



**THE LAW SOCIETY
of SCOTLAND**
www.lawscot.org.uk

Consultation Response

Ministry of Justice call for evidence: Civil Judicial Cooperation

**The Law Society of Scotland's response
August 2013**

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

We support the principles of civil judicial cooperation both within the EU and beyond. Many people across the EU live, work and study in a member state other than that of their original residence. These people form contracts, sign documents, buy property, form relationships and lead lives with a host of legal consequences. Civil judicial cooperation helps these people when they interact with the justice system.

In the increasingly international, cross-jurisdictional nature of the lives that individuals lead and the commercial operations of businesses in the EU, civil courts need to cooperate with one another to avoid unnecessary duplication of effort and/or conflicting legal position. It is now very common for purchases to be made in one country for delivery in another, both in the commercial and consumer space. Families regularly move not just within Europe but across the world and it is vital to support judicial cooperation in this context.

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

There are clear advantages both to business and to individuals in the UK from EU civil judicial cooperation.

Civil Law

One specific example is in relation to insolvency law. Businesses routinely have operations in multiple countries. They may be registered in one jurisdiction but operate principally in another. EC Regulation 1346/2000 allows principal insolvency proceedings to be raised in the jurisdiction of the centre of main interest whilst allowing secondary proceedings to be

raised elsewhere. We have found that, in the main, judicial cooperation facilitates the efficient winding up for the benefit of creditors. There are other areas, such as freezing orders, interdicts, injunctions, etc where judicial cooperation is more mixed. In relation to cross-border personal injury claims we suggest that the forum of choice in matters where there may be a choice should allow the consumer or weaker party to always have the option to raise in their jurisdiction. Extracting money from foreign insurers generally takes longer and judicial cooperation for a standard period of payment, say 6 weeks, would be beneficial.

Family Law

There are advantages in clarity over which member state has jurisdiction in relation to divorce, parental responsibility and maintenance. There are also clear benefits in relation to enforcement of access rights, particularly when enforcement is available with *exequatur*. Enforcement of maintenance is a further benefit.

The most pressing disadvantages are:

- The discouragement of mediation in family matters by the application of the *lis pendens* principle. If mediation is to be encouraged, and is recognised as particularly appropriate in the sensitive area of family law, there needs to be some mitigation of *lis pendens* while mediation is attempted.
- The application of different jurisdiction and enforcement regimes for maintenance and other aspects of financial provision on divorce are proving a major source of difficulty. There are already cases where Scotland has jurisdiction for divorce, but not maintenance. This gives rise to the prospect of split actions in different countries. In practice there is an overlap between maintenance and financial provision, particularly for Scotland, where we have no matrimonial property regime (ie during the marriage as opposed to on divorce) and where we apply a “clean break” principle, so sharing capital is expected to provide for future support (ie maintenance). Extension of provisions for transfer between jurisdictions (on the model of article 15 of Brussels II bis) would assist.

We also need enforcement of financial orders generally, not limited to maintenance. That may be difficult when the UK has not opted in to proposed regulations on matrimonial property regimes.

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

Civil Law

We would suggest that the impact of EU civil judicial cooperation has had limited impact on the development of Scots civil law. The impact however is mainly felt in the practice and administration of justice and by individual persons or businesses. We would say that in the main our experience is that this has been positive.

Family Law

The extension of EU competence into the area of family law is complex and brings many challenges. It suggests that we will require a skilled and highly trained judiciary to deal with family law. Scottish Courts and the Scottish Judicial Institute will need to take account of this emergent requirement in the context of court reform and judicial training.

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

Civil Law

That judicial cooperation is necessary for the effective functioning of the internal market is particularly apparent in, for example, consumer internet purchases. A consumer based in Scotland could purchase goods from a company registered in France where the goods are dispatched from Germany. Judicial cooperation is clearly necessary in those circumstances where there could potentially be multiple Courts having jurisdiction to determine any dispute.

One of the necessary frameworks to allow an effective internal market is a degree of certainty as to the applicable law and dispute resolution framework. Judicial cooperation assists in that.

Family Law

Development of good relationships between the judiciary of member states promotes smooth implementation of these measures. There are already some useful steps in judicial conferences and cooperation. It would be difficult for the whole judiciary to be involved, suggesting that there should be liaison between key judicial personnel, and a limited group of designated judges to deal with cases where a difficult issue arises.

More use should be made of Brussels II bis article 15 transfers. These will work better if there can be more 'live link' facilities between courts, so judges can speak in the presence of parties, and hear submissions from parties.

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.

Family Law

There should be no "unintended consequences" in the application of civil judicial cooperation and there are aspects of EU competence where the consequences cause difficulties which could be mitigated. Some of these lie with the UK, where we have not been alive to the issues:

- We have adopted the provisions of the Maintenance Regulation intra-UK, without recognising the problems referred to above. This is particularly acute intra-UK as we have retained domestic conflict provisions in relation to divorce and children.

- We have failed to adapt procedural rules to the requirements of Regulations, in particular following *HSE v SC and AC*¹. The rule relating to recognition and enforcement have a suspensive effect that is incompatible with the Regulation. The Court of Session has been persuaded that in appropriate cases there must be immediate enforcement (contrary to the Rules of Court), but the situation is not satisfactory. The matter could be seen as a consequence of retaining *exequatur*, but illustrates the nature of the problems facing law-makers (including rule-makers) and judges.

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

Civil Law

The opt-in gives the UK flexibility and allows the UK not to participate in matters which are either incompatible or politically undesirable. Ultimately, these are political questions beyond the Society's scope. However we would comment that partial participation will cause confusion to users and possibly the judiciary. Certainty and clarity is needed.

Family Law

The opt-in safeguards existing domestic law, but makes relationships with other EU member states more complex. It demands and will increasingly demand greater attention to the relationship between the measures in force and the domestic law to ensure that the system is capable of functioning optimally.

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

This is a political question which the Society does not feel able to answer.

¹ Case C-92/12 (PPU)

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

Civil Law

Any future enlargement of the EU in our view makes civil judicial cooperation more effective. Clearly the greater number of countries that have a common judicial cooperation regime, the wider the impact this would have upon individuals and businesses within the UK, and the EU more generally. Any enlargement would make civil judicial cooperation more desirable as without this, there would be the enforcement procedures and processes of additional countries to navigate.

Family Law

Put simply, enlargement would extend the benefits and increase the challenges.

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

Language differences are an obvious example of a future challenge. This is a challenge at present and enlargement will have further impact. It will be necessary for legal documents and judgments to be accurately translated into the language of the member state where enforcement is being sought, and particular care will have to be given to ensure that legal terminology is accurately translated to reflect the meaning and interpretation where the judgment was given, as many legal terms have different meanings and consequences cross-border.

Training will need to be given to all levels of the judiciary and support staff to ensure a sufficient understanding of the law as applicable to other member states.

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

This is a political question which the Society does not feel able to answer.

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

Family Law

It is important that Hague Convention matters are harmonised with EU regulations. It is therefore helpful that the EU have now assumed competence in dealing with the Hague Convention on parental responsibility and protection of children of 1996 and ratified the Convention. The EU has also 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 that is necessary.

For further information and alternative formats, please contact:

The Law Society of Scotland
26 Drumsheugh Gardens
Edinburgh
EH3 7YR
www.lawscot.org.uk