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Civil and Family Judicial Cooperation: EU Balance of Competences Review

August 2013

Resolution's response to the Ministry of Justice

Resolution's 6,500 members are family lawyers, mediators and other family professionals, committed to a non-adversarial approach to family law and the resolution of family disputes. Resolution members abide by a Code of Practice which emphasises a constructive and collaborative approach to family problems and encourages solutions that take into account the needs of the whole family, and the best interests of any children in particular.

Resolution as an organisation is committed to developing and promoting best standards in the practice of family law amongst its members and amongst family lawyers in general. Resolution members seek to solve problems outside of court, where possible, through negotiation, mediation or collaborative law and now arbitration.

Resolution publishes various guides to improve standards of practice. Resolution provides training in law and in the skills and understanding that family lawyers need to help their clients face a difficult time. We also campaign for better laws and better support and facilities for families and children undergoing family change.

Our response has been prepared by members of Resolution's International Committee.

General comments

The practical experience of Resolution's members is that, as a general rule, the introduction into UK and English and Welsh law of European legislation in the form of EU Council Regulations has been beneficial. Judicial discretion has been curtailed in many areas to give more certainty of outcome, for example in the area of divorce jurisdiction pursuant to the Brussels II (1347/2000) and Brussels II bis (2201/2003) Regulations. There have been isolated instances of "hard law" resulting in apparently odd jurisdiction decisions. However, there is no doubt the jurisdictional certainty which significantly reduces the scope for forum disputes has saved many UK and EU citizens and residents from the distress and expense of defended court proceedings over divorce jurisdiction.

This overarching principal of sacrificing judicial discretion, and sovereign powers, in favour of rigid rules to provide certainty, is common to many of the family law areas in which the EU has legislated. The aim of reducing the stress and cost of litigation by promoting certainty, harmonisation and cooperation between EU Member States is commendable. Nevertheless, care must be taken to avoid unacceptable encroachments on domestic sovereignty, particularly where this would disadvantage nationals and residents of the UK disproportionately compared with their EU neighbours.

Response to consultation questions

Question 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.

As stated above, the two Brussels II Regulations have had a major impact on individuals in the UK and EU. Although there have been some hard decisions, the effect has been largely beneficial. Despite initial concerns expressed by many in 2001 when Brussels II was implemented, the legal profession now accepts the regime as a satisfactory norm. We recommend that the Brussels II scheme should be modified to provide for a hierarchy of jurisdiction bases, with a presumption in favour of the jurisdiction of joint or last joint habitual residence. Many other commentators agree that this option deserves careful consideration.

Other examples of EU Regulations which have been of generally beneficial effect are:

The Judgments Regulation (44/2001) ("Brussels I")
The Service Regulations (1348/2000 and 1393/2007)
The Maintenance Regulation (4/2009).

Taken together, this package of EU legislation has been generally well received by family lawyers and has been beneficial for their clients. The laws are seen to reduce the scope for forum shopping and satellite litigation, thus facilitating the process of family law dispute resolution in EU Member States.

Some commentators have been critical of the restriction imposed on maintenance pending suit claims by the Court of Appeal's interpretation of Art 31 of Brussels I in Wermuth v Wermuth [2002] EWCA Civ 50; [2003] 1 FLR 1029. The former Art 31 is reproduced in Art 14 of the 2009 Maintenance Regulation so the issue should be reviewed in the light of developments in EU law since Wermuth was decided 11 years ago.

The Service Regulation has encountered no major controversy, although the process is sometimes slow.

The Maintenance Regulation has been in operation for just over two years so family lawyers have had limited time to test its practical effects. The focus on jurisdiction based on habitual residence is sensible. English and Welsh family lawyers have different opinions on the applicable law provisions and whether they should be, or should not be, accepted in the UK. There is support for some clarification of the definition of "maintenance" (and how it differs from "property adjustment" and other financial orders), particularly because the English concept of maintenance is not shared by other EU Member States (or even Scotland). There is almost universal criticism of the apparent abolition of maintenance jurisdiction where divorce jurisdiction is based on the domicile of one spouse alone. Although the point has yet to be judicially determined, commentators agree that this appears to be the effect of Recital 15 and Art 3(c). Family lawyers are unhappy about this and would like to explore how the former maintenance jurisdiction might be retrieved. The restriction is likely to make it harder for economically weaker parties (usually wives and mothers) to get maintenance.

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

The Regulations cited above have led to a marked reduction in family law forum shopping and satellite litigation. The clarity of the law has also made it easier for parties to reach agreement about certain issues, especially choice of jurisdiction. The resulting savings in legal costs, court

administration costs and support service costs have been significant. There has also been a consequent reduction in conflict between parties: if there is no scope for argument on choice of jurisdiction there can be no conflict.

A negative impact is felt by those parties who feel unfairly prejudiced by being forced to litigate in what they see as an "inappropriate" forum. The difficulty in managing this impact is that there is no universal standard by which forum conveniens litigation is resolved. Even within the jurisdiction of England and Wales there are different tests depending on the subject matter of the dispute. Internationally there is a wide divergence of law and practice.

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

We do not believe that this question relates to family law issues, although it may be relevant to family welfare to the extent that families can move and work between EU Member States.

Question 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.

As stated above:

- Some "hard" cases on divorce jurisdiction
- Consider a "hierarchy" of divorce jurisdiction criteria
- Consider removing the Wermuth restriction on maintenance pending suit
- Clearer definition of "maintenance"
- Restore maintenance jurisdiction in sole domicile divorce cases.

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

It is conceded that special pleading in favour of the opt-in on behalf of the UK may make our EU partners sceptical of the UK's commitment to the European project. It would be counter-productive to the facilitation of family law cooperation if this led to the UK being marginalised in discussions concerning the formulation of EU family law policy.

However, the opt-in is supported by family lawyers. The UK is in a unique position as the largest common law jurisdiction in the EU with historic, cultural and economic links to common law countries which other EU Members States do not have. The freedom to opt in to EU legislation, or aspects of it (like matrimonial property regimes), gives the UK an advantage in dealing with non-EU international family law cases, unfettered by concepts and restrictions which may be inappropriate in such cases.

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

The effect of Art 81 of the Treaty for the Functioning of the EU raises complex issues. The European Commission's suggestion that it could pass legislation that would apply purely to domestic measures should be resisted. The EU should legislate only in areas where there is a cross-border element.

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

Family law matters are particularly sensitive to cultural, social and religious norms which vary significantly between countries. Intense passions can be raised over family law reform issues, even within the UK (for example, around same sex marriage). In Australia in the 1970s and 1980s there were serious acts of violence perpetrated by anti-Family Court terrorists, leading to the murder of a judge and the bombing of a court. Family law needs to be handled with kid gloves.

This sensitivity means that the family law principles and practice of any candidate for EU membership should be carefully examined. If the standards conflict substantially with those accepted by existing EU Member States the candidate State should we believe be encouraged to adopt acceptable reforms before admission.

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

Family lawyers and their clients would be assisted by the EU sponsoring educational and liaison programmes which would foster mutual understanding among family law professionals in EU Member States. Networking groups, publications, seminars and on-line facilities would promote harmonisation and cooperation in a positive way without the need for legislation.

The EU should also do more to reach out beyond the European context with links to family law practitioners and policy makers in other countries, especially those that do not have the Civil Law systems familiar to the majority of EU Member States. Some Asian and Islamic jurisdictions, for example, may have much to teach us about how conciliation and mediation can be used to reduce court litigation over disputed family law issues.

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

There is debate about whether the EU has exclusive competence to enter into accessions with new Member States of the 1980 Hague Abduction Convention. The European Commission argues that Brussels II bis gives it exclusive competence over 1980 Hague because acceptance of new Member States affects the operation of Brussels II bis.

We can understand the preference for EU accession on behalf of all EU member States. As a unit the EU will have more political and diplomatic influence when it negotiates on behalf of all EU Member States with non-EU countries. But this frustrates domestic UK efforts to expand its network of 1980 Hague "friends".

This is one example of the tension between collective and unilateral action which is inherent in the EU structure. In the case of the 1980 Hague Abduction Convention, which for family lawyers is certainly the most important of all Hague Conventions, we believe that the UK should be free to act unilaterally.

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

The answer to this question follows from the answer to question 9. The 1980 Hague Abduction Convention is an example of an instrument in respect of which the UK should be free to act unilaterally and not on a collective basis with the EU.

The UK should also retain its power to deal unilaterally with non-EU countries in relation to a broad range of family law issues, particularly if the EU is reluctant or too slow to act in areas which the UK believes should be prioritised. The UK's independent connections with common law counties in particular, such as the USA, Canada, India, Australia, New Zealand, Singapore and Hong Kong, should be protected and preserved from EU restrictions.

For further information please contact:

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