COMPARATIVE STUDY OF “RESIDUAL JURISDICTION”
IN CIVIL AND COMMERCIAL DISPUTES IN THE EU
NATIONAL REPORT FOR:

SCOTLAND

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(A) General Structure of National Jurisdictional Rules for Cross-Border Disputes

1. Main legal Sources

Apart from the Brussels I Regulation ("the Regulation"), the Brussels Convention ("the Convention") and the Lugano Convention the main legal source of the rules of jurisdiction in civil and commercial matters in Scotland is the Civil Jurisdiction and Judgements Act 1982 ("the 1982 Act"). This is an act of the United Kingdom Parliament that gives, originally, the Convention and the Lugano Convention and, more recently, the Regulation force of law in the United Kingdom. Schedule 8 to the 1982 Act ("Schedule 8") contains the rules governing the residual jurisdiction of the Scottish Courts in circumstances where the provisions of the Regulation do not apply.

Schedule 8 is, essentially, a copy of the provisions of the Regulation which has been amended and revised, where appropriate, for application in the Scottish Courts.

There are a limited number of instances where the rules contained in Schedule 8 do not apply. These are specified in Section 21 and Schedule 9 of the 1982 Act. In the instances where the Schedule 8 rules do not apply the jurisdictional rules are derived from either specific provisions contained in statutes or statutory instruments of the United Kingdom or Scottish Parliament or from common law principles established in the case law of the Scottish courts. The specific instances where the Schedule 8 rules do not apply will, if appropriate, be discussed in detail in Part C of this report.

The full current English text of the 1982 Act is attached to this report as Appendix 1.

2. Specific Rules (or Not) for Transnational Disputes

The Schedule 8 rules, and indeed any rules which apply in the absence of the Schedule 8 rules, apply to both trans-national disputes and internal disputes. In other words, the Schedule 8 rules apply equally to the question of whether a Scottish court has jurisdiction over a non-EU domiciled person as they do to the question of which, if any, domestic Scottish court is seized of jurisdiction in a particular matter involving two Scottish domiciled parties.

3. Specific Rules (or Not) for Article 4(1) Jurisdiction

Schedule 8 is the specific set of national rules designed to govern the jurisdiction of the Scottish courts pursuant to Article 4(1) of the Regulation. Section 20(1) of the 1982 Act provides that "Subject to the Regulation.....Schedule 8 has effect to determine in what circumstances a person may be sued in civil proceedings in the Court of Session or in a sheriff court." The regulation referred to is the Regulation.

The Court of Session and sheriff courts are the two branches of the civil courts in Scotland. The Court of Session is the supreme civil court in Scotland although a right of appeal exists to the House of Lords. The sheriff courts are Scotland's lower tier of civil courts. There are 51 sheriff courts throughout Scotland, with each one having jurisdiction over a distinct and separate territory within Scotland. Every part of Scotland is subject to the jurisdiction of one, and only ever one, sheriff court.
4. Influence of EU Law

The application and interpretation of the 1982 Act, and Schedule 8 in particular, are influenced by both the Convention and the Regulation and by the case law of the European Court of Justice. Firstly, given that Schedule 8 is essentially a copy of the Regulation; any revisal of the Regulation directly results in an alteration to the wording of Schedule 8. The introduction of the Regulation is an example of this. Prior to that the wording of Schedule 8 reflected the wording of the Convention but, following the introduction of the Regulation, the UK Parliament passed the Civil Jurisdiction and Judgments Order 2001 (UK Statutory Instrument 2001/3929) to amend *inter alia* the wording of Schedule 8 so that it accurately reflected the wording of the Regulation.

In addition, the 1982 Act makes specific provision for account to be taken by the judiciary of the wording of the Convention, the Lugano Convention and the Regulation and any decisions of the European Court of Justice on the meaning or effect of the either of the Convention or the Regulation.

Section 3 of the 1982 Act provides *inter alia* that:

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(1) Any question as to the meaning or effect of any provision of the Brussels Convention shall...be determined in accordance with the principles laid down by and any relevant decision of the European Court.

(2) Judicial notice shall be taken of any decision of, or expression of opinion by, the European Court on any such question....."
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Section 20(5) of the 1982 Act goes on to provide *inter alia* that:

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(5) In determining any question as to the meaning or effect of any provision contained in Schedule 8-

(a) regard shall be had to any relevant principles laid down by the European Court in connection with Title II of the 1968 Convention or Chapter II of the Regulation and to any relevant decision of that court as to the meaning or effect of any provision of that Title or that Chapter; and

(b) .....the reports mentioned in Section 3(3) may be considered and shall, so far as relevant, be given such weight as is appropriate in the circumstances.”
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The reports mentioned in Section 3(3) of the 1982 Act are the report by Mr P Jenard, the report by Professor Schlosser, the report by Professors Evrigenis and Kerameus and the report by Mr de Almeida Cruz, Mr Desantes Real and Mr Jenard.

5. Impact of Other Sources of Law

All legislation in the United Kingdom requires to be interpreted in a manner compatible with the provisions of the European Convention on Human Rights which was adopted into UK law by the Human Rights Act 1998.
6. Other Specific Features

There are no specific features in relation to cross border disputes other than those already discussed in the preceding paragraphs.

7. Reform

The last change in the Scottish rules applicable in cross-border cases occurred with the coming into force of the Regulation. The Regulation resulted in the passing of the Civil Jurisdiction and Judgements Order 2001 (UK Statutory Instrument 2001/3929). The 2001 Order amended the 1982 Act to reflect the difference between the original Brussels/Lugano Conventions and the Brussels I Regulation.

At the time of writing, we are not aware of any proposed or contemplated changes to Scotland’s national rules of jurisdiction in relation to cross-border cases.

(B) Bilateral and Multilateral Conventions

8. Conventions with Third States

Scotland is not a party to any conventions in its own right. Any conventions or treaties that have effect in Scotland will have been entered into by the United Kingdom. Reference should therefore also be made to section 8 and 9 of the national report in relation to England and Wales.

That having been said, there are a number of conventions to which the United Kingdom is party which contain jurisdictional rules. There are no conventions with third states to which the United Kingdom is a party which correspond to the Convention or the Regulation or which could be argued take the place of the Convention or the Regulation when dealing with third states. Indeed, the conventions which do contain jurisdictional rules relating to contractual or delictual matters all relate to one particular area, namely the international carriage of passengers and goods by either air, road, rail or sea. The relevant conventions are:

- The Warsaw Convention for the unification of certain rules relating to international carriage by air – Warsaw, 12 October 1929
- The Guadalajara Convention, supplementary to the Warsaw Convention for the unification of certain rules relating to international carriage by air performed by a person other than a contracting carrier – Guadalajara, 18 September 1961
- The Berne Convention concerning international carriage by rail (COTIF) – Berne, 9 May 1980
- The Athens Convention relating to the carriage of passengers and their luggage by sea – Athens, 13 December 1974

The United Kingdom is also a party to two conventions in relation to the recognition and enforcement of maintenance orders issued by a foreign court. These conventions are:
9. Practical Impact of international conventions with third states

The conventions in relation to travel by air, road, rail and sea have been subscribed to by both EU member states and third states. Whilst these conventions provide jurisdictional rules in relation to contractual and delictual claims arising out of these types of travel, their relevance in relation to this report is arguably limited. These conventions apply in preference to the rules of the Convention or Regulation. Indeed, the subject matter to which they relate is not something which is governed by either the Convention or the Regulation. Whilst their practical impact in this specialist field is undoubtedly extensive and of significant academic interest, it is, we think, of no relevance here.

(C) Applicable National Rules Pursuant to Article 4 of the Brussels I Regulation

10. Structure

The general structure of the Scottish rules of jurisdiction in relation actions against defendants domiciled in a non-EU state is relatively straightforward. As discussed earlier in part A of this report the primary source of these rules is Schedule 8. Schedule 8 is, for all intents and purposes, a version of the Regulation adapted for use within Scotland. The structure of Schedule 8 broadly mirrors the structure of the Regulation itself.

There are situations where the rules contained in Schedule 8 do not apply. These exceptions are listed in Schedule 9 of the 1982 Act. Broadly speaking these exceptions are:

- Actions of divorce and separation
- Actions of nullity of marriage
- Actions of declarator of marriage
- Actions relating to adoption, custody and guardianship
- Insolvency proceedings
- Commissary proceedings
- Admiralty actions where jurisdiction is based on arrestment

Each of these exceptions derives its own rules either from statute or from the Scottish common law. In addition to the exceptions listed in Schedule 9, section 21(1)(a) of the 1982 Act also precludes reliance on Schedule 8 if a specific rule of jurisdiction has already been provided for in a specific statute. These statutes tend to relate to specialist areas, such as patents, trademarks and registered designs, and cover matters which would not fall within the ambit of the Regulation even if the courts were dealing with parties domiciled within an EU state.
11. General Jurisdiction

There is a general rule of jurisdiction in the residual Scottish rules. It is found in paragraph 1 of Schedule 8. The general rule is as follows:

"Subject to the following rules, persons shall be sued in the courts for the place where they are domiciled."

Sections 41 to 46 of the 1982 Act set out, subject to Article 52 of the Convention, the criteria which determine whether or not a person or entity is domiciled within the UK or within a specific part of the UK. Section 41 deals with the domicile of an individual. The rules here can be summarised as follows:

An individual is deemed to be domiciled within the UK if he is resident within the UK and the nature and circumstances of his residence indicate that he has a substantial connection with the UK. Similar rules apply when considering whether an individual is domiciled in a particular part of the UK. If an individual is domiciled within the UK but cannot show a substantial connection to any part of the UK he shall be deemed to be domiciled in the part of the UK where he is resident. If a person has been resident in the UK, or in any particular part of the UK, for three months or more he shall be deemed to have a substantial connection to the UK or to the relevant part of the UK as appropriate. Section 41(7) of the 1982 Act goes on to provide that an individual shall only be deemed to be domiciled in a state other than a contracting state if (and only if) he is resident in that state and the nature and circumstances of his residence indicate that he has a substantial connection with that state.

12. Specific Rules of Jurisdiction

The specific grounds of jurisdiction which apply in relation to non-EU domiciled defenders are listed in paragraph 2 of Schedule 8. Once again these broadly mirror the provisions of Article 5 of the Regulation.

a) Contract

Paragraph 2(b) of Schedule 8 deals with the ground of jurisdiction applicable in contract. The rule is that, in addition to the general rule of domicile, a person may be sued, in matters relating to a contract, in the courts of the place of performance of the obligation in question. The Scottish courts have ruled that “the obligation in question” is the obligation which is the subject matter of the court action. Interestingly, when Schedule 8 was revised in light of the Regulation, Article 5(1)(b) of the Regulation was not introduced into paragraph 2 of Schedule 8. It is not yet clear whether this was a deliberate effort to preserve the ability, in Scotland at least, to sue in the place of payment or whether it was felt that because the 1982 Act is to be interpreted and applied in light of the Regulation, the presumptions contained in Article 5(1)(b) of the Regulation would be applied in any event and its specific inclusion within Schedule 8 was unnecessary. Judicial clarification of this issue would be welcomed by practitioners and commentators alike in Scotland.

An additional ground of jurisdiction in relation to matters arising out of a contract is contained in paragraph 2(p) of Schedule 8. If the action may be combined with an action against the same defender relating to the rights in rem in immovable property, then a claim arising out of a contract may also be raised in the courts of the place where that property is situated.
b) Tort

Paragraph 2(c) of Schedule 8 deals with jurisdiction in tort. Tort in Scotland is known as “delict”. The connecting factor in this case is the place where the harmful event occurred or, in the case of an application for an interim protective measure, where the harmful event may occur.

C) Criminal Proceedings

There is a specific rule in relation to civil claims arising out of a criminal act. The rule is contained in paragraph 2(d) of Schedule 8. The rule is that the court seized of jurisdiction in relation to the criminal proceedings also has jurisdiction, assuming that it has jurisdiction to entertain civil proceedings at all, to hear the civil claim. An example of this in practice is that the sheriff courts in Scotland preside over both civil and criminal matters. The supreme courts, the High Court and Court of Session, deal only with criminal claims and civil claims respectively. The High Court would be seized of jurisdiction in relation to any criminal proceedings but would be prevented from hearing any civil claim which would only be competent in the Court of Session or a sheriff court.

d) Secondary Establishment

Paragraph 2(f) of Schedule 8 deals with a defender who has a secondary establishment (a branch or agency) within Scotland. The rule is that, only where a dispute arises out of the operations of a branch or agency, a person may be sued in the courts of the place where that branch or agency is situated.

e) Trust

There is a specific ground of jurisdiction in relation to trusts. The rule is set out in paragraph 2(g) of Schedule 8. The rule is that a person may be sued in his capacity as settlor, trustee or beneficiary of a trust in either the Court of Session or the sheriff court in whose territory any of the trustees was domiciled at the time of creation of the trust.

f) Arrest and/or location of Property

If a person is not domiciled within the United Kingdom, he may be sued in the courts of the place where any moveable property owned by him has been arrested. This rule is set out in paragraph 2(h)(i) of Schedule 8. Please see section 15(b) below for further analysis.

13. Protective Rules of Jurisdiction

a) Consumer Contracts

Paragraph 3 of Schedule 8 sets out the protective rules on jurisdiction in relation to a consumer contract. To qualify as a “consumer contract” the contract must have been concluded by an individual for a purpose outwith his trade or profession and must be either:

- a contract for the sale of goods on instalment credit terms; or
- a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
A contract concluded with a person who pursues commercial or professional activities in Scotland or, by any means, directs such activities to Scotland or to several places within Scotland. The contract must fall within the scope of those activities.

A contract will not be deemed a "consumer contract" if it is a contract for transport, unless it is a contract which provides a combination of travel and accommodation for an inclusive price.

A consumer has three options for a forum for raising proceedings. He can sue in the courts of his own domicile or in the courts where his opponent is domiciled. If the action relates to possessory or security rights in immovable property or to an attempt to obtain authority to dispose of moveable property then proceedings can be raised in the courts of the place where that property is situated.

A consumer can only be sued in the courts of his own domicile. The only exception is if the action relates to possessory or security rights over immovable property or to an attempt to obtain authority to dispose of moveable property then proceedings can be raised in the courts of the place where that property is situated.

There is limited scope for departing from the provisions of this rule by agreement. Any such agreement will only be effective if it was entered into by the parties after the dispute arose or if it allows the consumer to raise proceedings in additional courts.

**b) Individual Employment Contracts**

The protective rules on jurisdiction in relation to contracts of employment are contained in paragraph 4 of Schedule 8.

An employee has three options for courts in which to sue his employer. He may sue in the courts of the employer's domicile, he may sue in the courts of the place where he habitually carries out his work or, if he does not habitually carry out his work in any one place, he may sue in the courts of the place where the business who engaged him is situated.

In addition to this, if an employee's dispute with his employer arises out of the operations of a particular branch or agency of the employer, the employee may also choose to sue in the courts of the place where that branch or agency is situated.

An employee may only be sued in the courts of his own domicile.

There is limited scope for departing from the provisions of this rule by agreement. Any such agreement will only be effective if it was entered into by the parties after the dispute arose or if it allows the employee to raise proceedings in additional courts.

**c) Insurance Contracts**

Schedule 8 does not contain any protective rules on jurisdiction in relation to contracts of insurance. At the time of introduction of the 1982 Act it was not felt that such protective measures were necessary in the context of allocation of jurisdiction intra-UK or intra-Scotland. It would also appear that it was not considered necessary in the context of an insurance company domiciled outwith the contracting states. In the absence of specific protective rules it is most likely that the rules discussed in sections 12 (a) and (d) above would be relied upon to found jurisdiction in the Scottish courts.

**d) Distribution Contracts**

As far as we are aware, the Scottish rules on residual jurisdiction do not contain any protective rules in relation to distributorship agreements, commercial agency agreements or franchise agreements.
e) **Protective Rules in Other Matters**

As far as we are aware, the only specific matters subject to protective rules of jurisdiction in Scotland are consumer contracts and employment contracts referred to in sections 13(a) and (b) above.

14. **Rules for the Consolidation of Claims**

Paragraph 2(o) of Schedule 8 sets out the residual Scottish rules in relation to the consolidation of related claims. These rules are largely identical to those rules contained within Article 6 of the Regulation.

a) **Co-Defendants**

A person domiciled in a non-EU state can be sued in the Scottish courts if he is one of a number of defendants at least one of whom is domiciled in Scotland. The only condition attached to this rule is that the claims against the various defendants must be so closely connected that it is expedient for the court to hear and determine them together to avoid the risk of irreconcilable judgments being given by separate courts. Please refer to paragraph 2(o)(i) of Schedule 8.

b) **Third Party Proceedings**

A person domiciled in a non-EU state can be sued in the Scottish courts if he is introduced as a third party in an action arising out of a warranty or guarantee, or indeed in any other third party action, and the Scottish court was the court first seized of the original proceedings. The only exception to this rule is that jurisdiction is excluded if the original proceedings were raised with the sole objective of removing the third party from the jurisdiction of another court which would be competent in the case of the third party. Please refer to Paragraph 2(o)(ii) of Schedule 8.

c) **Counter-Claims**

A party in an action in the Scottish courts can bring a counterclaim in the original Scottish proceedings even if the pursuer in the original proceedings is domiciled in a non-EU state. The counterclaim must arise from the same contract or set of facts on which the original claim was based before the Scottish court can competently deal with the counterclaim. Please refer to Paragraph 2(o)(iii) of Schedule 8.

d) **Related Claims**

There are two sets of circumstances in which a person domiciled in a non-EU state can be sued in the Scottish courts on the basis that the claim is related to or connected with another claim already pending before the court. The first provision is found in paragraph 2(p) of Schedule 8. This mirrors Article 6(4) of the Regulation. A person may be sued in the Scottish courts, in a matter relating to a contract, if the action can be combined with an action against that person in relation to rights in rem in immoveable property and that immoveable property is situated in Scotland.

The second circumstance is not quite so specific. Section 22(4) of the 1982 Act provides that where a Scottish court has jurisdiction in terms of Schedule 8, that court shall also have jurisdiction to determine any matter which is ancillary or incidental to the proceedings or which requires to be determined for the purposes of a decision in the original proceedings.

e) **Any Problems Pertaining to Lack of Harmonisation**

Given that the Scottish rules in this area virtually mirror the rules in Article 6 of the Regulation, the absence of harmonisation in this area has not, as far as we are aware, resulted in or created any specific problems in practice.
15. Rules of Jurisdiction Pursuant to Annex I of Brussels I

a) The rules listed in Annex I

There are three jurisdictional rules of the United Kingdom which are listed in Annex 1 to the Regulation. These are:

- A rule allowing jurisdiction to be founded on service of papers on a party during his temporary presence in the United Kingdom;
- A rule allowing jurisdiction to be founded on the presence in the United Kingdom or property belonging to the defender; and
- A rule allowing jurisdiction to be founded upon seizure by the pursuer of property situated in the United Kingdom.

These rules are examined in more detail in paragraph 15(b) below.

b) Practical use of the rules listed in Annex I

There is no rule in Scotland which allows jurisdiction to be based on service of papers on a party during his temporary presence in Scotland. This is a concept entirely unique to English law and reference should be made to section 15(b) of the National Report for England. The only similar rule is to be found in paragraph 2(1) which allows the Scottish courts to assume jurisdiction over a defender personally cited in Scotland. This only applies, however, where the defender has no fixed residence and would not, therefore, apply where the defender was domiciled in another state whether that state was an EU member or not.

The principle allowing jurisdiction to be based on the presence in Scotland of property belonging to a defender is a long established one. Originally this ground of jurisdiction was only available in the Court of Session but was latterly extended to the Sheriff courts. The ground of jurisdiction has been expressly preserved by paragraph 2(8)(b) of Schedule 8.

It is only heritable property in Scotland which can be used to found jurisdiction. The defender must have a real and beneficial interest in the property. It is not enough that the defender has concluded missives for the purchase of the property; he must have acquired a real right, as opposed to a personal right, in the property. A real right in heritage situated in Scotland can be used to found jurisdiction in any action of a patrimonial nature. It is not necessary that the action involves the property at all. The actual value of the interest in the heritable property is not relevant. The only condition is that the defender must own the property in the same capacity as that in which he is being sued. For example, if a person owns heritable property in Scotland as a trustee, that ownership would not subject him to the jurisdiction of the Scottish courts in an action involving him in a personal capacity.

Paragraph 2(8)(a) of Schedule 8 also preserves the historic principle which allows jurisdiction be based on the arrestment of moveable property in Scotland. This ground of jurisdiction was historically available in both the Court of Session and Sheriff courts. Various rules in relation to jurisdiction based on arrestment have arisen during the evolution of this principle at common law. The practical application of these rules can be summarised as follows:-

- The ground of jurisdiction is available in all patrimonial actions and is not limited to actions actually involving the moveable property.
- The assets which are arrested must be either goods belonging to the defender or a debt owed to the defender.
• The assets must be owned by the defender in the same capacity as that in which he is being sued.

• The assets must be arrested in the hands of a third party who is subject to the jurisdiction of the Scottish courts.

• The actual value of the goods arrested is not relevant although they must be shown to have some commercial value.

c) Extension of jurisdiction pursuant to article 4(2) of Brussels I

Article 4(2) of the Regulation allows a defender, whatever his nationality, to avail himself of the jurisdictional rules listed in Annex 1 to the Regulation. As far as we are aware, there has been no case in Scotland where the courts have applied the provisions of Article 4(2) of the Regulation. The principal cases in relation to jurisdiction based on ownership of heritable property in Scotland pre-date the Convention and the Regulation. These cases largely involve defenders domiciled in England being sued in the Court of Session on the basis of their ownership of heritage in Scotland. We are not aware of any case where a non-EU domiciled person has been sued in the Scottish courts on the basis of their ownership of Scottish heritage.

We have been able to identify one case where jurisdiction based on the arrest of moveable property has been used against a non-EU domiciled entity. In the case of PKTF Kontinent v. VMPTO Progress 1994 SLT 235, the Court of Session assumed jurisdiction over a Russian domiciled entity on the basis of the arrestment to found jurisdiction of a ship allegedly owned by the defender. Although in Scotland there are specific rules relating to the arrestment of a ship as security on the dependence of an action, it is also possible to arrest a ship to found jurisdiction. In that situation a ship is treated in exactly the same way as any other piece of moveable property. The rules in relation to arrestment of a ship in security are expressly excluded from the Regulation and Schedule 8 and are therefore not relevant to this report. A full copy of the decision in the PKTF Kontinent case is attached to this report as Appendix 7.

16. Forum necessitatis

As far as we are aware, the principle of forum necessitatis, or any similar principle or rule, is not recognised in Scots law.
(D) National Jurisdiction & Enforcement of Non-EU Judgments

17. National rules of jurisdiction barring the enforcement of a non-EU judgment

The rules in relation to the recognition and enforcement of a foreign, non-EU judgement are found in three separate sources in Scotland. The first is the common law of Scotland. The remaining two are statutes, the Administration of Justice Act 1920 and the Foreign Judgements (Reciprocal Enforcement) Act 1933.

Scottish common law permits the enforcement of a foreign, non-EU judgement to be refused if the Scottish court is satisfied that the foreign court did not have jurisdiction. The Scottish courts do not, however, apply their own jurisdictional rules when considering this question. Instead they consider whether or not the foreign court's ground of jurisdiction complies with broad international standards of justice. This test has resulted in jurisdiction based on domicile, residence, presence, prorogation, submission, reconvention, performance of contract and occurrence of delict being recognised and accepted but has resulted in jurisdiction based on nationality, arrestment and ownership of heritage not involved in the action being rejected. There is no rule in Scottish common law which permits a Scottish court to refuse the enforcement of a foreign decree simply because, according to the Scottish rules on jurisdiction, a Scottish court ought to have been seized of exclusive jurisdiction.

The Administration of Justice Act 1920 (“the 1920 Act”) regulates the enforcement of judgements obtained in the supreme courts of New Zealand, the Falkland Islands, Jamaica, Trinidad, Ghana, Nigeria, Kenya, Tanzania, Uganda, Zimbabwe, Zambia, Malawi, Botswana, Sri Lanka, Malaysia, Singapore, Cyprus and Malta. Section 9(2)(a) of the 1920 Act provides that a judgement shall not be registered if “the original court acted without jurisdiction”. No further definition or explanation of how this is to be applied is given in the 1920 Act. No further guidance has been given by the Courts. It can only be assumed that, if this question were to arise, the Scottish courts would apply the common law rules referred to above.

A copy of the Administration of Justice Act 1920 is attached to this report as Appendix 2.

The Foreign Judgments (Reciprocal Enforcement) Act 1933 (“the 1933 Act”) regulates the enforcement of judgements obtained in the courts of Australia, Bangladesh, Canada, India, Jersey, Guernsey, the Isle of Man, Israel, Pakistan, Surinam and Tonga. Section 4(1)(a)(ii) of the 1933 Act provides that registration of a foreign judgement may be set aside if the Scottish court is satisfied that “the courts of the country of the original court had no jurisdiction in the circumstances of the case”. The 1933 Act then goes on to provide criteria for deciding when a foreign court should, and should not, be considered to have jurisdiction.

The circumstances where a foreign court is considered to have jurisdiction are specified in section 4(2) of the 1933 Act and are:

- That the defender submitted to the jurisdiction of the court by voluntarily appearing in the proceedings;
- That the defender had, prior to the action being raised, agreed to be subject to the jurisdiction of the courts of that country;
- That the defender was, at the time when the original action was raised, resident in that country or, in the case of a corporate body, had its principal place of business in that country;
That the defender had an office or place of business in that country and the proceedings were in relation to a transaction effected through or at that office or place of business;

That, if the action related to property, that the property in question was located in that country; and

In any other situation, if the jurisdiction of the original court is recognised by the registering court.

The circumstances where a foreign is considered not to have jurisdiction are specified in section 4(3) of the 1933 Act and are:

- Where the subject matter of the proceedings was immovable property situated outside the country of the original court.
- If the defender was a person who, under the rules of public international law, was entitled to immunity from the jurisdiction of the courts of that country and did not submit to the jurisdiction of that court.

A copy of the Foreign Judgments (Reciprocal Enforcement) Act 1933 is attached to this report as Appendix 3.

(E) Declining Jurisdiction

18. Forum Non Conveniens

When the Regulation does not apply and the Scottish courts are applying the rules contained in Schedule 8, there is a general rule allowing the courts to decline jurisdiction on the basis of forum non conveniens. Section 22 of the 1982 Act provides that:

"Nothing in Schedule 8 shall prevent a court from declining jurisdiction on the ground of forum non conveniens."

Section 49 of the 1982 Act goes on to state:

"Nothing in this Act shall prevent any court in the United Kingdom from staying, sisting, striking out or dismissing any proceedings before it, on the ground of forum non conveniens or otherwise, where to do so is not inconsistent with the 1968 Convention or, as the case may be, the Lugano Convention."

The generally accepted view amongst commentators in Scotland is that a stay or sist of proceedings would be inconsistent with the Regulation and the Convention and that, therefore, a plea of forum non conveniens is not available in favour of a court of an EU state. Any dispute regarding which court ought to be seized of jurisdiction would instead be resolved by reference to the exclusive jurisdictions under the Regulation or the principle of priority of process.

The prevailing judicial view is that the plea is available if there is a choice between two different courts within the United Kingdom. Furthermore, recent authority suggests that the plea is available in a Scottish (or indeed United Kingdom) court where the alternative forum is a non-EU state and the case has no connection to any other EU state. The courts have observed that in cases where there are mixed circumstances, such as possible forum both in EU and non-EU states or where the parties are from more than one EU state, the plea should not be available and "the jurisdiction rules in the Convention should
be mandatory”. The leading case in this area is Re Harrods (Buenos Aires) Limited [1992] Ch. 72. A copy of this case is attached to this report as Appendix 4.

A Scottish court may also dismiss or sist an action on the basis that an action has already been raised in another court in relation to the same matter. This is known as the plea of *lis alibi pendens*. This plea would only be available if the earlier proceedings had been raised in a non-EU state, otherwise the provisions of the Convention and the Regulation in relation to priority of process would apply.

19. Declining Jurisdiction when the Defendant is Domiciled in a Third State

a) *Non-EU Jurisdiction Agreements*

Paragraph 6(1) of Schedule 8 provides that if parties have agreed that a court is to have jurisdiction to resolve disputes between them then that court shall have jurisdiction. Paragraph 6(2) of Schedule 8 confirms that such an agreement must be in writing, evidenced in writing, in a form which accords with the practices which the parties have established between themselves or, in international trade or commerce, is in a form which accords with the usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known and regularly observed.

The view taken by the Scottish courts on this issue is that the wording of any clause must make it clear that the parties intended to confer exclusive jurisdiction. If that is the case then the Scottish court must dismiss the proceedings before it for want of jurisdiction. If, however, it is not clear from the agreement that exclusivity was intended, the Scottish court can continue to hear the case provided that it has a ground of jurisdiction in terms of Schedule 8.

b) *Parallel Proceedings in a non-EU court*

Please see the comments on the plea of *lis alibi pendens* in section 18 above. This plea is only available in a Scottish court if proceedings have already been raised in another, non-EU, state.

c) “Exclusive” *Jurisdiction in a non-EU State*

Paragraph 8 of Schedule 8 provides that where a Scottish court is seized of jurisdiction in a claim which is principally concerned with a matter over which another court has exclusive jurisdiction, the Scottish court must, on its own motion, declare that it has no jurisdiction.

The relevant exclusive jurisdictions are listed in paragraph 5(1) of Schedule 8. They are:

- In proceedings relating to a right *in rem*, or tenancy of, immovable property, the courts for the place where that property is situated;
- In proceedings which have as their object the validity, nullity or dissolution of companies, legal persons or associations of natural or legal persons, the courts of the place where that entity has its seat;
- In proceedings concerning the validity of entries in public registers, the courts of the place where the register is kept; and
- In proceedings relating to the enforcement of a judgement, the courts of the place where the judgement has been or is to be enforced.
Paragraph 5(2) goes on to provide that “No court shall exercise jurisdiction in a case where immovable property, the seat of a body......a public register or the place where a judgement has been or is to be enforced is situated outside Scotland......”

20. Declining Jurisdiction When the Defendant is Domiciled in the EU

a) Non-EU Jurisdiction Agreements. The Scottish Courts could decline jurisdiction over an EU domiciled defender if there was a valid prorogation agreement. The Schlosser Report (which the Scottish courts are required to have regard to when interpreting the Convention and the Regulation and when applying the Schedule 8 rules) states, at page 124, that where there is a prorogation of jurisdiction clause in favour of a non-EU state, the court in question must determine the validity of that agreement in accordance with the \textit{lex fori}. For a Scottish court the \textit{lex fori} is Schedule 8. The requirements in relation to a prorogation agreement are set out in section 19(a) above.

Even assuming that the agreement in question meets the formal requirements of validity, a Scottish court, which would otherwise have jurisdiction in the absence of the agreement, will only decline jurisdiction if it is clear from the agreement being relied upon that exclusivity of jurisdiction was intended. Generally the use of the word “exclusive” or something similar will be required by the court although each case will depend on its own circumstances and the wording of the agreement as a whole. The leading case in this area is \textit{McGowan v. Summit at Lloyds} 2002 SC 638. A copy of this case is attached to this report as Appendix 5.

b) Parallel proceedings in a non-EU court. The Scottish courts could decline jurisdiction in favour of prior proceedings in a non-EU court. Section 49 of the 1982 Act provides that nothing in the Act shall prevent any UK court from staying or dismissing any proceedings before it on the grounds of \textit{forum non conveniens} or otherwise (emphasis added). It appears therefore that this clause preserves the pre-existing common law plea of \textit{lis alibi pendens} (please see section 18 above). In these circumstances it is at least theoretically possible that a Scottish court could refuse jurisdiction or stay proceedings in circumstances where proceedings had already been raised in another, albeit non-EU, state.

c) Exclusive jurisdiction in a non-EU state. It is unlikely that exclusive jurisdiction in a non-EU state would affect an EU domiciled defender. It does not appear that, when operating under the rules of the Regulation, a Scottish court will recognise the exclusive jurisdiction of a non-EU state. It is quite clear that the exclusive jurisdictions contained in the Regulation apply only to EU states. Equally, the exclusive jurisdictions recognised by a Scottish court when applying the rules in Schedule 8 (and which include the recognition of the exclusive jurisdiction of non-EU states) will not apply if the Regulation applies.
(F) The Adequate Protection (or lack thereof) of EU Nationals and/or Domiciliaries through the Application of Domestic Jurisdictional Rules

21. Use of National Jurisdictional Rules to Avoid an Inadequate Protection in Non-EU Courts

We are not aware of any case where the Scottish courts have exercised jurisdiction on the basis of the Scottish national rules on the basis that the pursuer would not get a fair hearing or adequate protection in a foreign court.

22. Lack of Jurisdiction Under National Rules Having the Effect to Deprive EU Plaintiffs of an Adequate Protection

We are not aware of any case where the Scottish courts have declined or declared themselves not to have jurisdiction to hear a claim brought by an EU domiciliary in either a claim brought by a consumer against a non-EU domiciliary, a claim brought by an employee against a non-EU domiciliary or a claim brought by an EU domiciliary in a Community regulated matter.

23. Lack of Adequate Protection as a Consequence of Transfer of Domicile to or from a Third State

As far as we are aware, there is no reported case where a Scottish national has not been able to invoke the protection of Community legislation because the persons involved were no longer domiciled in the EU at the time the proceedings were instituted.


We are not aware of any other case or circumstance where the application of domestic jurisdictional rules has led, or is likely to lead, to the jeopardisation of mandatory Community legislation, the proper functioning of the internal market of the adequate protection of EU nationals and domiciliaries. Given the distinct similarities between the Regulation and the Scottish national jurisdictional rules, we would not expect such a circumstance to arise.

(G) Residual Jurisdiction under the new Brussels II Regulation

25. Applicable National Rules Pursuant to article 14 of the New Brussels II Regulation (Parental Responsibility)

We note that in terms of the Brussels II Regulation the term “parental responsibility” includes custody and guardianship of children but does not include either adoption or the question of legitimacy of a child. We shall deal with only custody and guardianship in this report.

The Scottish rules of jurisdiction in relation to both custody and guardianship are found in the Family Law Act 1986 (“the 1986 Act”). We shall deal with each in turn.

Section 1 of the 1986 Act confirms that the act applies to “an order…..with respect to the residence, custody, care or control of a child, contact with or, access to a child or the education or upbringing of a child…..” Section 9 of the 1986 Act allows the Scottish courts to assume jurisdiction if the child concerned is habitually resident in Scotland at the time of the application. The Court of Session will have
jurisdiction if the child is resident anywhere in Scotland and individual sheriff courts will have jurisdiction if the child is resident within the territory of that particular court. In addition, section 10 of the 1986 Act allows the Court of Session to assume jurisdiction if the child is present in Scotland and is not habitually resident anywhere else in the United Kingdom at the time of the application. Section 10 allows a sheriff court to assume jurisdiction if, at the date of the application, the child is present in Scotland, the child is not habitually resident in any part of the UK and either the pursuer or defender in the action, the parents, is habitually resident within the territory of that sheriff court.

There are two exceptions to these rules. Section 11 of the 1986 Act provides that, if at the date of the custody application, there are proceedings in another court in the United Kingdom in relation to the marriage of the child’s parents, then that court shall have jurisdiction in relation to custody matters. Furthermore, section 12 of the 1986 Act provides that the Court of Session can assume jurisdiction if the child concerned is in Scotland and it is necessary for the protection of the child that an order be made immediately. The same provisions are applicable in the sheriff court where the child in question is, at the time of the application, present within the territory of that sheriff court.

The rules of jurisdiction in relation to a guardianship application are found in section 16 of the 1986 Act. The basis of jurisdiction for the Scottish courts is the habitual residence of the child at the date of the application.

Section 16(2) excludes from the ambit of section 16 an application for the appointment of a judicial factor or curator bonis over the estate of a child or any application by such a factor or curator. The basis for assuming jurisdiction in relation to applications of this nature is the property in question is situated within Scotland, in the case of the Court of Session, or within the territory of a particular sheriff court.

A copy of the Family Law Act 1986 is attached to this report as Appendix 6.
26. NA

27. Conventions with Third States in Matters of Parental Responsibility (and maintenance of children)

What are the international (and in particular bilateral) conventions concluded between your country and non-EU countries that include rules of jurisdiction in matters of parental responsibility (and maintenance of children)?

- Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children

  Note: This convention has been signed, but not yet ratified, by the UK.

- Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Inter-country Adoption


28. Jurisdiction as a Ground for Resisting the Enforcement of non-EU Judgment in Matters of Parental Responsibility

Can the judgment of a non-EU State relating to matters of parental responsibility (for instance, a judgment given the guardianship of a child to one of the parents) be denied recognition or enforcement in your country on the basis that the courts of your country are the only ones who have jurisdiction to entertain the matter? If so, what is (are) the ground(s) of these “exclusive” rules of jurisdiction (e.g., habitual residence of the child in your country, citizenship of one or several of the parties, etc.)

Where a particular judgement does not fall within the ambit of the 1996 Hague Convention (full details given above) either because the State from which it emanates is not a contracting party or the judgement is concerned with an issue not covered by the Convention, then the Scottish Courts will have regard to the habitual residence of the child as the correct ground of jurisdiction in deciding whether or not to recognise and enforce the foreign judgement.

Section 26 of the Family Law Act 1986 provides that an order relating to parental responsibilities or parental rights in relation to a child which is made outside the United Kingdom shall be recognised in Scotland if the order was made in the country where the child was habitually resident. So, if a child is habitually resident in Scotland, it follows that any judgement of another non-EU country relating to parental responsibilities towards that child is unlikely to be given effect on the basis that the Scottish Court has jurisdiction in relation to that matter.

However, it should be noted that, in practice, foreign custody decrees emanating from the courts of a country in which the child is habitually resident are not necessarily enforced by Scottish Courts without further scrutiny. That is because in all cases of custody the welfare of the child will be considered to be of paramount importance. Therefore if a foreign judgement of a court in the country of habitual residence of a child is considered, by a Scottish Court, not to be in the best interests of the child at the time it comes to be enforced in Scotland, the Scottish Court will not give effect to it. This would be the case even if the judgement was in the best interests of the child at the time it was made.

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