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## Some reflections on the way ahead for UK private international law after Brexit

Paul Beaumont\*

Since 1 January 2021 the UK has moved out of the implementation period for its withdrawal from the European Union (EU) and it is an appropriate time to reflect on the way forward for the UK in developing private international law. This article considers the practical steps that the UK should take in the near future. There is significant work that the UK can do to progress its commitment to the “progressive unification of the rules of private international law” by improving its commitment to the effective functioning of several key Conventions concluded by the Hague Conference on Private International Law (HCCH). Some of these steps can and should be taken immediately, notably accepting the accessions of other States to the Hague Evidence and Child Abduction Conventions and extending the scope of the UK’s ratification of the Adults Convention to England and Wales, and Northern Ireland. Other things require more consultation and time but there are great opportunities to provide leadership in the world by ratifying the Hague Judgments Convention 2019 and, when implementing that Convention which is based on minimum harmonisation, providing leadership in the Commonwealth by implementing, at least to some extent, the Commonwealth Model Law on Recognition and Enforcement of Civil and Commercial Judgments. Within the UK, as a demonstration of best constitutional practice, intergovernmental cooperation between the UK Government and the devolved administrations should take place to consider how intra-UK private international law could be reformed learning the lessons from the UK Supreme Court’s highly divided decision in *Villiers*. Such work should involve the best of the UK’s experts (from each of its systems of law) on private international law from academia, the judiciary and legal practice. Doing so, would avoid accusations that Brexit will see a UK run by

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generalists who give too little attention and weight to the views of experts. This use of experts should also extend to the UK's involvement in the future work of HCCH at all levels. The HCCH will only be able to be an effective international organisation if its Members show a commitment to harnessing the talents of experts in the subject within the work of the HCCH.

**Keywords:** Brexit; private international law; global; Hague Conference on Private International Law (HCCH); UK; EU; Commonwealth; intra-UK

## A. Introduction

The UK came to the end of the implementation period for completing its withdrawal from the European Union on 31 December 2020. The main legacy of EU Private International Law still applicable in the UK from 1 January 2021 is the Rome I and II Regulations on applicable law in relation to contractual and non-contractual obligations.<sup>1</sup> The UK has applied to accede to the Lugano Convention as an independent State<sup>2</sup> but as from 1 January 2021 it is not a Party to that Convention and can only become a party again if the EU, Denmark, Iceland, Norway and Switzerland all agree to accept the accession of the UK.<sup>3</sup> The UK was a party

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<sup>1</sup>The Law Applicable to Contractual Obligations and Non-contractual Obligations (Amendment etc) (EU Exit) Regulations 2019, SI 2019/834.

<sup>2</sup>See the Swiss official depositary website for the Lugano Convention where notifications are recorded available here <https://www.eda.admin.ch/eda/fr/dfae/politique-exterieure/droit-international-public/traites-internationaux/depositaire/autres-conventions/convention-concernant-la-competence-judiciaire-la-reconnaissance-et-l-execution-des-decisions-en-mati%C3%A8re-civile-et-commerciale.html>. The UK notification asking to accede to the Convention was made on 2 April 2020 and is recorded on the website as a notification of 14 April 2020. The notification dated 22 May 2020 contains some minor corrections to the UK's initial notification. One of these is quite amusing as the initial document referred to "ailment" which has been corrected to "aliment", the Scottish term for maintenance. The delicate interaction between the Lugano Convention's provisions on maintenance and the Hague Maintenance Convention 2007 – which the UK has become an independent party to from 1 January 2021 (see the Private International Law (Implementation of Agreements) Act 2020 and the status table on the Hague Conference on Private International Law (HCCH) website at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=131> – is discussed in Paul Beaumont, "Interaction of the Brussels IIa and Maintenance Regulations with (Possible) Litigation in Non-EU States: Including Brexit Implications", in I Viarengo and F Villata (eds), *Planning the Future of Cross Border Families A Path Through Coordination* (Hart, 2020) 331–43.

<sup>3</sup>See Art 72 of the Lugano Convention. Art 72(3) provides that:

Without prejudice to paragraph 4, the Depositary shall invite the State concerned to accede only if it has obtained the unanimous agreement of the Contracting Parties. The Contracting Parties shall endeavour to give their consent at the latest within one year after the invitation by the Depositary.

Hopefully the Contracting Parties will comply with the one-year time limit and give their answer to the Swiss depositary by April 2021. The answer of the EU is still not certain at the time of writing.

to the Lugano Convention as a Member State of the EU and during the implementation period for Brexit but this came to an end at 11pm on 31 December 2020.<sup>4</sup> Otherwise the UK is part of an international framework of treaty obligations in relation to Hague Conventions to which the UK is a party. The Hague Conventions which now apply between the UK and Member States of the EU where before EU instruments applied are: the Hague Convention on Service of 15 November 1965,<sup>5</sup> the Hague Convention on Divorce of 1 June 1970,<sup>6</sup> the Hague Convention on Evidence of 18 March 1970, the Hague Convention on Child Abduction of 15 October 1980, the Hague Convention on Protection of Children of 19 October 1996, the Hague Convention on Choice of Court of 30 June 2005, and the Hague Convention on Maintenance of 23 November 2007.<sup>7</sup> The last three Conventions are now part of UK law completely independently of EU Law through the Civil Jurisdiction and Judgments Act 1982 as amended by the Private International Law (Implementation of Agreements) Act 2020.<sup>8</sup>

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<sup>4</sup>See the “List of States Parties” on the depositary website (n 2 above).

<sup>5</sup>This Convention is in force for 78 States including all 27 EU Member States, see the HCCH status table available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=17>. For a recent expert analysis of the Convention with some comparison to the new EU Regulation on Service, see David McClean’s chapter on “Service”, in Paul Beaumont and Jayne Holliday (eds), *Guide to Global Private International Law* (Hart, forthcoming).

<sup>6</sup>This Convention although only in force for 20 States including 12 EU Member States (see the HCCH status table at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=80>) still has great potential and the UK has recently accepted the accession of four States, on 29 October 2020 (Albania, Estonia, Moldova and Poland), after a long delay in doing so, in response to the prompting of Jayne Holliday, “The urgent need for the UK to accept the accessions of EU and Non-EU Contracting Parties to the 1970 Hague Convention on Recognition of Divorces and Legal Separation” (Stirling Law Working Paper 2019/1) available at <https://www.stir.ac.uk/about/faculties/arts-humanities/law-and-philosophy/law-research/law-working-papers/>. For a comparison of the Hague Divorce Convention and the EU Brussels IIa Regulation see Janeen Carruthers and Elizabeth Crawford, “Divorcing Europe: Reflections from a Scottish Perspective on the Implications of Brexit for Cross-border Divorce Proceedings” (2017) *Child and Family Law Quarterly* 233–52.

<sup>7</sup>For comparison of the Hague Conventions on Child Abduction, Child Protection and Maintenance to the EU instruments (the Brussels IIa Regulation and the Maintenance Regulation) see Paul Beaumont, “Private International Law Concerning Children in the UK after Brexit: Comparing Hague Treaty Law with EU Regulations” (2017) *Child and Family Law Quarterly* 213–32. Of course all EU Member States are party to the Hague Child Abduction and Child Protection Conventions as they are part of the EU *acquis communautaire*, whereas all EU Member States apart from Denmark are bound by the Hague Maintenance Convention 2007 through the EU’s adoption of that Convention, see the HCCH status table at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=131>.

<sup>8</sup>See <https://www.legislation.gov.uk/ukpga/2020/24/contents/enacted>.

## B. The UK should become a party to the Hague Judgments Convention 2019

The UK should take a lead in making the Hague Judgments Convention of 2 July 2019 effective by becoming a Contracting State as soon as possible.<sup>9</sup> The UK has a strong policy interest in protecting the UK as one of the leading centres for resolving cross-border private disputes. In order to persuade parties from other countries to continue to litigate in the UK there needs to be confidence that any resulting judgment can be enforced. One way to achieve this is to persuade States to ratify the Hague Judgments Convention 2019 and this is best done by ratifying it quickly.

This Convention has been advocated by many Workshop participants including Professors Trevor Hartley, David McClean, Mary Keyes and Reid Mortensen.<sup>10</sup> It goes significantly beyond the common law regime for recognition and enforcement of judgments by introducing several indirect jurisdiction rules in Article 5 of the Convention that are not available at the common law. The common law grounds of indirect jurisdiction that permit the foreign judgments to be recognised in the UK are presence (residence in Scotland), prorogation (choice of court agreement in favour of the court that gave the judgment) and submission.<sup>11</sup> The Hague Convention adds a number of other grounds notably:

- i the place of performance of the contractual obligation that was adjudicated upon, unless the activities of the defendant in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State; and
- ii the place of the act or omission (irrespective of the place of harm) directly causing death, physical injury, damage to or loss of tangible property and the judgment ruled on a non-contractual obligation arising from the death, physical injury, damage to or loss of tangible property.<sup>12</sup>

So being a party to the Hague Judgments Convention 2019 will increase the number of UK court judgments which can be recognised and enforced abroad if

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<sup>9</sup>See the Judgments Section of HCCH available at <https://www.hcch.net/en/instruments/conventions/specialised-sections/judgments>. See also David Goddard and Paul Beaumont, "Recognition and Enforcement of Judgments in Civil or Commercial Matters", in Paul Beaumont and Jayne Holliday (eds), *Guide to Global Private International Law* (Hart, forthcoming).

<sup>10</sup>See Reid Mortensen's excellent article on "Brexit and the Commonwealth" (2021) 17 *Journal of Private International Law* 18–52.

<sup>11</sup>See P R Beaumont and P E McEleavy, *Anton's Private International Law* (W Green/SULI, 3rd edn, 2011), 377–81. These are in the *in personam* grounds. Other grounds apply for *in rem* actions, see 383–84.

<sup>12</sup>See the explanatory report to the Judgments Convention by Francisco Garcimartín and Geneviève Saumier (2020) available at <https://www.hcch.net/en/publications-and-studies/details4/?pid=6797>. Notably paras 180–188 and 194–198.

the Convention is ratified elsewhere (not least because the relatively restrictive approach of the UK is mirrored in most Commonwealth States and in some other States, eg in Scandinavia, foreign judgments are only recognised and enforced if there is a Treaty relationship). The Convention is also careful to protect party autonomy in commercial contracts by giving way to the Hague Choice of Court Convention and at the same time strengthening that Convention by providing a ground for refusal of recognition and enforcement of a foreign judgment which is “contrary” to a choice of court agreement between the parties.<sup>13</sup>

### C. Implement the Commonwealth Model Law on Recognition and Enforcement of Civil and Commercial Judgments

When adopting primary legislation to implement the Hague Judgments Convention 2019 the UK can go further and implement at least some provisions of the Commonwealth Model Law,<sup>14</sup> in particular some indirect jurisdiction rules which are not in Article 5 of the 2019 Convention – see the paper from the first workshop by Professor David McClean who is the main author of the Commonwealth Model Law and represented the Commonwealth Secretariat brilliantly in The Hague for many years.<sup>15</sup>

It is easy to go beyond the Hague 2019 Convention because it is designed as a system of minimum harmonisation (apart from in relation to judgments on rights *in rem* concerning immovable property where Article 6 of the Convention is both a minimum and a maximum – such judgments can only be enforced if they come from the courts of the place of the immovable property). So, it would be easy to extend the non-contractual obligation jurisdiction in the way provided for in the Commonwealth Model Law:

the proceedings related to tort or a non-contractual obligation and the wrongful act occurred in the state of origin<sup>16</sup>

This would represent an expansion of the indirect jurisdiction in the 2019 Convention by not restricting the recognition of judgments to those where the act

<sup>13</sup>See Art 7(1)(d) and for a fuller analysis of the Judgments Convention 2019 see David Goddard and Paul Beaumont, “Recognition and Enforcement of Judgments in Civil or Commercial Matters”, in Paul Beaumont and Jayne Holliday (eds), *Guide to Global Private International Law* (Hart, forthcoming).

<sup>14</sup>Commonwealth Secretariat, 2018. Available at [https://thecommonwealth.org/sites/default/files/key\\_reform\\_pdfs/D16227\\_1\\_GPD\\_ROL\\_Model\\_Law\\_Rec\\_Enf\\_Foreign\\_Judgements.pdf](https://thecommonwealth.org/sites/default/files/key_reform_pdfs/D16227_1_GPD_ROL_Model_Law_Rec_Enf_Foreign_Judgements.pdf)

<sup>15</sup>Available at <https://privateinternationallaw.stir.ac.uk/projects/ahrc-research-network/workshop-i/>.

<sup>16</sup>N 14 at s5(1)(h).

or omission causes death, personal injury, damage to or loss of tangible property while keeping the important restriction that the judgment must be given in the place of the wrongful act (or omission).

Similarly, it would be easy to extend the contractual obligation jurisdiction to the one stated in the Commonwealth Model Law:

the proceedings related to a contractual obligation that was or should have been performed in the state of origin<sup>17</sup>

This would remove the “unless” proviso to the Hague 2019 Judgments Convention contract jurisdiction which was added primarily to meet US due process concerns.

The Commonwealth Ministers themselves advocated a global approach when adopting the Commonwealth Model Law on Recognition and Enforcement of Civil and Commercial Judgments:

The Model Law was considered and endorsed by Commonwealth Law Ministers at their meeting of 16–19 October 2017, held in Nassau, The Bahamas. At that meeting, Law Ministers commended the Model Law and noted its usefulness. They further noted the desirability for member countries that have not already done so to become party to The Hague Convention on Choice of Court Agreements and to participate in the Judgments Projects of The Hague Conference on Private International Law.<sup>18</sup>

The Judgments Project in turn led to the successful conclusion of the Hague Judgments Convention on 2 July 2019.<sup>19</sup>

## **D. Hague Choice of Court Convention 2005**

The UK has already become an independent Contracting State to this Convention with effect from 1 January 2021 but the entry into force of the Convention for the UK remains the date on which it entered into force for the EU, ie 1 October 2015.<sup>20</sup> This is important because the Convention only applies to choice of

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<sup>17</sup>*Ibid* at s5(1)(g)

<sup>18</sup>N 14 at 2.

<sup>19</sup>N 10. For an analysis of both the Commonwealth Model Law and the Hague Judgments Convention 2019 see the forthcoming book by Abubakri Yekini in the Hart Studies in Private International Law Series, *The Hague Judgments Convention and the Commonwealth Model Law A Pragmatic Perspective* (Hart, 2021), see <https://www.bloomsburyprofessional.com/series/studies-in-private-international-law/>.

<sup>20</sup>See the HCCH status table for Choice of Court available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>. There are 31 States bound by the Convention (all 27 EU Member States plus Mexico, Montenegro, Singapore and UK) plus the European Union. For a recent analysis of this Convention see Paul Beaumont and Mary Keyes, “Choice of Court Agreements”, in Paul Beaumont and Jayne Holliday (eds),

court agreements concluded after the Convention entered into force for the State of the chosen court.<sup>21</sup>

The UK has, however, repeated the EU's declaration limiting the application of the Convention in relation to certain insurance contracts.<sup>22</sup> The UK should withdraw this declaration and completely free up the UK insurance services market to party autonomy in business to business cases. The declaration prevents the Convention applying to a significant number of such insurance contracts and thus exclusive jurisdiction agreements in insurance contracts covered by the declaration are not given effect to under the Convention in the UK and UK judgments on matters within the scope of the declaration do not benefit from recognition and enforcement under the Convention in other Contracting States, eg in Singapore.<sup>23</sup> It overcomplicates UK cross-border insurance law. While the UK was a Member State of the EU it consistently opposed these protective provisions on insurance which go beyond the accepted need to protect consumers. The UK was consistently outvoted as this was a qualified majority file in the Council of the EU. It is ironic that after Brexit the UK is following the EU approach to insurance in its declaration on the Hague Choice of Court Convention when it is completely free not to do so.

## E. Hague Taking of Evidence Convention 1970

The UK is a party to this Convention which is a key building block for the development of global private international law. There are currently 63 Contracting States.<sup>24</sup>

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*Guide to Global Private International Law* (Hart, forthcoming). For an earlier analysis taking account of the possibility that the Hague Choice of Court Convention would apply between the UK and the EU Member States (the reality from 1 January 2021) rather than the Lugano Convention or any special deal between the UK and EU, see M Ahmed and P Beaumont, "Exclusive choice of court agreements: some issues on the Hague Convention on Choice of Court Agreements and its relationship with the Brussels Ia Regulation especially anti-suit injunctions, concurrent proceedings and the implications of Brexit" (2017) 13 *Journal of Private International Law* 386–410.

<sup>21</sup>See Art 16(1) of the Choice of Court Convention.

<sup>22</sup>See Art 21 of the Convention and <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1318&disp=resdn>.

<sup>23</sup>See Art 21(2) of the Convention. For a discussion of the lawfulness and appropriateness of the EU declaration on insurance contracts see Paul Beaumont, "The Revived Judgments Project in The Hague" (2014) *Nederlands Internationaal Privaatrecht (NIPR)* 532–39.

<sup>24</sup>See the HCCH status table for the Evidence Convention at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=82> including all the EU Member States apart from Austria, Belgium and Ireland. For an excellent recent analysis of this Convention, noting the new EU Regulation on Taking of Evidence, see Brooke Marshall and Nadia de Araujo, "Evidence", in Paul Beaumont and Jayne Holliday (eds), *Guide to Global Private International Law* (Hart, forthcoming).



The UK has not accepted the accession of the following 22 States (Albania, Andorra, Armenia, Bosnia and Herzegovina, Brazil, China, Colombia, Costa Rica, Iceland, India, Kazakhstan, Korea, Kuwait, Liechtenstein, Montenegro, Morocco, Nicaragua, North Macedonia, Serbia, Seychelles, Sri Lanka, and Vietnam).<sup>25</sup>

The UK did accept the accession of Croatia, Hungary, Lithuania, Malta, Romania, and Slovenia, in October 2020 after a long period of not accepting any States. Why is this seen by the UK Government as a Brexit only issue?

## F. Hague Convention on Adults 2000

The UK is a party to this Convention but only for Scotland.<sup>26</sup> This means, at present, the UK is not able to benefit from the recognition and enforcement of judgments from England and Wales and Northern Ireland, or to gain help for the residents of those countries from the Central and other competent Authorities, in other Contracting States to the Hague Adults Convention even though the Convention is applied internally in England and Wales and Northern Ireland.<sup>27</sup>

It is encouraging that on 17th June 2020, the UK Government committed to ratifying the 2000 Convention through making amendments to the Mental Capacity Act 2000.<sup>28</sup> However, this commitment has not yet been fulfilled. Once ratification for the rest of the UK takes place, Central Authority cooperation to help our adults who may be involved in a cross-border situation and do not have the full capacity to protect their interests will be supported.

The other Contracting States are Austria, Belgium, Cyprus, Czech, Estonia, Finland, France, Germany, Latvia, Monaco, Portugal and Switzerland. Much

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<sup>25</sup>See the status table, *ibid.* To check whether the UK has accepted the accession of a particular State you have to click on the A\* (for Accession) in the status table in relation to that State and then you will be taken to a webpage which indicates which States have accepted the accession of that State.

<sup>26</sup>See the HCCH Status Table for the Adults Convention at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=71>. You then click on the “D” for Declaration under the UK and you are taken to a webpage that shows the UK is only a party to the Convention for Scotland, see <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?cid=46&disp=resdn>.

<sup>27</sup>See the AHRC Workshop paper by Pietro Franzina and his chapter on the HCCH Adults Convention in P Beaumont and J Holliday (eds), *Guide to Global Private International Law* (Hart, forthcoming).

<sup>28</sup>See the amendment proposed to the Private International Law (Implementation of Agreements) Bill by Lord Wallace of Tankerness which he withdrew after the Advocate-General for Scotland (Lord Keen of Elie) made a commitment on behalf of the UK Government to extend the UK ratification of the Hague Adults Convention to England and Wales and Northern Ireland after the conclusion of discussions on the modalities of doing so with the Northern Ireland Executive, see Hansard, Column 2221 available at [https://hansard.parliament.uk/Lords/2020-06-17/debates/C9B60DAA-29B6-4B0F-A953-DAA48E3FB753/PrivateInternationalLaw\(ImplementationOfAgreements\)Bill\(HL\)](https://hansard.parliament.uk/Lords/2020-06-17/debates/C9B60DAA-29B6-4B0F-A953-DAA48E3FB753/PrivateInternationalLaw(ImplementationOfAgreements)Bill(HL)).

needs to be done by the UK and others to show our concern for the weak and vulnerable members of society by encouraging widespread ratification of the Adults Convention. The UK after all should be very proud of the fact that a former Scottish Law Commissioner, Professor Eric Clive, was the Chair of the Special Commission with a Diplomatic Character that concluded the Adults Convention in 1999.<sup>29</sup>

### G. Hague Child Abduction Convention 1980

The UK is a party to the Hague Child Abduction Convention which has 101 Contracting States.<sup>30</sup> The Secretary General of the Permanent Bureau of the HCCH, Dr Christophe Bernasconi, in the third AHRC Workshop in November 2020 raised concerns about the UK's non-acceptance of several accessions to this Convention and the Taking of Evidence Convention.

The UK should exercise its regained external competence in this field to accept the accession of the following States in order to make the Convention effective between the UK and those States so that children are protected from the adverse consequences of being abducted between those States:

Barbados, Bolivia, Cuba, Gabon, Guatemala, Guinea, Guyana, Iraq, Jamaica, Lesotho, Moldova, Nicaragua, Pakistan, Paraguay, Philippines, Sri Lanka, Thailand, Trinidad and Tobago, Tunisia, Zambia.<sup>31</sup>

If the UK has doubts about the ability of any of those States to comply with the Child Abduction Convention, it should be public about that and offer legal/technical assistance to help those States implement the Convention properly.

### H. UK cross-border justice policy?

What is the UK cross-border justice policy now that the UK is free of any EU external competence constraints?<sup>32</sup>

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<sup>29</sup>See *Proceedings of the Special Commission with a diplomatic character 20 September to 2 October 1999* <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=46&disp=resdn> at 150. Eric Clive was also the author of one of the foundational documents in the preparation of the Convention, "Report on incapable and other vulnerable adults" available in the *Proceedings ibid* at 10–28.

<sup>30</sup>See the HCCH status table for the Child Abduction Convention at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>. See the chapter on the HCCH Child Abduction Convention by Maria Caterina Baruffi and Jayne Holliday in Paul Beaumont and Jayne Holliday (eds), *Guide to Global Private International Law* (Hart, forthcoming).

<sup>31</sup>See the specialised HCCH status table for the acceptance of accessions under the Abduction Convention at <https://assets.hcch.net/docs/33bba6da-cb14-4c0e-bdc0-826c56051633.pdf>.

<sup>32</sup>For an analysis of those constraints in the context of private international law see Pietro Franzina (ed) *The External Action of the EU in the Field of Private International Law after*

In relation to the taking of evidence in cross-border litigation, the UK, by not accepting the accessions of Contracting States to the Hague Taking of Evidence Convention, gives the impression that it is snubbing major trading partners like Brazil and Korea and longstanding Commonwealth allies like India and Sri Lanka.

In relation to child abduction the UK also appears to be snubbing many of our Commonwealth allies in Africa, the Caribbean and Asia by not accepting the accessions of those allies to the Hague Child Abduction Convention.

UK PIL policy is to “work for the progressive unification of the rules of private international law” along with all the other members of the HCCH. This has been the UK’s policy at least since 1955 because the UK was a founder member of the modern HCCH’s Statute of 1955 which has this sole aim in Article 1.<sup>33</sup>

The UK should be promoting the adoption of Hague Conventions in the Commonwealth, Africa and Asia; not refusing to accept Treaty relations with these States when they do accede to those Conventions.

If the UK is genuinely motivated by ensuring that these States properly implement these Conventions (a good motivation) it must be clear about this and offer technical assistance to those countries to help them implement the Conventions more effectively.

The UK Government must not appear to be careless or condescending.

The UK Government needs to ensure that it sends world class representatives to The Hague Conference on Private International Law as it did until recently (eg Professor Ronald Graveson (Divorce), Professor Sandy Anton (Divorce, Trusts and Child Abduction – he was the father of the last of these), Professor David Hayton (Trusts and Succession), Professor Roy Goode (Securities); Professor Eric Clive (Children and Adults – father of Adults) and Professor Trevor Hartley (Choice of Court – co-rapporteur).

The UK should not rely *solely* on civil servants, even though they may well have a lot to offer, to develop the details of UK private international law policy and to negotiate for the UK in the HCCH. In the extremely important specialist area of private international law (cross-border justice), almost all of the civil servants employed should be lawyers (indeed lawyers who have studied private international law). In addition, the UK should, so far as possible, ensure that

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*Opinion 1/13* (Intersentia, 2016) including Paul Beaumont, “A Critical Analysis of the Judicial Activism of the Court of Justice of the European Union in Opinion 1/13” at 19–37.

<sup>33</sup>See the HCCH Statute at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=29>. The aim was not amended at the time of the first, and so far only, amendment to the Statute in 2005 which came into effect on 1 January 2007. The aim can now be secured only by “consensus” among the Members (including REIOs – at present only the EU), see Paul Beaumont, “Reflections on the Relevance of Public International Law to Private International Law Treaty Making” (2009) 340 *Hague Collected Courses* 9–61.

the different legal systems in the UK are represented in the HCCH negotiations. In the past – apart from the excellent work of Sandy Anton and Eric Clive referred to above – the UK delegation was greatly enriched by an excellent Scottish civil servant (Peter Beaton).

### **I. New Hague Conventions – leading role for UK**

The UK should promote the development of a new Convention strengthening party autonomy and alternative dispute resolution in the area of cross-border family agreements. In the HCCH it should try to persuade other member States that the work of the Experts' Group on Family Agreements should move to preparing a Convention.<sup>34</sup>

The UK should actively work for a Hague Convention on parentage and a Protocol on international surrogacy. The latter should regulate international surrogacy in a way similar to the highly successful Hague Intercountry Adoption Convention 1993. Today potential surrogate mothers can be exploited, unsuitable intended parents can buy children and some children born to a surrogate mother can be left unwanted because they don't meet the expectations of intended parents.<sup>35</sup> A Convention on international surrogacy would help to protect and safeguard the parties involved.

### **J. Intra-UK PIL**

Any reform of intra-UK PIL should be done after a proper academic and empirical study involving experts from all three UK legal systems. It should make sure that already established experts are at the heart of it (eg Dr Kirsty Hood QC who gave an excellent paper on this topic at the first AHRC workshop<sup>36</sup> and is the author of the leading book on the subject<sup>37</sup>).

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<sup>34</sup>See Family Agreements involving Children webpages on the HCCH website at <https://www.hcch.net/en/projects/legislative-projects/recognition-and-enforcement-of-agreements>. See also the chapter on this topic by Paul Beaumont and Nieve Rubaja in Paul Beaumont and Jayne Holliday (eds), *Guide to Global Private International Law* (Hart, forthcoming).

<sup>35</sup>See the Parentage/Surrogacy Project on the HCCH website at <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>. See Paul Beaumont and Katarina Trimings, "Recent jurisprudence of the European Court of Human Rights in the area of cross-border surrogacy: is there still a need for global regulation of surrogacy?", in G Biagioni (ed) *Migrant Children in the XXI Century: Selected Issues of Public and Private International Law* (Editoriale Scientifica, 2016) 109–36 and the chapter by Giacomo Biagioni on this topic in Paul Beaumont and Jayne Holliday (eds), *Guide to Global Private International Law* (Hart, forthcoming).

<sup>36</sup>Available at <https://privateinternationallaw.stir.ac.uk/projects/ahrc-research-network/workshop-i/>.

<sup>37</sup>Kirsty Hood, *The Conflict of Laws within the UK* (Oxford University Press, 2007).

Any resulting policy should be developed by the UK Government and the devolved administrations of Northern Ireland and Scotland in an open and collaborative process based on consensus. Given the gradual divergence of Welsh law from English law due to the increased legislative powers of the Welsh Parliament,<sup>38</sup> the time has probably come to recognise Wales as a separate system of law even if not yet a separate legal system and therefore the Welsh devolved institutions should also be involved in developing intra-UK private international law.

The current intra-UK framework in civil and commercial matters is excellent (see Schedules 4, 6 and 7 to the Civil Jurisdiction and Judgments Act 1982) but the various schemes for family law merit careful empirical and analytical examination.

Some of the potential tensions caused by possible forum shopping between Scotland and England due to the very different approach taken to maintenance and other financial provisions concerning spouses and former spouses in the substantive laws of the two legal systems was highlighted by the recent UK Supreme Court decision in *Villiers*.<sup>39</sup> The decision also highlighted that the internal application of the EU Maintenance Regulation in intra-UK cases,<sup>40</sup> in the view of the majority,<sup>41</sup> meant that the maintenance creditor's maintenance proceedings in England (her habitual residence) must be allowed to continue even though divorce proceedings were already pending in Scotland. This is because of the lack of any *forum non conveniens* rule under the Maintenance Regulation permitting the English court to decline its maintenance jurisdiction in favour of the Scottish court and because the "related action" provision in Article 13 of the EU

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<sup>38</sup>See <https://senedd.wales/>.

<sup>39</sup>See *Villiers v Villiers* [2020] UKSC 30. See Lord Sales (with whom Lord Kerr agreed) saying at para 3 that: "Issuing proceedings for maintenance in England was both more convenient for her, since she lives in England, and offered the prospect of more generous maintenance provision than would be available to her if she sought orders in Scotland." See also Lord Wilson (with whom Lady Hale agreed, both dissenting) at para 93 saying: "It is common ground, and a subject of current political debate, that financial awards to a spouse following both separation and divorce are more generous in England and Wales than in Scotland."

<sup>40</sup>See the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 (SI 2011/1484), made by the Secretary of State for Justice pursuant to s 2(2) of the European Communities Act 1972 and extending to all parts of the UK. As Lord Wilson correctly points out at para 125:

the recognition and enforcement in one part of the UK of a maintenance order made in another part of it (including an order made in England under section 27 of the MCA) are governed by the provisions for registration and enforcement in sections 16 to 18 of the Maintenance Orders Act 1950.

These provisions create an almost automatic system of recognition and enforcement of maintenance orders within the UK, see *Anton's Private International Law* (n 11) 904–5.

<sup>41</sup>Lord Sales, Lord Kerr and Lady Black.

Maintenance Regulation (which allows the court second seised to decline to exercise jurisdiction in favour of the court first seised) does not apply when the court first seised (in this case in Scotland) is only dealing with the divorce and not any financial aspects of that divorce.<sup>42</sup> In the view of the minority the majority decision had two serious adverse consequences:

untrammelled licence given to a wife to go forum-shopping, in other words to put her husband at an initial disadvantage unrelated to the merits of her case ... [and] the inability of a court in one part of the UK to decline to determine a wife's maintenance claim even when a court in another part alone has power to determine a claim by one spouse or the other for transfer of property or for some other adjustment (such as would, for example, disentangle them from joint ownership of property) or for a pension sharing order. As Lady Black says ... , the prospect is "not very palatable".<sup>43</sup>

Clearly intra-UK jurisdiction in maintenance and how it relates to (other) financial aspects of divorce needs to be carefully considered. The EU Maintenance Regulation no longer applies in the UK<sup>44</sup> and Schedule 6 to the 2011 Maintenance Regulations which applied the EU Maintenance Regulation to intra-UK maintenance jurisdiction has been omitted by SI 2019 No 519.<sup>45</sup> Indeed the Explanatory Memorandum to The Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020<sup>46</sup> explains that:

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<sup>42</sup>See Lady Black, at paras 90–91. The two senior family lawyers on the UK Supreme Court, Lady Hale and Lord Wilson, both decided that the English court could decline jurisdiction in the maintenance case in favour of the Scottish divorce court because it was a "related action" and the wife's maintenance claim could be brought there. The minority view on "related actions" is supported by Anatol Dutta, "The Application of the European Maintenance Regulation to intra-UK cases" (2021) *Journal of Social Welfare and Family Law* 000 who favours a "broad" view of "related actions" arguing that an "aim of the European rules for cross-border family disputes is to concentrate jurisdiction in the divorce forum." It is interesting that on such an important point of intra-UK law neither of the Scottish Supreme Court Justices sat on this case. As a matter of policy across all the European private international law instruments, including the Lugano Convention, a "broad" interpretation of related actions is appropriate, see the CJEU in Case C-406/92 *The Tatry* [1994] ECR I-5439 at [51]–[52], the House of Lords in *Sarrio SA* [1999] 1 AC 32 at 41, and *Anton's Private International Law* (n 11) at 357. This matter of what should constitute a "related action" at the global level is currently the subject of discussion in the Jurisdiction Project at the HCCH, see the Aide Memoire agreed in the February 2021 meeting of the Experts' Group (paras 34–35) to be made public as a Preliminary Document for the Hague Council on General Affairs and Policy in March 2021.

<sup>43</sup>*Villiers* at para 180.

<sup>44</sup>See The Jurisdiction and Judgments (Family) (Amendment etc) (EU Exit) Regulations 2019 SI 2019 No 519, Reg 6.

<sup>45</sup>*Ibid* at para 38(8).

<sup>46</sup>SI 2020 No 1574.

In the case of maintenance jurisdiction, these are primarily the rules as they existed prior to the relevant EU rules taking effect (the pre-EU rules).<sup>47</sup>

The natural solution is for intra-UK maintenance jurisdiction to revert to Schedule 4 to the Civil Jurisdiction and Judgments Act 1982.

In Schedule 8 to the Civil Jurisdiction and Judgments Act 1982, governing Scottish cases where the defendant is outside the UK,<sup>48</sup> a maintenance creditor-based jurisdiction (his or her habitual residence or domicile) has been restored in order to favour the weaker party. So, the maintenance creditor can sue the maintenance debtor in their own habitual residence or domicile, or the defendant's domicile, or the divorce forum where the maintenance and financial provisions are ancillary to the divorce proceedings.<sup>49</sup> There is no automatic priority for one forum over another. There is no *lis pendens* or related actions rule. Instead, there is a *forum non conveniens* rule which can be used by either the court first or second seised to decline jurisdiction in favour of the more appropriate forum if that will serve the ends of justice.<sup>50</sup>

Sadly, however, it would appear that the special maintenance jurisdiction has not been restored to Schedule 4 to the Civil Jurisdiction and Judgments Act 1982 and there is therefore neither a mention of maintenance being ancillary to divorce nor of the maintenance creditor being able to sue in their own habitual residence or their own domicile under Schedule 4, just leaving the maintenance creditor to sue the maintenance debtor at his or her domicile (statutory domicile under the 1982 Act not common law domicile). Of course, the divorce court is not prohibited from dealing with financial issues relating to the divorce, including maintenance. Furthermore, there is no *lis pendens* provision in Schedule 4 to the 1982 Act and the common law doctrine of *forum non conveniens* is applicable in such cases by virtue of section 49 of the 1982 Act.

The legislation needs to be changed to add the same maintenance jurisdiction that applies in Schedule 8 to the 1982 Act to Schedule 4 so that it applies in intra-UK cases.

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<sup>47</sup> At para 2.13.

<sup>48</sup> See SI 2020 No 1574, Regulation 5(3)(d) which reinserted rule 2(e) into Schedule 8 to the Civil Jurisdiction and Judgments Act 1982 as an alternative to the defender's domicile provided for in rule 1:

in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which has jurisdiction to entertain those proceedings, provided that an action of affiliation and aliment shall be treated as a matter relating to maintenance which is not ancillary to proceedings concerning the status of a person.

<sup>49</sup> Here domicile is the statutory domicile based on residence not the common law domicile, see *Anton's Private International Law* (n 11) at 289–92.

<sup>50</sup> For an explanation of *forum non conveniens* see *Anton's Private International Law* (n 11) at 359–67.



## K. Conclusion

The UK's departure from the EU, whatever the individual reader's views on the merits of that decision of the majority of the people of the UK who voted in the referendum, gives an opportunity for the UK to make a major contribution to the development of global private international law. Since the Treaty of Amsterdam, the EU has increasingly gained exclusive external competence in matters of private international law as more and more internal EU private international law has been passed. The UK's public role on the world private international law stage, mainly at the Hague Conference on Private International Law (HCCH), was gradually reducing while the UK was a member of the EU. Although the UK still had a significant role to play behind the scenes in the many co-ordination meetings of the EU delegation in the Hague and indeed in Council Working Groups in Brussels helping the Commission prepare the EU positions to be taken in The Hague. Now the UK can play a very public role in developing the future of private international law in The Hague, not only in promoting current legislative projects like those on jurisdiction, parentage and surrogacy, and family agreements involving children, but also in reviewing and developing all the existing Hague Conventions through Guides to Good Practice (like the important recent Guide on Article 13(1)(b) of the Hague Child Abduction Convention<sup>51</sup>) and Conclusions and Recommendations of Special Commissions called to review Conventions (notably in the near future on Intercountry Adoption, Adults, and Maintenance). The UK can be in the vanguard of developing and promoting ideas for new work at The Hague. There are many interesting ideas (some for Conventions and some for soft law instruments) including work on competition law,<sup>52</sup> clawback in the context of succession,<sup>53</sup> companies,<sup>54</sup> intellectual property,<sup>55</sup> maritime law,<sup>56</sup> and collective redress.<sup>57</sup>

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<sup>51</sup> Available at <https://www.hcch.net/en/publications-and-studies/details4/?pid=6740>. See further Onyoja Momoh, "The Interpretation and Application of Article 13(1) b) of the Hague Child Abduction Convention in Cases Involving Domestic Violence: Revisiting *X v Latvia* and the Principle of 'Effective Examination'" (2019) 15 *Journal of Private International Law* 626–57. In relation to this Guide the UK was excellently represented by Lady Hale on the Experts' Group that developed it.

<sup>52</sup> See Mihail Danov and Carmen Otero, "Competition", in Paul Beaumont and Jayne Holliday (eds), *Guide to Global Private International Law* (Hart, forthcoming) 000.

<sup>53</sup> See Jayne Holliday and Albert Font Segura, "Succession", in Paul Beaumont and Jayne Holliday (eds), *Guide to Global Private International Law* (Hart, forthcoming) 000 and Jayne Holliday, *Clawback Law in the Context of Succession* (Hart, 2020).

<sup>54</sup> See Johan Meeusen, "Companies", in Paul Beaumont and Jayne Holliday (eds), *Guide to Global Private International Law* (Hart, forthcoming) 000.

<sup>55</sup> See Paul Torremans, "Intellectual Property", in Paul Beaumont and Jayne Holliday (eds), *Guide to Global Private International Law* (Hart, forthcoming) 000.

<sup>56</sup> See Veronica Ruiz Abou-Nigm, "Maritime Law Exceptionalism", in Paul Beaumont and Jayne Holliday (eds), *Guide to Global Private International Law* (Hart, forthcoming) 000.

<sup>57</sup> See Koji Takahashi and Sophia Tang, "Collective Redress", in Paul Beaumont and Jayne Holliday (eds), *Guide to Global Private International Law* (Hart, forthcoming) 000.



The UK should harness its strong intellectual legal base in private international law (retired judges in the field like Lords Mance and Collins; serving judges like Lord Lloyd Jones and Lord Justice Moylan; outstanding QCs like Jonathan Harris, Kirsty Hood and Alex Layton; outstanding senior academics like Trevor Hartley and David McClean and many talented up and coming academics including Jayne Holliday and Lara Walker). It should find ways of involving the best people in the UK delegations at The Hague (notably academics and law reformers as it did in the past so successfully) and not just rely on civil servants. It can explode the myth that the post-Brexit UK might be sceptical of the value of experts by developing a cross-border justice policy that is built on expert knowledge and which consciously promotes high quality empirical and analytical work to inform the UK's positions. The UK must avoid the danger of relying too much on a generalist civil service and not valuing legal expertise and in particular private international law expertise.

The UK should continue to build its alliance in the Hague with the EU (this is an area where a friendly divorce can be demonstrated) which has been at the forefront of developing global private international law since 2003. In particular the EU has moved from largely concentrating on the internal development of EU private international law to fully realising the vital importance of progressively unifying global private international law – partly because EU companies and citizens find themselves trading, working and living all over the world. Without necessarily adopting the theory of reverse subsidiarity,<sup>58</sup> the EU has embraced its spirit by trying to maximise the opportunity for global agreement by negotiating strongly but with a willingness to bridge the different legal traditions (notably common law and civil law) in order to secure consensus, particularly in its handling of the Hague Conventions on Choice of Court, Maintenance, Judgments, and in the negotiations so far on the Jurisdiction Project.<sup>59</sup> The UK is used to bridging different legal traditions given that Scotland is a mixed legal system with significant civil law heritage.

The UK (largely through the legal system of England and Wales) still influences the development of the Commonwealth common law including the

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<sup>58</sup>See Paul Beaumont, “International Family Law in Europe – The Maintenance Project, the Hague Conference and the EC: A Triumph of Reverse Subsidiarity” (2009) 73 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 509–46; and Paul Beaumont, “Respecting Reverse Subsidiarity as an excellent strategy for the European Union at The Hague Conference on Private International Law – reflections in the context of the Judgments Project?” *Europejski Przegląd Sądowy*, 2016, issue 10 (the title means European Judiciary Review).

<sup>59</sup>I am speaking personally here but I have had the enormous privilege of being part of the EU delegation throughout the negotiations on the Judgments Convention and in the Jurisdiction Project so far and of being part of the UK delegation that negotiated all the stages of the Choice of Court and Maintenance Conventions while working with other EU Member States and the Commission to coordinate joint EU positions throughout. See also Beaumont (n 33) and the two articles *ibid*.

private international law dimensions of that.<sup>60</sup> It should renew and strengthen its alliance in the HCCH with Commonwealth partners, notably Australia, Canada, New Zealand and South Africa and encourage other key Commonwealth States like India and Nigeria to play a bigger role there.

Lastly the UK is in an excellent position to understand the unique common law tradition of the USA which has its historic origins in English law and to help both the US and other common law countries in the Commonwealth and beyond to understand how to develop global private international law solutions that work for the common law and civil law world (having had to work for so many years with the civil law dominated EU).

The UK can get off to a good start by accepting the accession of numerous States to the Hague Taking of Evidence and Child Abduction Conventions, by extending the geographical scope of its ratification of the Hague Adults Convention to England and Wales and Northern Ireland, by revoking the insurance declaration under the Hague Choice of Court Convention, and by being the first to ratify the Hague Judgments Convention 2019. When implementing the Hague Judgments Convention serious consideration should be given to incorporating some of the more liberal indirect grounds of jurisdiction in the Commonwealth Model Law and thereby give a lead which hopefully other Commonwealth States will follow.

### **Disclosure statement**

No potential conflict of interest was reported by the author.

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<sup>60</sup>See in particular Reid Mortensen, “Brexit and the Commonwealth” (2021) 17 *Journal of Private International Law* 18–52.