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Justice Committee Comataidh a' Cheartais

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Contents

Introduction	1
Background	1
Protocol agreement between the Scottish Government and the Scottish Parliament	1
The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018	3
The International Recovery of Maintenance (Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance 2007) (EU Exit) Regulations 2018	5
Justice Committee's Scrutiny	6

Justice Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice.



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Introduction

1. At its meeting on 2 October, the Justice Committee considered two UK statutory instruments (SIs) related to the European Union (Withdrawal) Act 2018. This report summarises the Justice Committee's consideration of the:
 - Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018, and;
 - International Recovery of Maintenance (Hague Convention 2007 etc.) (Amendment) (England and Wales) (EU Exit) Regulations 2018.

Background

2. The European Union (Withdrawal) Act 2018, passed by the UK Parliament, allows the UK and Scottish parliaments to begin considering regulations to convert non-domestic European Union (EU) law into UK law.
3. As part of the process by which the UK leaves the EU, consideration must be given as to whether current UK law needs to be amended to the UK's new status as a non-EU member. For example, there are currently many references in regulations to EU bodies and the EU itself that will no longer be applicable after the UK has left the EU.
4. Some of the necessary changes to the statute book will be done through Scottish Statutory Instruments (SSIs) in the usual way. However, a number will be done through Statutory Instruments (SIs) passed in the UK Parliament with the consent of the Scottish Parliament which itself is based on the recommendation of the Scottish Government (these are called SI notifications). Consent will be sought as these SIs will make changes to devolved powers and/or executive competences. Such changes should be broadly technical in nature. Protocols governing arrangements for both of these processes have been agreed to with the Scottish Government (see below).

Protocol agreement between the Scottish Government and the Scottish Parliament

5. In order to prepare devolved legislation for UK withdrawal from the European Union, Scottish Government and Scottish Parliament officials developed a protocol governing UK Statutory Instruments. The protocol is intended to ensure the Scottish Parliament can scrutinise the Scottish Government's approach to instruments it considers are better dealt with by the UK Government.
6. In a [letter](#) to the Conveners of the Finance and Constitution Committee and the Delegated Powers and Law Reform Committee, Michael Russell, Cabinet Secretary Government Business and Constitutional Relations wrote that, "This [process] is not about the question of where devolved powers will be exercised after EU withdrawal.

Instead it is about the technical task of ensuring that important schemes and regulations can continue to operate despite withdrawal.”

7. He continued, “Where the policy outcome being sought is consistent across administrations, then it could be appropriate and in Scotland's interests to agree a UK-wide approach to statutory instruments (for example, to avoid duplication of effort, or where only technical or minor amendments are required). Where a different way of dealing with EU withdrawal, or a different policy outcome, is required in Scotland, we will pursue our own statutory instruments in the Scottish Parliament.”
8. Under terms of the protocol, Scottish Ministers will notify the Scottish Parliament of any proposal to consent to the UK Government using its powers in devolved areas. Lead committees are then invited to scrutinise the proposal to consent, and report to Parliament with a recommendation as to whether consent should be given to the consideration of instrument in question taking place at Westminster.

The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018

9. This Statutory Instrument will be laid in the UK Parliament on 11 October 2018. The [instrument, explanatory notes, and impact assessment](#) can be found online.
10. The UK currently participates in the 2005 Hague Convention by virtue of EU membership. This will cease on exit from the EU. The EU is the contracting party for all Member States. The UK is seeking to join the Convention as an independent contracting party.
11. The 2005 Hague Convention provides rules in relation to international commercial choice of court agreements relating to both jurisdiction (choice of court) and enforcement and recognition of judgements.
12. As UK participation in the 2005 Hague Convention will cease after the UK's withdrawal from the EU, the SI is aimed at ensuring that the rules of the 2005 Hague Convention will continue to work effectively between the UK and all the existing contracting parties (including the EU).
13. The SI aims to provide a 'back-up' position for this possibility of no deal with the EU on Brexit day, and the subsequent cessation of the [Recast Brussels Regulation \(RBR\)](#).ⁱ
14. The SI provides the UK legislative framework so that the rules in the 2005 Hague Convention would apply to "choice of court" agreements once the UK has signed up to this Convention. Essentially, the rules in the 2005 Hague Convention mean that courts of contracting parties must follow choice of court agreements in contracts. The [Explanatory Memorandum](#) also explains that the 2005 Hague Convention, "requires any judgment rendered by the chosen court to be recognised and enforced in the courts of all other contracting parties, as necessary." Consequently, the SI would cover both court jurisdiction and enforcement of judgments.

ⁱ This updated previous EU law on jurisdiction, and the recognition and enforcement of judgments in civil and commercial matters. The RBR aims to make the process easier and faster, for example, by providing for judgments in one Member State to be enforced in other EU countries without the need for any special procedure. The basic principle for jurisdiction is that a defendant should be sued in his/her country of domicile. The RBR also contains a rule which allows the parties to agree in writing that a particular court will have jurisdiction irrespective of the parties' domicile. Businesses normally include clauses like this in their contracts so that it is clear up front where disputes will be heard. These are known as "choice of court" clauses or "choice of court" agreements. There are number of important exceptions and alternatives to the rules. For example, as they are normally in a weaker position, consumers can require litigation to take place in the courts of their own country.

15. As indicated in the [Explanatory Memorandum](#), “at present, the 2005 Hague Convention is largely inapplicable between EU Member States.” However, once the UK has signed up to the 2005 Convention, the EU and UK would both be parties to the 2005 Convention. The aim would, therefore, be to ensure that there are common rules on choice of court agreements between the UK and the EU (with domestic legislation to bring this into force in the UK).

The International Recovery of Maintenance (Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance 2007) (EU Exit) Regulations 2018

16. This Statutory Instrument will be laid in the UK Parliament on 11 October 2018. The [instrument, explanatory notes, and impact assessment](#) can be found online.
17. The 2007 Hague Convention provides rules on the international recovery of child support and other forms of family maintenance and for the recognition and enforcement of maintenance decisions across borders.
18. One important regulation in the field of EU family law is Council Regulation (EC) No 4/2009 ('the Maintenance Regulation'). The Maintenance Regulation applies to obligations to pay maintenance (or financial support). It covers maintenance cases which have a connection with more than one Member State, for example, where one litigant is French-born and the other is UK-born.
19. The Maintenance Regulation provides EU level rules on which Member State's court should have authority to resolve such a dispute. It also provides an EU system for the recognition and enforcement in one country of a court judgement made in another country.
20. In the event of a 'no deal' scenario, the Maintenance Regulation would cease to apply on Brexit day (29 March 2019). However, the UK Government wants to ensure that there are still international arrangements for cross-border cooperation on maintenance obligations after Brexit in this situation. The SI is aimed at ensuring that the rules of the 2007 Hague Convention will continue to work effectively between the UK and all the existing contracting parties (including the EU) following withdrawal from the EU.

Justice Committee's Scrutiny

21. On 2 October 2018, the Committee considered its consent to the Scottish Government's proposal that the instruments be considered by the UK Parliament. No comments were made. The discussion can be found in the [Official Report](#) .
22. The Committee received submissions from the Law Society of Scotland and Professor Janeen Caruthers, University of Glasgow. The Committee expresses its gratitude to them for their views.
23. The Committee is content for the Scottish Government to give its consent for the UK Ministers to lay a Statutory Instrument in the UK Parliament on the following instruments:
 - The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018, and;
 - The International Recovery of Maintenance (Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance 2007) (EU Exit) Regulations 2018.

