

Balance of Competences Civil Judicial Cooperation Report: Event in Edinburgh on 23 July 2013

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

EU civil judicial cooperation – advantages/disadvantages to businesses and/or individuals in the UK, impact on UK civil and family law and how is it necessary for the functioning of the internal market

- Participants considered that an advantage of the EU measures was the ability to enforce judgments. People are moving around the EU more, cohabiting and marrying across borders therefore, without the EU framework, judgments in cross-border disputes would be difficult to enforce.
- Participants thought that Brussels I was also good for businesses, since it provided a set of rules for determining jurisdiction and for the recognition and enforcement of judgments throughout Member States. As such they considered that businesses would feel more confident about trading or pursuing claims if a cross-border dispute arose. They argued that, pre-Brussels I, the absence of any agreed rules meant getting judgments enforced was difficult, and the current system was considered to be more efficient.
- There were some problems with enforcement issues and it was suggested that there still may be some areas where it is difficult to enforce in Scotland a judgement obtained in England and Wales and vice-versa¹.
- In family matters, participants asserted that there needed to be clear rules for partners and child abduction especially in the modern world.
- The lack of legal aid was also raised and whether EU legislation harmonising different policies further would empower people or not. Reference was made to the Legal Aid Directive which aims to harmonise access across member states and to which the UK opt-in applies.
- The issue of Mutual Recognition of Protection Measures in civil matters being based on Brussels I was raised by a participant. It was noted that

¹ In particular section 18(3) (a) of the Civil Jurisdiction and Judgments Act 1982 (<http://www.legislation.gov.uk/ukpga/1982/27>) limits the effect of the 1982 Act in respect of magistrates' courts judgments. This means, for example, that Domestic Violence Protection Orders issued by the magistrates' courts in England and Wales are not, at least in theory, enforceable in Scotland. This may yet turn out to be an issue in relation to the implementation of the EU Regulation on the mutual recognition of protection measures in civil matters - Scotland might recognise French orders but not English ones. Scotland has also had some issues over the years about cross-UK border cases in relation to child contact and residence.

that this measure had not been updated to take account of more recent changes to Brussels I.

Unintended/undesired consequences of EU competence, advantages and disadvantages of (a) the opt-in for the UK, and (b) the cross-border requirement for the UK's national interests

- It was suggested that an unintended consequence of EU competence was that the definition of maintenance could lead to judicial discretion being exercised which would not necessarily be good for family law.
- Participants also suggested that, in Scotland, the application of different jurisdiction and enforcement regimes for maintenance and divorce was proving difficult. Scotland has jurisdiction for divorce but not maintenance. It has no matrimonial property regime; a “clean break” principle applies so sharing of capital in a divorce is expected to provide for future support.
- The issue of the application of foreign law in the UK courts was also raised, Some participants commented that the Scottish Judiciary, particularly in the more remote Sheriff Courts, may have difficulty in applying foreign law because of the principle of UK law that foreign law is a matter of fact and therefore of evidence. Neither expertise nor funding may be available. It was suggested that a better way of dealing with foreign law in the UK was needed.
- On the opt-in, there was a suggestion that partial participation can lead to difficulties, since courts and practitioners need to know whether the UK has opted in to measures or not to help advise their clients.
- Participants also considered that it was important for the UK to be involved at the start of negotiations to ensure that the implications of the measures would be understood and to put the necessary arrangements in place.
- An issue over transparency of negotiations was raised at EU level. The UK parliament publishes Bills and the related debates. It is difficult to find information in the public domain in relation to the EU.
- It was also commented that, in a diverse jurisdiction like Scotland, the judiciary may not get the fully informed assistance from the legal profession that the judiciary may get elsewhere. Therefore there was a need for a Judiciary who were fully trained in this area and identify judges who could deal with these issues.

Impact of any future enlargement of the EU Civil Judicial Cooperation, what future challenges and opportunities are there in this area

- It was suggested that the future enlargement of the EU makes a framework of regulation more essential but it will take money and effort.

Advantages/disadvantages to the UK of (a) the EU's powers to act internationally in this area and (b) action being taken at an international rather than EU level

- Some considered that the EU's power to act internationally was an advantage in negotiating on the international stage and gave the EU more confidence when representing all Member States e.g. at the Hague Conference. Those powers some considered were most useful in family law, where a standardised/European approach was considered to be more beneficial.
- In the future, as more countries join the EU, with their different legal systems, it could become more difficult to reach a consensus. It was suggested that the EU should be the central driver on the international treaties but this was considered to be a long way in the future.
- A participant suggested that different Member States could interpret their obligations under international agreements differently. The EU could ensure that Member States' understanding and implementation was consistent.
- Finally on a wider point, some participants suggested that there was the lack of interest in the legal profession in international matters. Some of those present argued that they must take a wider interest and recognise the implications for them.