FACULTY OF ADVOCATES

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Response to

Ministry of Justice Call for Evidence on

CIVIL JUDICIAL COOPERATION: REVIEW OF THE BALANCE OF COMPETENCES

I. PRELIMINARY OBSERVATIONS

The Faculty of Advocates (the '**Faculty**') welcomes the opportunity to respond to Ministry of Justice ('**MoJ**')'s Call for Evidence (the '**Consultation**') on this topic. Before turning to address, in turn, the ten questions asked, we begin with some preliminary observations:

(a) The Faculty is the independent referral bar in Scotland, and its members appear in the UK Supreme Court, the Judicial Committee of the Privy Council, the Court of Justice of the European Union and the European Court of Human Rights, as well as in the Scottish courts. Members of Faculty, collectively, have unrivalled experience of the civil justice system in Scotland. The Faculty has responded to consultations from the MoJ in relation to specific measures within this field. The Faculty and its members would wish to provide relevant information to the MoJ and to engage at all stages with EU law reform in this area.

(b) When addressing EU developments in this area, full account should be taken of: (i) the multi-jurisdictional nature of the United Kingdom; (ii) the distinctive features of the common law systems (i.e. those of England and Wales and Northern Ireland); and (iii) the distinctiveness from those systems of Scots law. Although it may be tempting to use convenient shorthand, there is, technically, no such thing as the 'UK Legal System' or 'UK Law'. When considering cross-border judicial cooperation among the UK jurisdictions in criminal matters, the House of Lords, in 1999, recalled that, although Scotland and England are politically united, for jurisdiction

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(c) purposes, the two legal systems are to be considered as 'independent foreign countries'.[1] The same principle applies in civil matters. It is accordingly essential, when an EU measure is in contemplation, that consideration is given not only to how it will fit onto each of the UK's legal systems, but also to whether or not, and if so how, the measure should be transposed for application as between the UK's legal systems.

(d) As a mixed legal system, containing elements of both the European civil law and the Anglo-American common law. Scots law – and Scots lawyers – are often well-placed to bridge the gap between the English common law and the major national legal systems of the EU. Scottish academic lawyers are well-known in Europe and have had a significant influence on many modern EU developments.

(e) The standard of English translation of EU instruments may be subject to criticism. Scots law may provide a useful linguistic resource. It is, for example, the only legal system in Europe where many of the concepts of civilian property law of property are formulated in English. All too often, concepts consistently formulated in the Romance and Germanic languages are clumsily rendered into common law English, when a Scots law word would have more accurately reflected the meaning of the words of the EU law instrument.

(f) It is the Faculty's impression that in some other northern European Countries, the government has a close relationship with elements of the legal profession – particularly the academic profession in specialist institutes - which is put to good use in dealing with EU law reform. Developing mechanisms through which the expertise of the legal profession, both academic and practising, can be engaged throughout the legislative process, would be beneficial.

With these preliminary remarks, we turn to address the questions asked in the Consultation.

II. CONSULTATION QUESTIONS

1. What are the advantages and/or disadvantages to businesses and/or individuals in the UK of EU civil judicial cooperation? You may wish to focus on a particular instrument.

1.1 As a general proposition, EU civil judicial co-operation, in the context of the single market, may be regarded as a practical necessity. In order for the principles underpinning the single market to

[1] *R v Manchester Stipendiary Magistrate, Ex parte Granada Television Ltd* [2001] 1 AC 300 at 304 *per* Lord Hope of Craighead, recalling Lord Campbell LC's observation in *Stuart v Stuart and Moore* (1861) 4 Macq 1 at 49 that: 'as to judicial jurisdiction, Scotland and England, although politically under the same Crown, and under the supreme sway of one legislature, are to be considered as independent foreign countries, unconnected with each other'.

be given practical expression, effective mechanisms for the resolution of cross-border disputes, in which businesses and consumers can have confidence, are essential. A functioning market is underpinned by, and depends on, effective and reliable legal institutions whereby contracts and property rights can be enforced. Since persons may move freely across the single market, there require to be mechanisms whereby cross-border disputes in the family law field can be resolved. Ultimately, the justification for civil judicial co-operation is to be found in no less an ideal than the rule of law itself: that citizens and undertakings should be able to enforce their rights, and that they should be able to access independent lawyers qualified to advise them of those rights, to identify the appropriate forum to resolve their disputes and to identify the law to be applied to their disputes. For these reasons, civil judicial co-operation between the different jurisdictions of the EU may be regarded as being no less important than civil judicial co-operation between the different jurisdictions of the UK.

1.2 Turning to some of the EU instruments in question, a number of advantages may be identified.

1.2.1 *EU rules on jurisdiction.* As a general proposition, well-framed uniform rules on jurisdiction assist in bringing clarity, avoiding conflicts and promoting certainty. The EU Insolvency Regulation is one instrument that has been particularly successful and has resulted in many undertakings registered in other EU jurisdictions being placed into UK insolvency proceedings. In civil proceedings generally, uniform rules on jurisdiction should allow parties, properly advised, to identify the forum where a dispute is likely to be resolved.

1.2.2 *Choice of Law Rules.* Again, as a general proposition, well-framed uniform choice of law rules are likely to promote the rule of law by maximising the prospect that parties in different jurisdictions can nevertheless, if properly advised, identify the law which falls to be applied to determine their respective rights and obligations and then take advice from appropriately qualified lawyers on the substance of that law.

1.2.3 *Mutual Recognition and Enforcement.* Again, as a general proposition, immediate EU-wide recognition of domestic court orders is essential to ensuring that the principles underlying the single market may be realised. The EU instruments on enforcement of judgements and, in the family law context, on enforcement of access rights and maintenance, have proved beneficial.

1.2.4 *Measures to facilitate litigation in cross-border cases* – such as provisions on service of documents and co-operation in obtaining evidence – are necessary if cross-border disputes are to be effectively and expeditiously resolved.

As the history of the multi-jurisdictional single market in the United Kingdom demonstrates, where such measures of judicial co-operation are effective, a functioning single market can accommodate diverse legal systems with only selective harmonisation of the substantive law.

1.3 All of this having been said, however, it is, under the current arrangements, always a matter for consideration whether it is in the UK's interests to opt into any particular instrument. The Faculty has in the past addressed consultations on the question of whether the UK should opt into any particular instrument on the merits of the particular proposal.

2. What is the impact of EU civil judicial cooperation on UK civil and family law?

2.1 The impact has been most marked in: (i) jurisdiction and choice of law in civil and commercial disputes; and (ii) family law.

2.2 Much of that impact has been positive. The Faculty would draw attention, however, to some practical difficulties in the field of family law.

2.2.1. The application of the *lis pendens* principle in the 'first to file' rule has the benefit of certainty. But such a regime has a particular practical disadvantage, in the family law context: it may discourage the use of mediation, other forms of alternative dispute resolution and collaborative solutions in advance of litigation: in cross-border cases, the rule imposes pressure on parties to be the 'first to file'. If mediation in advance of litigation is to be encouraged – and this is widely recognised as being appropriate in the sensitive area of family law – there may need to be some mitigation of the *lis pendens* principle while mediation or ADR solutions are being attempted.

2.2.2. The application of different jurisdiction and enforcement regimes for maintenance and other aspects of financial provision on divorce are another source of difficulty. So, for instance, there have been cases where the Scottish courts have had jurisdiction for divorce, but not for maintenance. Split actions across different countries dealing with such closely related matters are what the EU provisions seek to avoid. But that is not necessarily what happens at present. In practice there is an overlap between the EU concept of maintenance, and the domestic concept of financial provision on divorce, but the two concepts are not coincident in scope. In Scots law there is no matrimonial property regime (ie operative

during the marriage, as opposed to on divorce); and a 'clean break' principle is applied on divorce: the sharing of capital assets is partly intended to provide also for future support (ie maintenance). There is, at present, a lack of a unitary regime for the enforcement of financial orders on divorce which relate to matters beyond those capable of being characterised as maintenance.

2.2.3. Greater use could be made of provisions for transfer between jurisdictions (as in Article 15 of Brussels II*bis*) both in practice in cases relating to parental responsibilities and to alleviate some of the adverse consequences of a strict rule of *lis pendens,* resolving some of the conflicts of jurisdiction in cases that do not involve children.

3. How is civil judicial cooperation necessary for the functioning of the internal market? Which aspects support and/or hinder it?

3.1 The functioning of the internal market depends on there being effective means for enforcing rights and obligations within that market, including those which have a cross-border element. If participants in the market do not have confidence that their contracts and property rights can be enforced effectively, the market cannot properly function. Effective legal institutions – including an independent judiciary and an independent legal profession – as well as sound rules of substantive law (including, where necessary, rules on jurisdiction, choice of law and mutual recognition and enforcement) are essential.

3.2 The free movement of persons brings with it, inevitably, increased scope for family law disputes with cross-border elements. It would be unacceptable in human terms if such disputes could not be resolved effectively in a manner which respects the rights of those involved and takes account of the best interests of any children as a primary consideration.

3.3 Effective rules on jurisdiction, choice of law and mutual recognition and enforcement of judgments are, in a multi-jurisdictional market, essential. Beyond these measures, practical measures of co-operation may be valuable, including, for example, the measures providing for assistance between jurisdictions in securing evidence. More use should also be made of Brussels II*bis*, Article 15 transfers and participating in hearings from another jurisdiction by telephone or video live-link.

4. Are there any areas where EU competence in this area has led to unintended and/or undesired consequences for individuals and companies in the UK? Please give examples.

4.1 The view was expressed at the consultation event held in Scotland on 23 July that the application of EU law in the jurisdictions of the UK should be neither unintended nor unexpected. The UK has the opportunity to promote awareness, and to influence the content, of EU law instruments. Providing the UK constructively engages both with its own stakeholders and with the formulation of EU instruments, none of the results of the EU exercising competence in this area should be unintended. If the UK Government negotiates with a full appreciation of the potential implications of a proposed instrument in the various jurisdictions of the UK and keeps the relevant professions informed, then – while there may no doubt be points on which there will require to be a compromise – there should not, generally speaking, be unintended consequences.

4.2 Nonetheless, there are areas where EU legislation has caused difficulties which could be mitigated. Some of the difficulties, however, arise within the UK from the way that the Government or the constituent legal systems have dealt with EU measures. We give two examples. First, the UK has adopted the provisions of the Maintenance Regulation (2009/4/EC) intra-UK while retaining domestic conflict provisions in relation to divorce and children. This increases the complexity of the law, causes confusion and results in potentially split hearings within the UK where one part will have primary jurisdiction to deal with maintenance by virtue of *lis pendens* but another will have primary jurisdiction under the domestic rules. The difficulty is similar, but not identical, to that which arise between member states. Second, Scots law has failed to adapt its procedural rules to the requirements of EU Regulations, in particular following the decision of the CJEU in Case C−92/12 *Health Service Executive v SC and AC*.[2] The domestic UK rules relating to recognition and enforcement orders placing a child in institutional or foster care have a suspensive effect that is incompatible with the Brussels II Regulation. Thus far, the Court of Session has been persuaded that, in appropriate cases, there must be immediate enforcement (contrary to the Rules of the Court of Session); but the situation is not satisfactory. This particular issue may be seen as a consequence of retaining *exequatur*, but illustrates the nature of the problems facing judges and law-makers, including those with responsibility for Rules of Court.

5. What are the advantages and/or disadvantages of the opt-in for the UK?

[2] [2013] Int L Pr 6, [2012] 2 FLR 1040.

The major advantage of the opt-in is that it gives the UK the opportunity to evaluate each measure on its merits. There are some potential disadvantages. The opt-in creates a level of complexity and potential lack of transparency for practitioners. In relation to any particular EU instrument which may be relevant to the case in hand, the practitioner (who must appreciate that the instrument has been made in an area of competence where the UK has an option to opt in) requires to check whether the instrument is one in respect of which the UK has exercised its opt-in. Furthermore, insofar as certain EU instruments are designed to cohere (neither leaving gaps in legislative provision, nor creating confusing overlaps), piecemeal adoption of EU measures does not bring the benefits of coherence. There may also be a risk that, at the stage of negotiation and during the legislative process, UK interests are less likely to be accommodated in the context of an instrument which the UK has not opted into. UK lawyers may, by reason of the opt-in, be less engaged with the legislative process of an instrument that may never apply; and may also be relatively unprepared if the UK, late in the day, does decide to opt-in. It is important that, notwithstanding the opt-in option, the UK should be fully and actively engaged in the negotiation of EU instruments.

6. What are the advantages and/or disadvantages of the cross-border requirement for the UK's national interests?

6.1 The cross-border requirement may be necessary to demarcate issues which engage the EU and those which are purely domestic in nature. But for the day-to-day operations of EU instruments before the Scottish courts, the cross-border requirement can give rise to additional – and, perhaps, sometimes unnecessary – complications. Because EU rules are drafted to apply only to cross-border situations, the result is that there may need to be two sets of rules: one set for a purely domestic case, and one set for the cross-border case. Indeed, in some cases, such as insolvency, there may be a third layer of rules to deal with international cases involving non-EU states. It will often, accordingly, be sensible to consider whether the EU rules can and should be transposed into intra-UK cases or even into purely domestic cases within one of the UK's jurisdictions.

6.2 Some instruments contain provisions expressly dealing with the fact that the UK has more than one legal system. This is to be welcomed. However, in certain cases the drafting of such provisions can cause difficulty (see, for example, Brussels II*bis*, Art 66(b)). There is much to be said for provisions which make absolutely clear that the allocation of cases to a particular jurisdiction within the Member State is a matter for the domestic law or laws of the Member State in question. The UK can then take a considered view on whether the EU measure

should simply be transposed into the domestic legal orders for intra-UK cross-border cases or whether there are particular reasons for adopting different rules within the UK.

6.3 There will normally be much to be said, simply from the point of view of avoiding unnecessary complexity, for applying the EU rules to the intra-UK context. On occasion, however, it has been necessary to adapt the EU rules to the specialities of the UK situation: since EU instruments refer to a 'member state' or the law of a 'member state' a multi-legal system state like the UK needs to be able, for domestic purposes, to make provision for jurisdiction and enforcement, or identification of the applicable law, in respect of a matter where the UK is identified as the relevant member state for EU purposes. We would suggest that it is important: (a) that the question of transposition of any EU rules to intra-UK cases is kept in mind when the UK is negotiating at the EU level; but (b) that the UK should retain the freedom to choose to apply any EU rules to intra-UK cases as appropriate.

6.4 On other occasions it has been necessary to adapt those rules to the specialities of the UK situation: for example, the exclusive jurisdiction provision in respect of proceedings concerned with the registration or validity of certain intellectual property rights which was found in the Brussels Convention (and now in the Brussels I Regulation) could not have been utilised in the intra-UK allocation of jurisdiction, since these UK-wide registers are held in England & Wales (originally in London and now at the Intellectual Property Office in Newport).

6.5 The EU rules may also initially give rise to apparent conflicts between the EU rules and the scope of the residual UK rules dealing with international elements involving third countries, as occurred (and was resolved by the CJEU) in Case C-281/02 *Owusu v Jackson (t/a Villa Holidays Bal Inn Villas)*.[3]

7. What impact might any future enlargement of the EU have on civil judicial cooperation?

No comment.

8. What future challenges and opportunities are there in the area of EU civil judicial cooperation?

No comment.

[3] [2005] QB 801.

9. **What are the advantages and/or disadvantages to the UK of the EU's powers to act internationally in this area?**

It is important that Hague Convention instruments should be consistent with EU instruments. It is therefore helpful that the EU has now assumed competence for dealing with the Hague Convention on parental responsibility and protection of children of 1996 and has authorised member states to accede to the Convention. The EU has also, itself, signed the Hague Convention of 23 November 2007 on International Recovery of Maintenance. Any implementation of this Convention requires to be coordinated with the operation of the Maintenance Regulation. There is already a proposal for development of information technology solutions. This is exactly the kind of practical response which would facilitate the effective application of the rule of law in cross-border cases..

10. **What would the advantages and/or disadvantages to the UK of action being taken at an international rather than EU level?**

We refer to our response to question 9 above. Whilst international action will generally be the best outcome, it may be more difficult to achieve than action at EU level, given the even greater number of different legal systems involved (and also, sometimes, the lack of comparable institutions to those which exist at EU level). In some spheres, international co-operation simply may not be possible, whereas action at an EU level may be an attainable goal.

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