Balance of Competences Civil Judicial Cooperation Report: Event in Brussels 25 June 2013

The following is a summary record of key points made by participants during the event.

How effective is Article 81? Has it been used as it was designed? What happens next?

- The Regulations under Article 81 worked well. The Regulations simplified complicated areas of family law giving Europe common rules to apply. These are areas which affect everyone and consequently make the legal process easier for all. It was important to note that these were areas that were of huge importance to the general public.

- The area of civil judicial cooperation has had a positive outcome for the EU and the UK especially since the adoption of the Amsterdam Treaty. For example, Brussels I gives enormous added value to the UK and Europe as a whole by providing people living abroad with a co-operative system of mutual recognition of civil and family law matters. There are only advantages to such a system and the implications on the domestic legal systems are minimal. The UK's opt-in has worked well for the UK, the UK has opted into all instruments in this field except Succession, the protocol to Hague 2007 and Matrimonial Property Regimes, and this indicates that the UK itself recognises the value that these Regulations bring. Since 2000 there have been more that 40 initiatives in this area which underlines the importance to working together in order to achieve the benefits that this area of law can bring the citizen.

- The output of Civil Judicial Cooperation has been unequivocally a good thing. There have been some areas where perhaps the EU has been too ambitious for example Rome III, however the EU is very helpful where the EU is tackling genuine problems.

- From an England and Wales' perspective solicitors and barristers attach great importance to legislation in this area. There is huge value in Brussels I and also in Rome I which provides rules governing choice of law. There is further work that could be done in this area to improve the resolution of cross-border disputes. The Law Society considers that it would be useful to revise the Small Claims regulation to cover claims up to 10,000 Euros. The Bar Council, in its response to the recent Commission consultation on the measure, also expressed itself to be open to an increase in the threshold. This would make the Regulation more effective as it currently has a very low threshold with claims unable to exceed 2,000 Euros. Despite mixed views about

individual opt-in decisions, the opt-in generally works well though it can give rise to some important difficulties.[1]

- Most of the Instruments and Regulations under discussion were negotiated under article 65 of the Treaty establishing the European Community. There were concerns about the impact of the change of wording under article 81 of the Treaty on the Functioning of the EU (the product of the Treaty of Lisbon). The wording of the new article is not as tight. There should be a limitation to procedural matters; substantive matters should not be affected. There is a worry that the interpretation of Article 81 could be too wide. There needs to be much greater awareness in the UK of the instruments in this area and the benefits that these can provide to the individual. The public and in some cases courts and practitioners are not aware of Regulations in this area. An advertising campaign should be undertaken to increase awareness.

- Civil Judicial Cooperation is all about mutual recognition, oiling the wheels of justice, and not so much about affecting substantive law. The opt-in placed the UK in a much better position than Denmark, which does not have an opt-in. Denmark needs to agree an International Treaty for every measure that they want to become a party to. The opt-in is easier. A question that the UK should be asking is, what instruments would the UK retain if the UK leaves the EU? In this area most on the Regulations should be retained. In practice the European Parliament goes to get great lengths to ensure that the common law is taken into account in negotiations. The European Parliament's Legal Affairs Committee, ensures that there is a Common Law representative at every hearing that it holds. There is a belief in the UK that we are a victim of the Commission and other EU countries trying to impinge on domestic law. This is not that case: all European countries wish to keep their domestic laws. Article 81 is about helping to resolve cross border disputes and although there have been attempts by the Commission to make some regulations apply to domestic cases these have been limited.

- Civil law matters receive a lot less political and media attention than the criminal justice area; however the regulations in the Civil Judicial Cooperation field affect a lot more people's lives. They have a practical value, touching as they do matters that everyone is likely to deal with i.e. property, wills etc. The opt-in works particularly well for the UK, it gives a lot of leverage in Council and Parliament. Experience shows that both the Commission and Parliament bend over backwards to allow the UK to opt in. However there is a feeling that the opt-in decision is not always made on the basis of what will be most advantageous for UK citizens. In recent times the UK appears to be moving away from a position where it always opted in to often opting out. Opting in is the best way for the UK to benefit from Regulations as

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[1] See detailed discussion in the 'opt-in' section below.

it allows the UK to have a seat at negotiations and influence the outcome.

- In response it was argued that any trend to opt out more had been of limited effect in the civil area. The decision to opt out of the Account Preservation Regulation had been in response to the opinions expressed during the public consultation that the UK undertook.

- Article 81 is all about the mutual recognition of judgements. For example the system which allows the freezing of bank accounts in another country, after listening to Member States there is now a rule that of liability to protect the debtor from the creditor. In effect the debtor can hold the creditor liable if assets are frozen unreasonably.

- The Mediation Directive was very popular and had beneficial effects on the cost of justice to the state.[2] Another example of an effective EU initiative is the e-justice portal, which will allow more effective collaboration and therefore make justice cheaper for individual Member States.

- There is a greater need to learn from other countries about the way that their laws operate. For example it would be worth looking at Germany for family law.

- The Court of Justice has developed over time and is now less like a French Court of Cassation. This is to a large extent due to the influence of judges from other jurisdictions including the UK.

<u>Opt-in</u>

- It was understood, in the Civil Judicial Cooperation area, how difficult it could be for the UK to opt in at the beginning of negotiations, so the UK was given a full seat at the table from the start to allow the UK to negotiate. This approach, it was believed, made it easier for the UK to opt in at a later date. An example of this was the negotiation around the Maintenance regulation.

- The opt-in can sometimes work to the detriment of the UK. For example the decision not to opt in at the beginning of the Wills and Succession Regulation had not been viewed favourably in some quarters. Sometimes it is felt that there is one rule for the UK and another for everyone else.

- Not all Member States are aware that the UK has an opt–in, and when they do become aware they are resentful.

[2] The Mediation Directive has received a mixed response from solicitors in England and Wales (and many are not yet aware of it); however, it is believed to be a popular instrument with mediators.

- One of the big advantages that the Civil Judicial Cooperation field has brought about is that judges now communicate more and have access to training. The UK has taken the decision not to opt in to the Justice Programme. This will make it much more difficult for UK judges to go on exchange programmes and for UK legal practitioners to receive training on EU instruments. The UK's participation in the previous scheme has been of great value but following the decision not to opt in these benefits will not continue. This decision is very short-sighted.

- There is some evidence that the Commission has tried to extend the scope of measures beyond cross-border matters into domestic law. One example of this was the Small Claims Regulation, which the Commission had recently been suggesting should apply in a purely domestic context. The Commission did not appear to consider this a problem, although there has been considerable opposition from Member States.

- A common statistic seen in UK papers is that 75% of legislation in the UK now comes from the EU. This is in part because the UK government is not clear on what the EU is responsible for. The UK government needs to set out for the UK people what competence actually is. This needs to be done in such a way that the public can understand. This needs to be done now ahead of any referendum. It was noted that setting out what EU Competence is and how it works was, indeed, a key purpose of this exercise; however the point was re-iterated that this explanation needed to be made in the popular press.

- The UK's opt-in rights in relation to Civil Judicial Co-operation cannot be considered in isolation from the UK's possible opt-out of EU criminal justice and police measures concluded prior to the Treaty of Lisbon (which the Law Society does not support). (There is a risk of this leading to a general perception of the UK not engaging or being less engaged in the field of Justice and Home Affairs and a consequent loss of influence).

Family Instruments

- The family instruments that the EU has adopted cover a range of different areas of law; these include jurisdiction, recognition and enforcement, co-operation between central authorities and legal aid. The topics that these instruments cover include divorce, legal separation and annulment, partnership, maintenance and a number of Hague Conference Regulations. The UK has accepted all of the family instruments that the EU has put forward apart from the Protocol to the Hague 2007 Maintenance Convention and Rome III (choice of law in divorce) and both of these were due to difficulties in applying foreign law in courts in the UK. The UK's approach to jurisdiction has been very pragmatic once it is assured that the necessary safeguards were in place. The UK has been more sensitive during negotiations which cover applicable law. The EU accepts that it is harder for the UK to

apply these in a common law environment. There is a conflict due to the culture of the courts. The family instruments are useful because they help make people's everyday lives easier. For example if you have a married couple (for example one partner is English, the other French) who live in The Netherlands, the marriage can be recognised in the UK without the need for the couple to fill out any paperwork. This is an example of a family instrument making citizens life easier. In terms of future developments in the family area future negotiations and developments include Matrimonial Property Regimes, Partnerships, new Stockholm Programme, adoption, affiliation and the legalisation of public documents.

- Some family instruments into which the UK has opted are viewed as being extremely useful by solicitors[3] and members of the Family law Bar.

- Solicitors consulted so far had been positive towards the proposal for a Regulation on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union.

- The decision not to opt in to the Succession Regulation based on the final text was generally viewed to be the right one. Less people are affected by family law across borders than in the domestic context.

- Taken as a whole the EU family instruments are an advantage to families and to business as the UK now has many citizens living abroad and many Member States' citizens living within its borders. All of these people benefit from family law instruments as they make it easier for families to manage their affairs.

- A large number of the queries received from the public are family related. There has been a marked increase in the number of queries from Brits living abroad. Most of the questions ask how family law will be applied to them. Members of the public do not understand what the UK has or has not opted into. Another issue is that is hard for citizens to find specialised legal advice in these instruments, and especially difficult to get legal advice on British law from abroad.

- One concern was whether the UK not opting in to some measures increased the complexities that the UK citizen had to contend with. The example of the Succession Regulation was then discussed. At the start of the negotiation some specialist practitioners wanted to opt in (though they did recognise that there were some difficulties with the

[3] On further consultation with solicitors in England and Wales prior to preparing the Law Society's written response to the Call for Evidence, it became apparent that while family law practitioners are generally very positive towards the Brussels IIa Regulation (with which most of them are familiar), they do have a number of significant concerns, for example, about the Maintenance Regulation. This is further explained in the Law Society's written response to the Call for Evidence.

proposal).[4] Now practitioners from other Member States have standardised rules to work with, which those from the UK do not. In cases with a cross border element this creates legal uncertainty.

Why does the EU need to legislate? What added value does the EU bring to family law? The Hague also takes forward work in this arena; could we engage only at the Hague level and achieve the same?

- At the EU level the Hague Conference work is seen as extremely important, the work done at the EU level does not jeopardise work at the Hague level. At the Hague Conference you have the world in the room, you have international views, however the Member States can achieve more if the work together as a group at the Hague Conference. At the European level, Member States can achieve more than the Hague Conference because we are friends together and are more prepared to negotiate, one example of this is on the Service Regulation and the electronic service of documents. The EU can however help to sell the products of Hague negotiations to the world which is valuable in itself.

- There are difficulties at the Hague level which do not exist at the EU level: for example at the Hague level it is more difficult to agree due to the numbers involved and there need to be more safeguards to ensure standards for example ensuring the quality of judgments (e.g. in negotiations concerning the Hague Judgments Project). Mention was also made of the problem of late or even non-ratification of Hague conventions by the signatory states.

Civil Instruments

- Brussels I is very important and is regarded as a very useful instrument by solicitors and barristers. Not all regulations are so helpful – for example Rome I has some useful and some not so useful elements.[5] It is a balancing act but on the whole the solicitors' profession is positive.

- The civil area covers a number of useful instruments for business. It covers jurisdiction, recognition and enforcement and applicable law. The Hague Conference has comparable instruments and the EU works closely with it. In general only see advantages that the civil instruments bring, they help companies do business across border with confidence. In terms of competence and its extent it is worth noting that the EU sometimes takes a different view to the Commission. One difficulty that surrounds (external) competence is that it is sometimes not clear whether the competence rests with the Commission or the Council and Parliament to decide. This is a point which is also not clear for Member States and the legal profession.

[4] Further information is available in the Law Society's written response to the Call for Evidence in the section on the Succession Regulation, pages 16 and 17.
[5] However, overall, Rome I is generally viewed positively by solicitors in England and Wales.

Is it helpful to UK and Member States for external competence to apply?

- If well done this can have advantages, EU legislation can be used as a model to be extended beyond the EU's borders for example to extend agreements with other countries such as the US.

- There is a downside to external competence. For example the Hague Maintenance Regulation 2007.where we have to wait for the EU to ratify on our behalf. We have been waiting since December 2012.

- There has been a presumption that EU laws are better. It was suggested that the EU is capable of negotiating a better position internationally as it operates as a block. It was asked if Member States should be worried about giving competence away. It was suggested that we should not as the EU allows for better law-making across borders.

- There are advantages and disadvantages to the application of EU laws, once new measures are adopted often issues emerge, the revision of laws every few years allows the regulations to be amended so that they work on a practical basis. For example, the Brussels I Regulation has been revised effectively. It is however important the EU continues to take the time to review and then revise legislation properly.

How well used and advertised are the Instruments in this area? Are there problems in drafting and in European Court of Justice (ECJ) interpretation?

- In the first few years of the court operating there was real criticism that competence was not understood by the court. However in recent times the case law coming out of the court makes sense and problems have been understood and addressed.

- Future work includes putting together the necessary infrastructure for the instruments that have been adopted to work as efficiently as possible. For example the system that allows payment orders to be made in real time. There was a demonstration of this recently where an order was sent for Austria to Milan to Rome. This was done is real time. The Clerk was able to check the application and send to the Judge. This is a good example how this area can effect and improve real life experience.

- In terms of the ECJ, Member States are able to contribute to the Court and can influence the court by either written observations or in person. There are good judgments made.

- One participant had experience of working in a British law firm with ECJ cases. The competence of the court is not always seen as being up to scratch. The training that has been available can be seen to

have benefited the judgments made in civil law areas in recent years. The concerns that have often been heard have now been resolved by the Judicial Training Programme. There have also been practical changes electronic documentation, progress of logistics has all helped to improve the functioning of the court. There have also been criticisms in the past that common law is not understood by the court. However common law has influenced the Court and there is now a better understanding of how common law works in the ECJ.

- There have been some Brussels I judgments that have not helped but these have now been at least partly resolved in the recast Regulation. The Law Society is preparing some documents which will explain about the role of the Court to the lay person. This might help perceptions. Most judgments are helpful but would encourage all Member States to agree to more Advocates General in the court to assist with workload/resourcing difficulties.[6] There has been a sustained attack in the UK on the role of the Court and some of the judgments that the Court makes but these views are often on a misunderstood basis and ill informed.

Future developments

- There are some problems with the Service Regulation (though it is generally regarded as useful by solicitors) and the way that it operates, and it is important that the EU undertakes the review to resolve the issues.

- In relation to the Internal Market Article 81 has never been used. The difficulty in Brussels IIa is in determining to what extent it was required for the functioning of the internal market. The thinking now is in terms of the “mutual recognition of judgments – this is now the foundation stone to make mutual recognition function properly”.

- There is an increasing merging of measures that cover aspects of internal market law and civil justice (e.g. the Directive on alternative dispute resolution for consumer disputes and the proposal for a Regulation on a Common European Sales Law). It is anticipated that there will be more of this.

- There is a worry that the opt-in will no longer be applicable – family law is more about mutual recognition which cannot be extended to Article 114 in the way that the civil instruments have in recent times. It was confirmed that there will be more Regulations based on article 114 in the future. Article 81 has built bridges in this area but there is a need to do even better for people and business. This can be achieved through Article 114. There is also likely to be more harmonisation of national law in civil and mutual recognition in family. This forecast received a mixed reception, as there are concerns about moves to

[6] This was agreed by the Council of the EU on 25 June 2013.

harmonise private, as opposed to private international, law, in the civil and commercial field. In addition, there were concerns about the misuse of Article 114 in financial matters. Whilst harmonisation might bring some benefits there is a danger that this might become uncontrolled and therefore this is of major concern.

- There have been calls, in particular in the context of individual files, from bar associations in a few other Member States for the ECJ to become a Supreme Court. This would change the way that the court operates and would not be a welcome change for the UK.

- The EU is undertaking projects around e-justice which will bring real information to the people.

- The Council Secretariat plans to publish an e-book in 22 languages on the instruments in this area with the text of the instruments themselves. This will help the citizen understand the instruments in this area.