unlikely that, once we have left the EU, the FCA would suddenly ignore emerging risks to consumers that are identified by the EU. It also seems unlikely that the FCA would ignore the interpretations that the ECJ applies to certain matters in implementing its obligations to protect consumers in the UK. That is an important point.

Where the Financial Ombudsman Service, for example, is free of charge to the consumer, and where the FCA is a very proactive regulator, those bodies will be very keen to identify risks in relation

to consumers in the UK being harmed, even if the first signs of such harm emerge in the EU.

Professor Beaumont: We are almost straying into trade law, which is not my area of expertise, but I will make a general point that I hope is not incorrect.

It is very hard for people to plan on the UK's future trading arrangements with the EU until we have the final deal, including the trade deal that the UK hopes to agree, because it is precisely such issues that a trade deal will encompass. There may be complete regulatory alignment in a particular sector—which would mean that there would be no change, if I understand it correctly—whereas in other sectors, some regulatory divergence may begin to occur. Therefore, I do not know how people can try to plan until the trade deal is finished. We currently have no idea what will be in the trade deal at the end of the day—that is life. We can anticipate that there may be problems, but we will not know the nature of those problems until the trade deal is finalised.

Those issues are different from issues of civil justice. There is an EU law trade issue, and there are issues around the impact of leaving the customs union and the single market, and how far we would diverge from those in a trade deal. The closer we are to the customs union and the single market, the less likely it is that those trade problems will arise. The more we diverge, the more likely it is that they will arise. I am stating the obvious here. On the other hand, if we have the freedom to create different trading arrangements with the rest of the world, and if—it is a big if—we have enough of those arrangements, the cost-benefit analysis might be positive rather than negative; we do not know yet. That is a long-term rather than a short-term view.

It is clear that there will be a short-term hit, but in the long term, we could shift our balance of trade. After all, we should pay attention to the fact that in terms of goods, we do very badly at trading with the rest of the EU; it is only in services that we do well. In terms of pure trade and the balance of payments, our involvement in the EU is not a big success, even though we are in the single market. It may be easier for individual traders, but is it necessarily working for UK plc? That is the bigger question with which we need to concern ourselves.

That is the other side to the argument. If UK plc might do better in the international rather than the European market, switching our attention to the international market might be a good thing in the long run. I am no expert, and I am not an economist—I simply point out that we must also look at the very big picture rather than focusing only on the technical legal aspects. We cannot address those aspects in relation to trade until we know what the trade deal is.

On the civil justice side, which concerns jurisdiction, applicable law and the recognition and enforcement of judgments, there will—as I said—be a gap in terms of the ability of commercial companies to enforce judgments against EU companies. The question is how big an issue that actually is, because enforcement is not in fact required very often. Usually, a company gets its judgment and the other side pays up; cross-border enforcement is rarely necessary.

I would like an improved cross-border enforcement regime—in fact, I am currently negotiating in The Hague a new regime that I believe will do the job of recognition and enforcement in future. However, I am not sure—I am trying to be objective—that, if we do not either have a bespoke European deal or stay in the Lugano convention, the lack of a bespoke EU civil justice deal with harmonised rules on jurisdiction and on recognition and enforcement of judgments would be a huge issue for business-to-business relationships.

Rona Mackay: I want to expand on that a wee bit and seek views from some of our other panel members. If the outcome is that there is no deal, what effect would that have on Scottish businesses and consumers? Would we just carry on and perhaps move to trading internationally, as Professor Beaumont suggested? What would be the outcome?

The Convener: Before we move to that more general question, I think that James Mure wants to pick up on Professor Beaumont's point.

James Mure: My point goes back to Rona Mackay's question too. The answer is that people have modelled different scenarios and analysed consumer law. They have looked at what will happen if we negotiate to join the European Economic Area or if we fall back on the World Trade Organization model. We know that the aim is to negotiate some sort of bespoke model. Of course, it is difficult to look at the consequences of that until—as Professor Beaumont said—we can actually read the terms.

Over the past year or so, concerns have been widely expressed that consumer protection has not figured sufficiently in the UK Government's papers on Brexit, and that it was not one of the main principles that were laid down early on. There is, therefore, a need for people to articulate issues around consumer protection in particular.

12:30

I say that for the following reason. As I have said, the irony is that the British consumer will best

understand what being in the EU means at the point when we leave. At that point, people will turn round and say, “Hang on—have I lost that? I didn’t have to pay roaming charges back then—are those back again now?” That also applies to things such as airline passengers being denied boarding and issues around package travel. We have also heard about progress on geo-blocking, which covers the right for people to access digital services as they travel around the EU. That is the key point—we do not want consumers to wake up at a particular point and start reading stories in the press about how they have been let down by the process.

Rona Mackay: I take your point entirely, but what can be done about that right now?

James Mure: The answer is that we should move consumer protection up the agenda. You heard the same being said about family law by Janys Scott QC in the previous evidence. Those issues will affect people. We are not going to leave the global marketplace: we will still be sourcing and buying things on the internet, and travelling to Europe. We also have a huge tourism industry, so people will be travelling to the UK.

I also make the point that much of the EU law on consumer protection does not consist simply of minimum standards that leave states to put in higher standards; there is harmonisation, so that standards are the same throughout the European Union. Therefore, the closer we can remain in alignment with the law elsewhere, the better. Of course, the difficulty with that approach is that, if we do not accept the ECJ’s interpretative judgments, there is bound to be an element of divergence, which raises the question how we direct our courts on how they should treat ECJ jurisprudence in the future.

Graeme Paton: As I said, many of the laws that we enforce are directives or regulations. If there is simply a lift-and-shift approach, the impact of Brexit may not be immediate. I will still be able to undertake legal metrology work and enforce the Weights and Measures Act 1985, and consumer protection regulations will still be in place. It is when divergence begins to happen that problems will arise for enforcement bodies. The EU regulations that removed roaming charges, and those that introduced compensation for delayed or cancelled flights and for people who are refused boarding, for example, will have to be brought into British law.

The immediate effect on enforcement will not be that stark, especially given the likely transition period that is currently being negotiated. Ultimately, however, if our technical standards start to diverge from those of Europe, that will cause issues for consumers and for business. There will be additional burdens involved in running two different sets of standards and producing two different goods for different markets. The question will then become whether European businesses will bother manufacturing to the British standard. If they do not, consumer choice will probably reduce. Even if they do, there will probably be a stark increase in prices for consumers, because the cost to producers’ business will go up and will be passed on.

There will be a great many issues further down the line. If we are part of the single market and the customs union, that is great—that will make my job much easier. However, if we are not, that will introduce a maelstrom of potential outcomes. My colleagues in the Department for Business, Energy and Industrial Strategy are spending hours trying to work out what those could be, but until they get some sort of steer from those above them, or the aims of the British Government become apparent to them, they will not be able to predict which situation we will be in. To a large extent, it is all guesswork.

The Convener: I will bring in Ben Macpherson, followed by Peter Sellar, after which we will hear concluding comments.

Ben Macpherson: My question relates to what Graeme Paton just said. He stated clearly that maintenance of our membership of the single market and the customs union would provide the added continuity that would be beneficial for consumers and businesses. Do the witnesses want to comment on that point, given that it is currently an area of political discussion?

The Convener: Peter Sellar wants to make a comment; I do not know whether it is on that point.

Peter Sellar: My comment is perhaps related. I want to pick up on the specific question of what we, as individuals around the table, can do to try to maintain the level of consumer protection to which we have become accustomed and in which we can look forward to seeing continued improvement at European level. I have not seen much of the type of lobbying that one would hope to see. As an example, I have kept a close eye on the considerations of the Exiting the European Union Committee. Many witnesses from the Confederation for British Industry and other industry organisations have appeared before the committee, but I have not seen any representatives from Which?, for example. I am not saying that the organisation is not making its point behind the scenes, but I have not seen its concerns being widely broadcast. That is not least because it is difficult for Which? to represent such a generic group of people. In effect, it represents the entire population, so it cannot lobby from a subtle and nuanced position.

With regard to the cliff edge, if we leave the EU without a bespoke trade deal, we will fall back on the WTO terms of trade. Within those terms—leaving aside tariffs and so on—there are agreements such as the technical barriers to trade agreement and the agreement on the application of sanitary and phytosanitary measures that will deal with any barriers that WTO members put up to restrict the selling of products. For instance, if there is an issue with beef hormone and we ban it in the UK that would be a WTO matter. The critical point, however, is that the consumer has no say in that process. Whenever we hear about WTO disputes, we hear words such as "Boeing" and "Airbus", or "bananas" and "Chiquita"—whatever it is—which highlights that it is not individuals who are bringing cases; it is very much at the governmental level. If we fall off the cliff edge, the consumer is immediately right at the back of the queue of concerns.

Graeme Paton: I direct the committee to the report that the House of Lords European Union Committee produced a couple of months ago, which is entitled "Brexit: will consumers be protected?" That is perhaps what the House of Commons committee is missing. I also point out that the Chartered Trading Standards Institute has convened a think tank to consider all the various changes that will affect trading standards law. Most of those areas have been detailed today: the think tank is also considering animal health and welfare. The report will be produced in the next six to nine months and it may direct the thoughts of the panel.

James Mure: I have two brief points to make. The first is on the single market. It is interesting that, in the past several years, much of the EU's work on consumer protection has been based on expansion of the single market, rather than coming at the issues from the consumer-rights end. Indeed, some people have been critical of the EU for putting the business side ahead of consumer rights.

Secondly, the answer may come down to resources in this country. If we have to set up offices ourselves—a new office for product safety was announced just a day or so ago, for example—resources will be required to ensure that regulatory agencies are able to co-operate internationally, as has been the case to date. I am afraid that, as with other sectors of the economy, we cannot underestimate the need for resources, especially during the transition stage when confidence may go through a bumpy period. I stress that aspect.

The Convener: That concludes our round-table session. I thank you all very much for clearly setting out some of the issues. What is not clear, of course, is what trade deal we will eventually end up with, and I understand that a lot of what you have said is speculation regarding the various scenarios and how we can address them. I thank you for your attendance at the meeting today—your evidence has been very worthwhile in enabling us to put the issues in perspective. The committee will look at all the evidence and see where we go from there.

I suspend the meeting briefly to allow the witnesses to leave.

12:39

Meeting suspended.

12:41

On resuming—

Witness Expenses

The Convener: Item 4 is to ask members whether they are content to delegate responsibility to me to arrange for the Scottish Parliamentary Corporate Body to pay, on request, witness expenses for the Brexit and family law session. Are we agreed?

Members *indicated agreement.*

The Convener: Item 5 is to ask members whether they are content to delegate responsibility to me to arrange for the Scottish Parliamentary Corporate Body to pay, on request, witness expenses for the Brexit session on civil, commercial and consumer law. Are we agreed?

Members *indicated agreement.*

The Convener: That concludes the public part of today's meeting. Our next meeting will be on Tuesday 6 February, when we will hear evidence on remand, and will hear round-table evidence on alternative dispute resolution.

12:42

Meeting continued in private until 13:03.

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