Op civielrechtelijk vlak blijven lopende procedures en procedures die voor het eind van de overgangsperiode zijn ingeleid, onder het EU-recht vallen. Zoals overeengekomen met het VK, wordt alle informatie op dat gebied in verband met het Verenigd Koninkrijk tot eind 2024 op het e-justitieportaal bijgehouden.

Which country's law applies?

Schotland

1 Sources of the rules in force

1.1 National rules

Scotland has a separate and distinct “mixed” legal system. This area of “applicable law” has been particularly influenced by the Continental systems, as well as the common law. Scotland forms a separate jurisdiction within the UK, and conflicts rules are needed to determine intra-UK cases as well as truly international cases. Generally, when the UK has become party to an international instrument containing applicable law rules, a decision has been taken to apply the same rules to intra-UK conflicts, although there is usually no obligation to do so. Scots law recognises this field as international private law, private international law, or conflict of laws.

As in England and Wales, many rules today derive from directly applicable EU Regulations. In relation to civil and commercial matters these are: Regulation 593/2008 (Rome I) on the law applicable to contractual obligations and Regulation 864/2007 (Rome II) on the law applicable to non-contractual obligations. The Contracts (Applicable Law) Act 1990, (which implemented the Rome Convention 1980) remains relevant in relation to contracts entered into before 17 December 2009 (the Rome I Regulation applies to contracts entered into on or after that date). The Private International Law (Miscellaneous Provisions) Act 1995 is only relevant to situations not covered by the Rome II Regulation (the Regulation applies to cases in which damage occurred after 11 January 2009). In other areas, common law generally applies. The sources in family law in Scotland are the common law; statute (often following recommendations made by the Scottish Law Commission); and EU and international obligations.

1.2 Multilateral international conventions

Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions 1961.

Rome Convention 1980 on the Law Applicable to Contractual Obligations (replaced by the Rome I Regulation in relation to contracts entered into on or after 17 December 2009)

Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition.

1.3 Principal bilateral conventions

We are unaware of any bilateral Conventions containing choice of law provisions to which the UK is party.

However, it should be noted that, although the Rome Convention 1980 and Hague Conventions permit a State to apply some other choice of law regime to “internal” conflicts – such as conflicts between the laws of England and Wales and Scotland – the UK has chosen not to make use of this facility. Hence, the Rome Convention (in relation to contracts entered into pre 17 December 2009) and Hague Convention rules apply to conflicts between the different jurisdictions of the UK as well as in international conflicts.

2 Implementation of conflict of law rules

2.1 Obligation of the judge to apply conflict of law rules on his own initiative

Foreign (i.e. non-Scots) law will be applied in the Scottish courts only if applicable under national conflicts rules and only if pleaded and proved by the party seeking to rely on it. This rule relates to evidence and procedure, and is not displaced by EU instruments.

2.2 Renvoi

Renvoi is the process by which a forum court adopts foreign law in a conflict of laws situation. This may be relevant in various areas of law, such as the law of succession and family law, although there is not a great deal of Scottish case law on renvoi. The relevant EU Regulations (such as Rome I and Rome II) exclude the application of renvoi, and the same approach was taken in the Private International Law (Miscellaneous Provisions) Act 1995 in relation to delict /tort.

2.3 Change of connecting factor

This would normally be dealt with by specifying the time at which the connecting factor is applied. In the case of transfer of title to moveables, the law would be that of the place where the moveables were located at the time of the event which allegedly transferred the title.

2.4 Exceptions to the normal application of conflict rules

Scottish courts may decline to apply a foreign law otherwise applicable on the basis that it is contrary to Scottish public policy. Although the term “international public policy” would not be used in this context, what is meant by “contrary to Scottish public policy” is that the law in question is regarded as unacceptable even allowing for the fact that the case is an international one to which Scots law could not be expected to apply. Scottish public policy will sometimes derive from international instruments or norms, such as the European Convention on Human Rights.

In addition the Rome I and Rome II Regulations both now provide for the application of the overriding mandatory rules of the forum irrespective of the law otherwise applicable to the contract. There are not many such rules in Scots law, and those that do exist are mainly to be found in UK-wide statutes. Examples would include the unenforceability of investment agreements made by or through unauthorised persons, or following an unlawful communication to the customer, under sections 26 and 30 of the Financial Services and Markets Act 2000.

2.5 Proof of foreign law

The content of foreign law is a matter of fact, and as such evidence has to be led by the parties and the judge must reach conclusions based on an analysis of this evidence. The judge cannot investigate and apply foreign law independently. Where the evidence is conflicting, the judge must decide which party’s view appears more plausible, and may examine foreign statutes and cases which have been referred to in evidence in order to do so.

The only exception to the rule that foreign law is a matter of fact is that, where the UK Supreme Court hears an appeal from one part of the UK, it may apply the law of any other UK jurisdiction even though the content of that law has not been proved by evidence. This is because the Supreme Court contains judges from all the UK jurisdictions, and considers itself qualified to apply the law of any of them.

Where foreign law requires to be proved, this is normally done by the evidence of expert witnesses. It is not enough simply to put a text, such as a foreign statute before the court, which will not regard itself as qualified to interpret or apply foreign legal material without the guidance of someone with proper knowledge of that system. Expert evidence may be given by anyone with suitable knowledge or experience, even if not a practising lawyer in the other country. Academics for instance have been used.

Generally where the parties disagree about the content of foreign law, this will need to be proved by oral evidence by experts, in the course of which they may refer to documentary material which may be placed before the court. Where there is no dispute the parties may simply be able to agree, or to submit affidavit evidence.

There is a presumption that foreign law is the same as Scots law. This is obviously rebuttable by evidence which satisfactorily proves the (different) content of the foreign law.

3 Conflict of law rules

3.1 Contractual obligations and legal acts

In cases concerning contractual obligations in civil and commercial matters in situations involving a conflict of laws, the Rome I Regulation (Regulation (EC) No. 593/2008 on the law applicable to contractual obligations) is directly applicable. The principle of universality means that any law specified by Rome I shall be applied irrespective of whether it is the law of a Member State of the EU.

Rome I does not apply to matters of evidence or procedure, which continue to be governed by the law of the forum. An exception are rules determining the burden of proof, which Rome I specifies are to be governed by the law governing a contractual obligation under the Regulation. Prescription and limitation periods interpretation, performance and consequences of a breach of an obligation, among others, are governed by the applicable law under the Regulation.

The primary rules of the Rome I are as follows. Where the parties have made an express choice of law, or the choice can be clearly demonstrated by the terms of the contract or the circumstances of the case, that law applies.

There are limits on freedom of choice. Article 3 of Rome I provides that where a choice of law is made, but all other “elements relevant to the situation” are located in another country, the choice of law will not deprive of effect those provisions of the law of that country which cannot be derogated from by agreement. Article 9 provides that overriding mandatory provisions of a country should apply, even where parties have not exercised freedom of choice of law. Additionally, in consumer and employment contracts, the law chosen cannot generally deprive the consumer or employee of the protection of the mandatory rules of the system which would have applied in the absence of choice.

In cases where there is no express choice of law, or one that can be clearly demonstrated, Rome I sets out, in Article 4, further rules for determining the governing law, which is often tied to the habitual residence of the party who is not making payment for the product or service, e.g. the seller in a contract for the sale of goods, the lender of a bank loan or the guarantor in a contract of guarantee. This presumption may be rebutted in favour of a country with which the contract is manifestly more closely connected. Case law relating to the Rome Convention, which may remain relevant in the context of the interpretation of Rome I, confirms that in order to rebut the presumption there must be at least a clear preponderance of factors in favour of the other country. The majority of judges in the leading Scottish case of Caledonia Subsea v Microperi SA went further, and said that the presumption should only be rebutted if in the exceptional circumstances of the case the habitual residence of the characteristic performer had no real significance.

3.2 Non-contractual obligations

The Rome II Regulation (Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations) applies to non-contractual obligations in civil and commercial matters in situations involving a conflict of laws. For the rules specified in the Regulation to apply, damage must have occurred or be likely to occur. Damage is specified as covering any “consequence” arising from tort/delict, unjust enrichment, negotiorum gestio (a non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person), or culpa in contrahendo (a non-contractual obligation arising out of dealings prior to the conclusion of a contract). The Rome II Regulation does not apply, among others, to cases of defamation, or an equivalent claim made under foreign law.

Under Rome II the general rule which applies to delicts is to apply the law of the country where the damage occurs. Special rules determine the applicable law for certain types of non-contractual obligation, including product liability, unfair competition, environmental damage and infringement of intellectual property rights. The Regulation also sets rules relating to unjust enrichment, negotiorum gestio and culpa in contrahendo. The Regulation allows the parties to choose the applicable law in certain circumstances. The Regulation however puts in place restrictions on the avoidance, through the operation of the Regulation’s rules, of rules of the domestic law of the forum, and on the avoidance of rules of a country other than the country chosen where all elements relevant to the situation at the time of the event giving rise to the damage occurring are located in that country.

In Scotland, there are some cases to which Rome II does not apply where one of the Private International Law (Miscellaneous Provisions) Act 1995 or common law will apply.

3.3 The personal status, its aspects relating to the civil status (name, domicile, capacity)

Domicile

In Scotland, the status of illegitimacy was abolished by section 21 of the Family Law (Scotland) Act 2006. As a consequence of this, section 22(2) of the 2006 Act provides that where (a) the parents of a child under 16 are domiciled in the same country as each other; and (b) the child has a home with a parent or a home (or homes) with both of them the child shall be domiciled in the same country as the child's parents. In other cases, section 22(3) provides that the child shall be domiciled in the country with which the child has for the time being the closest connection.

For persons over 16, their previous domicile continues to apply unless they take a domicile of choice. To adopt a domicile of choice, the individual must have actually moved to the new country where they wish to reside, and they must show an intention to give up their previous domicile and also an intention to live permanently in the new country. If a domicile of choice is abandoned, the domicile of origin will revive to fill any gap until a new domicile of choice may be acquired.

The domicile of married persons is now assessed independently of that of the other spouse.

Section 1 of the Domicile and Matrimonial Proceedings Act 1973 provides that a married woman has the same rights with regards to domicile as any other person. However, if the woman married prior to the 1973 Act (and thereby acquired her husband’s domicile under the old law) she shall continue to retain that domicile unless she abandons it or acquires a new domicile of choice.

Name

The right to name a child is part of parental responsibilities and rights (PRRs) In any dispute over PRRs section 11 of the Children (Scotland) Act 1995 requires the court to treat the welfare of the child as its paramount consideration.

Adults are generally entitled to call themselves by any name they like in Scotland, provided there is no fraudulent intent. Any person over 16, whose birth is registered in Scotland or who was legally adopted in Scotland, may apply to National Records of Scotland for a recorded change of name. However, there is no obligation to use this service. Further information on name changing can be found on the website of the National Records of Scotland.

Capacity to Contract

Capacity to enter into contracts, make wills etc. is governed by different laws depending on the issue in relation to which the question of capacity arises. The Age of Legal Capacity (Scotland) Act 1991 is relevant in certain circumstances. Under the Age of Legal Capacity (Scotland) Act 1991, a person of or over the age of 16 years has legal capacity to enter into any transaction. A younger person has capacity in some circumstances which are set out in the Act.

3.4 Establishment of parent-child relationship, including adoption

Scots law gives parents (and certain other individuals who have legal capacity to care for a child) parental rights and responsibilities. Provision is made in relation to parental rights and responsibilities in the Children (Scotland) Act 1995. Scots law will be applicable whenever the Scottish courts have jurisdiction subject to the provisions of the 1996 Hague Convention and Brussels IIa. Adoption matters in Scots law are determined by the Adoption and Children (Scotland) Act 2007.

3.5 Marriage, unmarried/cohabiting couples, partnerships, divorce, judicial separation, maintenance obligations

A marriage will only be valid in Scotland if certain requirements are satisfied. Both parties must be free to marry, have full legal capacity and have fully consented to the marriage.

Section 38(1) of the Family Law (Scotland) Act 2006 also requires that the marriage must conform to the formalities required by the law of the place where the marriage is celebrated. This covers the validity of the ceremony and its elements e.g. whether any particular form of words must be used, whether the marriage must take place in a particular location, whether a marriage can be conducted by proxy.

The question of whether a person who enters into marriage had capacity to do so and had fully consented to the marriage is determined by the law of the place where, immediately before the marriage, that person was domiciled (section 38(2) of the 2006 Act). In Scotland, the age of legal capacity to enter into a marriage is 16. In terms of consent, there must be a genuine and serious exchange of consent between both parties to the marriage.

Scotland now also recognises same sex marriage following the introduction of the Marriage and Civil Partnership (Scotland) Act 2014. This includes same sex marriages entered into both in Scotland and overseas.

Provided there is no legal impediment to the marriage, anyone can marry in Scotland. There is no residence requirement in Scotland for couples seeking to marry here although persons from outside the EU may need immigration clearance.

Civil Partnership and Same Sex Marriage

Scots law also recognises civil partnerships in accordance with the Civil Partnership Act 2004. Section 85 of the 2004 Act provides that a civil partnership is formed when two persons of the same sex sign the completed civil partnership schedule before two witnesses aged 16 years and over and an authorised registrar (all being present).

The 2004 Act also makes specific provision for civil partnerships formed outside the UK. A foreign same-sex civil union which has been legally entered into outwith the UK will be treated as a civil partnership in Scotland provided it meets certain criteria set out in the 2004 Act.

Cohabitation

As a general rule in Scotland, if a couple live together as though they were married, their cohabitation will generate certain rights and duties. The Family Law (Scotland) Act 2006 makes provision for rights of cohabiting couples (which apply equally to both same sex and opposite sex couples). For example, section 26 provides for rights in certain household goods; section 27 makes reference to rights to certain money and property; section 28 makes provision for financial provision on separation; section 29 provides for financial provision where one of the cohabitants dies without leaving a will; and section 30 makes provision on civil protection orders to protect against abuse.

Divorce and Separation

In matters of divorce and separation there is provision in UK legislation (namely the Domicile and Matrimonial Proceedings Act 1973 and the Civil Partnership Act 2004) on when the Scottish courts have jurisdiction in divorce and dissolution cases. More details can be found on the website of the Scottish Courts and Tribunals.

Maintenance

In respect of maintenance, the Department for Work and Pensions runs a statutory child maintenance service across Great Britain.

In Scotland, provision is also laid down in the Family Law (Scotland) Act 1985 on obligations of aliment to family members, such as spouses and children. An obligation of aliment is an obligation to provide such support as is reasonable in the circumstances.

3.6 Matrimonial property regimes

Scotland has a system in law for financial provision on divorce or dissolution of a civil partnership. Scots law sets out certain principles that must be considered when deciding on financial provision and the division of matrimonial property and these principles are contained in the Family Law (Scotland) Act 1985.

The general rule in Scots law is that the net value of the matrimonial property should be shared fairly between the parties unless there is a reason against fair and equal sharing. Matrimonial property is defined as all property belonging to the parties to the marriage or civil partnership that was acquired before or during the marriage or civil partnership. Section 9 of the 1985 Act sets out the principles that should be considered when making any order of financial provision on divorce or dissolution of a civil partnership, which should assist in deciding whether the matrimonial property should be divided equally amongst the parties, or whether one spouse or civil partnership should receive a larger share than the other.

3.7 Wills and successions

In cases of intestate succession (i.e. where there is no will), the law of domicile of the testator at the date of death applies to the succession to moveable property and the law of the country in which the property is located at the date of the death applies to succession to immovable property. The same rules apply where “legal rights” (i.e. the rights of certain family members to share in the deceased’s estate which cannot be defeated by will) are in issue. Legal rights have to be taken into account in both intestate and testate succession. It is of note that at present under Scots law, legal rights are available only from the moveable estate, and are therefore only available where the deceased has died domiciled in Scotland. In cases involving wills, the capacity of the testator to make a will is governed by the law of his domicile at the date of the will with regard to moveable property, and the law of the country in which the property is located with regard to immovable property.

Under the Wills Act 1963 a will is considered to be validly executed (“formally valid”) (e.g. in the correct form, right number of witnesses) if it complies with any of the following internal laws: the law of the place where the will was executed (signed and witnessed); the law of the domicile, habitual residence or nationality of the testator at the date of execution; the law of the domicile, habitual residence or nationality of the testator on death. It will also be formally valid in respect of immovable property if it complies with the law of the country in which the property is located.

The provisions of a will relating to moveable property are valid and enforceable (“essentially valid”) (e.g. limits on proportion of estate which can validly pass under the will) if it complies with the law of the testator’s domicile at the date of death. A will relating to immovable property is materially valid if it complies with the law of the country where the property is located at the date of death.

A will is interpreted by the law intended by the testator, which intention can be express or inferred from the language of the will. Otherwise it is presumed to be the law of the testator’s domicile at the date of the will with regard to moveable property. This rule probably also applies to immovable property. In exceptional cases, where the will does not clearly indicate a law, the law of domicile at the date of death has been applied.

It is of note that section 4 of the 1963 Act states that:
“The construction of a will shall not be altered by reason of any change in the testator's domicile after the execution of the will.”
The essential validity of an alleged revocation of a will is determined by the law of the domicile of the testator at the date of the alleged revocation with respect to moveable property and the law of the place where immovable property is situated where the revocation would affect that property. A will which seeks to revoke an earlier valid will or a provision of an earlier valid will is considered formally valid if the will revoking the earlier will, complies with the law of any country under which the revoked will or provision would have been treated as properly executed.

3.8 Real property

Whether property is to be classified as moveable or immovable is a question for the law of the place where the property is situated.
In the case of immovable property, the applicable law is the law of the place where the property is situated. This applies to all questions regarding the transaction, including capacity, formalities and material validity. There is a distinction between the transfer of land or other immovables, and the contract which governs the rights and liabilities of the parties to that transfer – the latter is governed by distinct applicable law rules (in particular, under the Rome I Regulation).
In the case of corporeal moveable property, the applicable law is the law of the place where the property is situated at the time of the event alleged to have affected the title to it. A title to corporeal movable property acquired in accordance with this general rule will generally be recognised as valid in Scotland. Contractual issues are of course governed by the Rome I Regulation.

3.9 Insolvency

The UK is a party to Council Regulation 1346/2000 on insolvency proceedings, which sets out the relevant rules in proceedings involving the complete or partial divestment of the debtor and appointment of a liquidator where the debtor’s main interests are in an EU Member State (other than Denmark). If the Scottish courts have jurisdiction (which will be the case if the debtor’s main interests were centred in Scotland, presumed to be the place of the registered office), Scots law will be applied.
In cases falling outside of Regulation 1346/2000, Scots law will be applied where the Scottish courts have and are exercising jurisdiction.

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