BALANCE OF COMPETENCES IN THE EUROPEAN UNION: PRIVATE INTERNATIONAL LAW

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This Note covers (i) the legislative powers of the Union in the area of private international law (conflict of laws); and (ii) three instruments adopted under those powers – Brussels I,[1] Rome I[2] and Rome II.[3]

The legislative powers of the EU in the field of private international law

The powers of the EU to adopt measures in the area of private international law are contained in Title V, Part III TFEU, in particular Article 67(4) and Article 81. Under Protocol No. 21 to the TEU and TFEU, the United Kingdom and Ireland are not bound by measures adopted under Title V, Part III TFEU (including international agreements concluded by the EU), unless they decide to opt in. If they opt into a particular measure, they are not bound by subsequent measures amending that measure, unless they again opt in.[4] Moreover, we can either opt in before the negotiations begin (in which case we will have the right to vote), or we can do so after they have been concluded (in which case we will know what the final product looks like before taking a decision). This provision puts the UK in the best of all possible worlds: we can enjoy the benefits of EU membership when we so desire, but do not have to opt into any measure we do not like.

The United Kingdom has made use of these powers to opt into measures we regard as desirable – for example, Rome I and Rome II – and to keep out of those which we regard as unsuitable for the UK legal system – for example, the regulation on succession.[5] By

[1] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001, L12/1. This has now been replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 2012, L351/1, which will apply from 10 January 2015.

[2] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ 2008, L177/6.

[3] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, OJ 2007, L199/40.

[4] Article 4a of the Protocol.

[5] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic

carefully assessing the balance of advantages, we have sought to attain the best possible outcome for the United Kingdom.

This opt-out applies only to measures adopted under Title V, Part III TFEU. Although this appears to cover all private-international-law measures, it does not cover measures for the unification of substantive law, even though such measures might have the objective of making choice of law redundant by eliminating all possible conflicts in the area in question within the European Union.

The proposed Common European Sales Law (CESL)[6] is an example. This would entail the creation of a uniform law on the sale of goods which would apply to cross-border sales in certain circumstances if both parties agreed. If the parties agreed that CESL would apply, choice of law would no longer be relevant: it would not matter which law applied, provided it was the law of a Member State. However, it is proposed that this measure would be adopted under Article 114 TFEU (approximation of laws on the internal market); so it would not be covered by Protocol No. 21: we could not opt out of it.

Since measures of this kind could significantly undermine the common law, and could eventually even lead to its replacement by a pan-European Civil Code, it would be desirable to extend the scope of Protocol No. 21 to cover measures intended to unify, harmonize or approximate discrete areas of civil or commercial law.

Brussels I, Rome I and Rome II

There is an important difference between Brussels I, on the one hand, and Rome I and II, on the other hand: Brussels I is based on reciprocity, while the other two are not. This is because the benefits of Brussels I apply only to the other participating (Member) States. We would lose these benefits if we left the EU, unless we concluded an agreement with the EU under which we opted into a similar system.[7]

The most important benefits are:

- Persons (individuals and companies) domiciled in the United Kingdom are protected from exorbitant rules of jurisdiction in other Member States;
- Courts in other Member States are precluded from assuming jurisdiction over certain specified matters in which we have an overriding interest – for example, actions *in rem* regarding immovable property in the United Kingdom, or proceedings concerning the validity of UK patents;
- Courts in other Member States are precluded from assuming jurisdiction in matters which are already before courts in the United Kingdom (doctrine of *lis pendens*);

instruments in matters of succession and on the creation of a European Certificate of Succession, OJ 2012, L201/107.

[6] COM(2011) 635 final, Brussels 11.10.2011.

[7] In practice, this would entail our joining the Lugano Convention.

- Courts in other Member States are precluded from hearing cases covered by an exclusive choice-of-court agreement designating a court in the United Kingdom; and
- Judgments given by UK courts have to be recognized and enforced in other Member States.

Of course, we have to reciprocate: our courts are bound by similar rules. However, there is a clear balance of advantage in remaining within the system, especially since it has been significantly improved by the changes adopted in 2012.

The position regarding Rome I and Rome II is different, since the choice-of-law rules laid down by these instruments apply irrespective of whether the country concerned is, or is not, a Member of the Union: the law indicated by them applies equally if it is the law of a Member State or a non-Member State. Consequently, if we left the Union, the application of UK law by courts in EU States would continue as before. Moreover, it we wanted to continue to apply similar rules ourselves, we could do so by adopting them as rules of UK law. The position would then remain unchanged, except that references for interpretation of the rules would no longer go to the Court of Justice of the European Union (CJEU, commonly known as the "ECJ"): the final decision would rest with the UK courts.

In general, I regard Rome I and Rome II as satisfactory instruments. The main difference with the pre-existing UK law in the area (English common law, Scottish common law and the Private International Law (Miscellaneous Provisions) Act 1995) is that Rome I and Rome II are, in the main, more detailed and precise, though they nevertheless retain a considerable degree of flexibility.[8] The pre-existing UK law was characterized by an extreme degree of flexibility, something which led to considerable uncertainty. Although some provisions of the EU measures are excessively complicated,[9] I think that, over all, they are an improvement on the pre-existing UK law.

However, this assessment would not be complete without mentioning the CJEU. All the measures discussed above – together with international agreements to which the European Union is a Party, such as the Hague Convention of 2005 on Choice of Court Agreements – fall within the jurisdiction of the CJEU to give preliminary rulings. This has two drawbacks: it can result in additional delay (sometimes for as much as two years) in giving a final judgment, and it means that the final say on the interpretation of the provision is given by a court most of whose the members have little or no experience in private law (civil and commercial law), let alone private international law. This raises such important issues that it is the subject of a separate Note.

[8] See, for example, Rome II, Article 4(3).
[9] For example, Rome II, Article 5.

BALANCE OF COMPETENCES IN THE EUROPEAN UNION: THE COURT OF JUSTICE OF THE EU

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This Note covers the Court of Justice of the European Union (CJEU) in so far as it operates in the field of private law (civil and commercial law).

The CJEU

Under Article 19 TEU (Treaty on European Union), the term "Court of Justice of the European Union" (CJEU) covers all the judicial organs of the Unions. At the present time, these come in three tiers:

- the Court of Justice,
- the General Court and
- specialized courts.

This Note will be concerned only with the first of these, and references to the CJEU should be read as references to the Court of Justice, unless the context indicates otherwise. I will focus on the court's interpretation of EU law in the private-law area, something which occurs mainly when preliminary references are made from courts in Member States. At the present time, only the Court of Justice has the power to hear these references.

General issues

In the past, the CJEU has been criticized for giving interpretations of the constitutional treaties which were not intended by the Parties to them, and which were clearly at odds with the words of the text.[10] Since this raises constitutional questions, it will not be considered in this Note, which is limited to private law.

Interpretation of private law

In the private-law area, the following problems arise:

[10] See Hartley, "The European Court, Judicial Objectivity and the Constitution of the European Union" (1996) 112 *Law Quarterly Review* 95.

- the court takes too long to give judgment (in some cases over two years);[11]
- the reasoning of its judgments sometimes lacks the clarity and precision one would expect of a court at the highest level of the judicial hierarchy;[12]
- its judgments sometimes lay down rules that are unsatisfactory from the point of view of the parties and put obstacles in the way of the efficient resolution of commercial disputes.[13]

Excessive delay

In commercial cases (and also in non-commercial cases) excessive delay can cause serious problems for litigants. Unscrupulous litigants may make a reference to the CJEU simply in order to delay matters: they hope that their opponents will then agree to a settlement.

I propose two remedies. First, it is said that one cause of delay is the burden of translating relevant documents. I propose that the court should work primarily in three languages: English, French and German. Documents required by the parties should also be translated into the language of the case. Beyond this, the lack of a translation should not be allowed to hold up proceedings.

Secondly, the treaties should be amended to provide that if, in a preliminary reference, the court does not give a ruling within a specified time – ideally six months, but realistically perhaps a year – it would automatically lose jurisdiction. The national court would then give the definitive judgment. The CJEU should be allowed to prioritize important cases and to decline to give a ruling in cases which raise no new issues.

Poor quality of judgments

The Court of Justice consists of one judge from each Member State.[14] This means that it is dominated by judges from the smaller Member States. At the present time, there are eight Member States which have a population of less than 5 million. Between them, they have eight judges, even though their combined population is less than a fifth of that of Germany, the largest Member State. Germany has only one judge. The consequence of this is that the pool from which judicial talent is drawn is often extremely small.

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[11] See, for example, *Turner v. Grovit,* Case C-159/02, [2004] ECR I-3565 (order for reference received at the CJEU on 29 April 2002; judgment given on 27 April 2004); *Owusu v. Jackson,* Case C-281/02, [2005] ECR I-1383 (reference received at the CJEU on 31 July 2002; judgment given on 1 March 2005).

[12] See, for example, *Mangold,* Case C-144/04, [2005] ECR I-9981. An Editorial in the *Common Market Law Review* said that the inept citation of authority in this judgment would have provoked "thick red underlining" if it had occurred in a student essay ((2006) 43 CMLRev. 1 at 8).

[13] See, for example, *Gasser v. MISAT,* Case C-116/02, [2003] ECR I-14693. The problems caused by this decision have been rectified in the new version of Brussels I (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 2012, L351/1, Article 31(2) and Recital 22).

[14] Article 19(2) TEU.

Another problem is that appointment is effectively in the gift of national governments. For lawyers from some countries, the generous salaries and other rewards given to judges on the CJEU make appointment extremely attractive. This creates a risk that some governments might regard the power to nominate persons for appointment to the CJEU as an opportunity for exercising political patronage. This could have a deleterious effect on the quality of judges.

The solution I propose is to abolish the rule that there must be one judge from each Member State. While it would be desirable to ensure that there is at least one judge from each major region of the Union and each legal family – from example, the French legal family, the German legal family, the common law, etc. – judges should be appointed on merit without regard for nationality. A Judicial Appointments committee should be established to make appointments. The composition of this committee would need careful consideration. Its members would probably have to be appointed by the Council of Ministers acting by a qualified majority.

Private law

Some of the defects in the private-law area are probably due to the fact that few judges on the CJEU have a private-law background. Many have backgrounds in diplomacy, constitutional law, public international law, politics and administration.[15] In making appointments, the Judicial Appointments Committee should ensure that a reasonable number of appointees are experienced in private law (including private international law), as well as in specialized areas such as intellectual property.

Private-law cases should be heard by judges with experience in that area. This could be done by establishing a private-law section within the CJEU. Cases would be allocated to this section when they predominantly concern private law. However, there should be no question of an appeal from the ruling of the private-law section to some more general configuration of the court. This would produce unacceptable delays.

Conclusions

The following reforms are proposed:

- the Treaties should be amended to provide that jurisdiction in references for a preliminary ruling should automatically revert to the national court if the CJEU does not give judgment within a specified time;
- there should be no requirement that there must be one judge from each Member State;
- appointments should be made by a Judicial Appointments Committee;

[15] See the CJEU's website, http://curia.europa.eu/jcms/jcms/Jo2_7026/.

- that Committee should be required to ensure that a reasonable number of appointees have experience in the area of private law; and
- a private law section of the CJEU should be set up, and cases concerning private law (including private international law) should be allocated to that section.