ALLEN & OVERY

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Dear Sirs

Review of the balance of competences between the United Kingdom and the European Union
Call for evidence
Civil Justice

Thank you for the opportunity to respond to this call for evidence in respect of civil justice.

A&O is an international law firm with approximately 5,000 staff worldwide and with offices in 14 Member States. We regularly act for clients in cross-border litigation. We often have to advise clients in relation to jurisdictional and enforcement issues and we appear on their behalf before the courts of England, other Member States and the Court of Justice of the EU in relation to such matters. Our clients are primarily drawn from the banking, corporate and commercial sectors across Europe and the rest of the world.

In preparing this short response we have focused purely on legal issues in private international law. We have sought to reflect some of our experiences of the various European instruments mentioned below when advising our clients and litigating on their behalf. In this response we briefly consider the following pieces of EU legislation, the Brussels Regulation[1] (and its recent "recast"); the Lugano Convention,[2] Rome I,[3] Rome II,[4] the Service Regulation[5] and the Insolvency Regulation.[6] We have not addressed family law issues.

A&O's response is based, broadly, on the views of its practitioners in England. We respond without attributing any particular view to any particular lawyer. To the extent that there are divergent views on particular issues, we have tried to capture these while at the same time making a single submission.

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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.
2 Lugano Convention 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters.
3 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.
4 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.
5 Council Regulation (EC) No 1393/2007 of 13 November 2007 on the service in the member states of judicial and extra-judicial documents in civil or commercial matters.
6 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.

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

Advantages

In summary, the following advantages can be identified:

The enforcement of English judgments across Member States and EEA states has been made much easier under the Brussels Regulation/Lugano Convention than was previously the case. This assists both EU and non EU clients that choose to litigate before the English courts. It makes the English court system attractive to litigants as it makes English judgments quite easily exportable to 30 EU/EEA states.

The adoption of uniform jurisdictional rules across Member States under the Brussels Regulation (and, prior to that, the Brussels Convention[7]) and the Lugano Convention promotes certainty for clients as to when jurisdiction might be taken by a particular Member State/EEA court (and when it might not). This in turn may reduce legal costs and time as local law may not be necessary at the transaction stage. These uniform jurisdictional rules also help ensure that other Member States follow set jurisdictional rules in this context, rather than exercise exorbitant jurisdiction.

The service of legal papers across Member States has been made easier by the Service Regulation (although it can still be quite time consuming – see below) than was previously the case and this assists litigants before the English courts.

The adoption of uniform governing law rules in respect of contractual and non-contractual obligations under respectively Rome I (previously under the Rome Convention) and Rome II has made it easier for clients to assess with reasonable certainty which law will be applied by Member State courts (save for Denmark). Rome II helpfully establishes that parties can agree to submit non-contractual obligations to the law of their choice; previously there had been some uncertainty about the position. This is a valuable development in the commercial context. On Rome I, the grounds upon which the chosen law in a commercial contract might be overridden, are relatively narrow and closely prescribed. Again this is valuable from a commercial perspective. At a transaction stage this may reduce costs and save time as local law advice may not be necessary. Commercial parties strive for legal certainty and predictability and so these developments are to be welcomed.

The Insolvency Regulation has improved the efficiency and effectiveness of cross-border insolvency cases, and associated cost saving. The UK benefits from the Regulation on Insolvency Proceedings as it supports and enhances the UK's pre-eminence and reputation in insolvency and restructuring, and the work of those institutions and professionals operating in this field. The Regulation on Insolvency Proceedings and other cross-border insolvency initiatives clearly support the desirability of the UK as a centre of global corporate rescue culture. The recent decision by the UK to opt into the revised Regulation is welcome.

Disadvantages

The discussion following identifies the disadvantages. The Court of Justice of the EU (**ECJ**) has often been slow to resolve issues, and also, on occasions, it has produced some uncommercial decisions (at least to English eyes) for example, *West Tankers*,[8] *Gasser*,[9] *Turner v Grovit*.[10] The time involved in getting a ruling from the ECJ on commercial disputes can have an adverse impact on parties' positions. Given the anticipated increase in workload, there is a good case for the creation of

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[7] Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.
[8] C-185/87.
[9] C-116/02.
[10] C-159/02.

a specialist commercial division at the ECJ and also the appointment of more specialist Advocates General to ensure that commercial disputes are dealt with promptly and effectively.

For commercial parties litigating/arbitrating in England the ECJ's interpretation of the *lis pendens* provisions in the Brussels Regulation (*Gasser*); its ruling on the ability of the English court to issue an anti-suit injunction to support London-based arbitrations (*West Tankers*) and its decision regarding the exercise by the English court of *forum conveniens* principles (*Owusu*)[11] have been matters of concern. These decisions have caused difficulties in the jurisdictional arena.

The Commission should be commended for seeking to address a number of these issues in the recast Regulation. Regrettably, the question of third state matters and defendants has not yet been satisfactorily resolved (see our earlier submissions to the Ministry of Justice on the recast Regulation). In particular there is concern that jurisdiction clauses in favour of third state courts (such as New York) are not expressly recognised under the recast Regulation.

Service under the Service Regulation remains patchy and can be very slow. We have experience of it taking over four months to serve documents in Spain. This must be improved.

There remain concerns about the application of EU instruments by certain other Member State courts, mainly on the grounds of delay. In certain jurisdictions, for example, Italy and Greece, it can take over a year and often longer for a court to determine whether or not it has jurisdiction and, as a result of the *lis pendens* rules in the Brussels Regulation, this may mean that during this period a party cannot proceed with an action in the court specified in its contract if proceedings were not commenced in that chosen court first. Many of our clients have had to deal with the consequences of the so-called "Italian torpedo".

For reasons explored in our various submissions to the Ministry of Justice and to the Commission, there are concerns about the resources devoted to the Commission's proposal for a Common European Sales Law and its potential impact on the position of English law/the English court system as the preferred choice of law/forum for dispute resolution for commercial parties.

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

   In civil justice, for the reasons outlined above, we consider that overall the impact is a positive one.

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

   See generally comments above.

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.

   See comments under "Disadvantages" above.

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

   The UK's "opt in" right has been exercised both skilfully and successfully. As to Rome I, the decision not to opt initially into the draft Regulation allowed the UK Government to assess carefully whether the final text was in the national interests. There was particular concern about the potential scope of the provisions relating to when a chosen law might be displaced (under the Rome Convention the UK had opted out of certain controversial provisions in this respect). The final text of Rome I included more narrowly drawn provisions in this regard (Article 9(2) and (3)) which were

[11] C-281/02.

acceptable to commercial parties. As to the proposal for European Account Preservation Orders, reflecting the views of many legal practitioners, the UK Government wisely chose not to opt into an instrument which, as currently drafted, is flawed. We fully support the UK Government's attempt to influence the direction of negotiations on this draft instrument to ensure that amongst other things it provides better protection to defendants and that a workable system is created. As to the Brussels Regulation, our impression is that the UK Government worked hard to ensure that the recast Regulation improved upon the existing Regulation, in particular addressing the problem of the *lis pendens* provisions and also helped to ensure that some of the more ambitious (and problematic) proposals in relation to third state matters/defendants were rejected.

We are aware there is some concern that the Commission's indirect response to the UK Government's exercise of the "opt in" mechanism may in part be to propose so-called "optional" instruments relying on Article 114 of the Treaty on the Functioning of the European Union (approximation/harmonisation of the internal legal market) as a legal basis as opposed to under the provisions of Title V of Part Three of the Treaty on the Functioning of the European Union (freedom, security and justice). The Commission's proposal for a Common European Sales Law is an example of this.

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

N/A.

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

Broadly, and for the reasons outlined above, this should be a positive development in the private international law sphere. It will mean further jurisdictions will be drawn into the uniform EU jurisdiction/enforcement/governing law/service and insolvency regimes.

This will create further pressure on the ECJ (see comments above about resourcing). Lead times for resolving jurisdictional disputes and enforcement of other Member States' judgments should also be monitored so that any difficulties are identified and addressed.

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

Ideally, the Commission will focus on trying to improve the administration/application of existing private international law in Member States (see comments regarding delay above) in preference to implement new laws. A period of consolidation would be welcomed.

More could be done to make case law from Member States on various EU instruments available online.

The Commission's approach to proposing new law is not always the most efficient, nor, sometimes, as effective as it should be, in seeking the views of the public. For the Brussels Regulation, a lengthy discussion paper was published upon which views were sought and then a draft Regulation was published. Some radical changes were made to that draft Regulation (for example, in relation to the third state matters) but no formal consultation was run. As a result, practitioners were not able to provide detailed insights into the revised provisions and, as a result, there was a "lost opportunity" in the recast Regulation to set out more workable and comprehensible rules in respect third state matters/defendants.

The Commission often sponsors two-day conferences at academic institutions in Europe during which draft instruments are debated; whilst useful exercises, the speakers at these events and, to a certain extent, the attendees, are often from the same institutions and firms. Lawyers from

commercial organisations are rarely on the speaker panels or in the audience, meaning the wider commercial perspective is not always outlined in the debate.

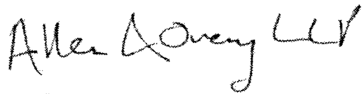
9. What are the advantages and/or disadvantages to the UK of the EU's powers to act internationally in this area?

   It is hoped that the EU should be able to progress the ratification of the Hague Choice of Court Convention and that the EU's action in this regard will encourage other trading nations to follow suit.

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

   See general points above.

Yours faithfully



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