Review of the Balance of Competences between the United Kingdom and the European Union – Civil Judicial Co-operation

August 2013

The Law Society of England and Wales (the Law Society) is the independent professional body, established for solicitors in 1825, that works globally to support and represent its 166,000 members, promoting the highest professional standards and the rule of law.

Introduction

1. The Law Society's Civil Justice, EU, Family Law and Wills and Equity Committees have considered the Call for Evidence – Civil Judicial Cooperation (Review of the Balance of Competences) paper prepared in May 2013 by the Ministry of Justice. The Law Society is contributing to a number of Calls for Evidence as part of the Review of the Balance of Competences. This submission should be read in the wider context of all our consultation responses.[1]

2. UK membership of the EU has brought significant benefits to solicitors, law firms and their clients, most particularly through the ability to trade, provide services and establish across the EU and to seek effective redress to cross-border legal issues.

3. The legal services sector plays a key role in the UK economy, the UK's competitive advantage and in improving the efficiency of doing business. Legal services directly contributed £26.8bn to the UK economy in 2011. This included almost £4bn of exports – a substantial volume of which was generated through trade with EU Member States.

4. Law firms exist in order to service the needs of their customers. These can be the trading needs of businesses from inside or outside the EU or the needs of individuals, for example, in a family law, consumer law or civil justice context. The legal profession works day-to-day with clients throughout the EU dealing with a broad range of legal issues across a diverse range of fields.

5. It is for these reasons that the Law Society and the legal profession have an interest in the stability of the UK's position within the EU and the future role of the UK at the heart of EU rule-making.

6. The Law Society nevertheless accepts that there is a debate as to the appropriate level of EU competence in various policy areas and will input into the parts of the Review of the Balance of Competences of most relevance to the legal profession.

[1] The Law Society's submissions to the Review of the Balance of Competences are available here: http://www.lawsociety.org.uk/representation/campaigns/eu-relationship/

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

Comments concerning EU civil judicial cooperation

7. The Law Society is not able to comment on every EU civil judicial cooperation instrument. This paper highlights some of the benefits and drawbacks of the key European instruments. Such instruments are "based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases" (Article 81, Treaty on the Functioning of the European Union (TFEU)).

Brussels I Regulation

8. The Law Society wishes to highlight the immense commercial benefit of the Brussels I Regulation[2] (and Lugano Convention) which facilitate the free movement of judgments across EU Member States and EEA states. The recognition and enforcement of judgments have been made much easier due to these instruments. This assists both EU and non-EU clients that choose to litigate before the English courts and seeks to make the English court system more attractive to litigants. English judgments are easily exportable to around 30 EU/EEA states.

9. Enforcement is a fundamental concern for litigants in cross border disputes – there is often little purpose pursuing a claim to judgment, if a claimant cannot then easily and cheaply enforce that judgment in a jurisdiction where a defendant has its assets. The adoption of uniform jurisdictional rules across Member States and EEA states under the Brussels I Regulation (and, prior to that, the Brussels Convention) and the Lugano Convention promotes certainty for individuals and companies as to when jurisdiction might be taken by a particular Member State/EEA court (and this may also reduce costs and time as local law advice may not be necessary at the transaction stage). Parties are better able to predict where they might sue and be sued across Member States.

10. The Brussels I Regulation provides (at Article 23) that Member States recognise jurisdiction clauses in favour of other Member States (provided one party is domiciled in a Member State). This helps ensure that English jurisdiction clauses, that are used for example in so many international finance, shipping and corporate contracts, are respected by other Member States.

11. The Brussels I Regulation provides a broadly reliable, understandable and predictable set of rules for determining jurisdiction over certain disputes across Member States. In this broad sense the Regulation contributes to making England and Wales the 'jurisdiction of choice' for so many international disputes. It is therefore very important that the UK remains in a strong position to influence any further changes to the Brussels I Regulation in partnership with other Member States, as it has successfully done in the past.

[2] Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (now recast, see below).

12. The newly recast Brussels I Regulation,[3] which will apply from 10 January 2015, improves the Regulation in a number of key areas. For example: the rules relating to parallel proceedings (*lis pendens*) will be changed to ensure that exclusive jurisdiction clauses can take effect without delay even if the chosen court is second seised, thus removing the problem of 'Italian torpedoes'; arbitration will be clearly excluded from the scope of the Regulation; and *exequatur*, the procedure by which courts in the receiving Member State must validate a judgment made in the issuing Member State before it is enforceable, will be abolished, thereby increasing efficiency in the enforcement process. The UK Government was a particularly powerful advocate for this change, which is hugely important for commercial parties.

13. There remain concerns about some aspects of the Brussels I Regulation. For example: the recast Regulation does not appear to authorise a Member State court to grant an anti-suit injunction in relation to proceedings in another Member State court brought in breach of an arbitration agreement; the Article 31(2) carve-out to the usual *lis pendens* rules refers to "exclusive" jurisdiction clauses in favour of Member State courts, meaning that there is no requirement for Member State courts to stay proceedings if parties have only sought to confer non-exclusive jurisdiction on another Member State court or parties have sought to confer jurisdiction on a non-Member State court. It is perhaps the great missed opportunity of this recast process that the Regulation was not extended to cover jurisdiction agreements in favour of third (non-EU) state courts (although we also recognise that it would have been difficult to secure support for this from all Member States).

Rome I and Rome II Regulations

14. The adoption of uniform governing law rules in respect of contractual and non-contractual obligations under respectively the Rome I Regulation[4] (previously the Rome Convention[5]) and the Rome II Regulation[6] has made it easier for clients to assess with more certainty which law will be applied to their disputes in Member State courts save for Denmark. At a transaction stage this may reduce costs and save time as local law advice may not be necessary.

15. Commercial parties seek legal certainty and so these developments are to be welcomed. In the Rome I Regulation, the narrow scope of Article 9(2) is an example of such certainty. Prior to the introduction of the Rome II Regulation, parties would potentially have had to investigate the position regarding the governing law for non-contractual obligations of up to 27 different Member States.

Regulation on insolvency proceedings

16. The Law Society supports the Regulation on insolvency proceedings[7] and the decision of the UK to opt in to negotiations concerning its revision.[8] The current Regulation has generally

[3] Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[4] Regulation 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I).
[5] Convention on the Law Applicable to Contractual Obligations ("Rome Convention") 1980.
[6] Regulation 864/2007of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).
[7] Regulation 1346/2000 of 29 May 2000 on insolvency proceedings.

worked well and the proposed clarifications and cooperation mechanisms are to be welcomed. The Law Society in particular agrees with the European Commission's proposal to maintain the existing system whereby it is left to the Member States to decide which insolvency laws are to be added to the scope of the Directive. The Law Society also believes that it is important to retain flexibility and, overall, to keep to mutual recognition within this field.[9]

European Account Preservation Order

17. Some practitioners have also highlighted the proposal for a European Account Preservation Order (EAPO) as an important initiative.[10] This is a proposal that seeks to provide a uniform mechanism across the EU for the application and enforcement of cross-border debt recovery. Practitioners who have examined this proposal note that clear benefits could be gained by claimants pursuing defendants with assets in other Member States. Claimants would be able to seek the freezing of accounts in Member States where this is currently not possible; they would have an opportunity to gain information about a defendant's bank accounts; and only one application would be needed to request the freezing of accounts in a number of Member States.

18. However, there were significant difficulties with the original proposal which led some specialist practitioners to recommend that the UK should not opt in at the outset. For example, there were concerns about the scope and also that defendants and third parties would not receive adequate protection because the requirements for obtaining an order were not adequate. Some practitioners also foresaw a risk of forum shopping and of businesses moving assets outside of Member States to guard against the risks. It is hoped that these difficulties can be overcome in the negotiations. The Law Society is aware that the Member States and MEPs are seeking to find a balance between the rights of claimants and defendants and considering methods to guard against the abuse of the EAPO.

Brussels IIa Regulation

19. The advantages of EU civil judicial cooperation can also be seen in the Brussels IIa Regulation,[11] a family law instrument which is likely to be the most frequently encountered by practising family lawyers. This Regulation sets out clearly the criteria to be used in establishing jurisdiction in matrimonial matters ("divorce", "legal separation" and "marriage annulment") and also deals with jurisdiction in matters of "parental responsibility"[12] i.e. the majority of children cases.

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[8] Proposal for a Regulation amending Regulation 1346/2000 on insolvency proceedings (COM(2012) 744 final).

[9] Further details on the Law Society's position can be found here: http://international.lawsociety.org.uk/node/12951

[10] Proposal for a Regulation creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters (COM(2011) 445).

[11] Regulation 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

[12] Please note that the meaning of "parental responsibility" under the law of England and Wales is much narrower than in an EU context. According to the EU definition, the majority of private (i.e. between citizens and not involving the state) law EU children matters relate to parental responsibility.

Matrimonial matters

20. The Regulation enables people to choose where to divorce as long as the Member State has jurisdiction. This flexibility is a positive benefit to parties. The Regulation provides clarity to family lawyers and, as a result, is likely to have reduced jurisdictional disputes which would have been costly to resolve.

21. Conflicts of jurisdiction are dealt with by Article 19. The principle of lis pendens, or "first come, first served" is used where proceedings are issued in two Member States which both have jurisdiction. In other words, the courts seised second must decline jurisdiction. There is no discretion and the rule is absolute, meaning there is clarity to the situation. (However it is still possible to challenge the jurisdictional basis of a claim, i.e. whether the jurisdictional grounds have been satisfied.)

22. The disadvantage of Article 19 is that, in EU cases, there may be a rush to issue proceedings in order to secure the jurisdiction which is perceived to be more favourable to one party. This may not be helpful to parties considering and reflecting upon whether their marriage is at an end. It also goes against the tenet of current family law practice whereby parties are encouraged to notify the other party before proceedings are issued so that hostility and antagonism are minimised. There is potentially a conflict between the UK Government's desire to see families mediate/use other forms of dispute resolution and the current practice to "issue first" and ask questions later, often creating a climate whereby alternative dispute resolution (ADR) methods are no longer appropriate.

23. A report on the practical application of the Regulation is due to be published in December 2013 and "preparation of the amendment of the Regulation [is] foreseen in 2013 to facilitate recognition and enforcement of decisions on parental responsibility and, where appropriate, to establish common minimum standards".[13] There may soon therefore be an opportunity to amend this Regulation as has recently happened in relation to the *lis pendens* provisions in the Brussels I Regulation.

24. A solution to the "race to secure jurisdiction" could be to insert the words "failing that", after each criterion for jurisdiction so that a hierarchy of jurisdiction is established. This has been proposed by a number of experienced family law practitioners and the Law Society urges the UK Government to take forward this proposal in the forthcoming negotiations.

25. In addition, some (though not all) family law practitioners recognise that EU legislators are also keen to promote the use of ADR and are aware of the introduction of the Mediation Directive (see below).

Parental responsibility / children matters

26. In relation to parental responsibility, Article 8(1) gives jurisdiction to the courts of a Member State in which the child is "habitually resident" at the time the court is seised. This rule of

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According to the England and Wales definition, the majority relate to residence and contact (e.g. where children live and how they divide their time).

[13] See page 51 Commission initiatives planned until the end of 2013:
http://ec.europa.eu/atwork/pdf/forward_programming_2013.pdf
(Please note that this table is updated every month and so page numbers may change.)

proximity is logical and practical although there can be significant complexities in working out where a child is habitually resident and the term is not defined.

27. Article 15 allows for a transfer of jurisdiction by a court to courts of another Member State with which the child has a "particular connection", if the other court would be better placed to hear the case, which again gives flexibility and is in the interests of the child. (Some practitioners have suggested that the scope of Article 15 could be extended to cases not involving children, especially financial cases in the field of family law.)

28. There are rules relating to children who move from one state to another lawfully (Article 9) and, where a child has been moved unlawfully, there are significant barriers to overcome before the courts of the new state of habitual residence will have jurisdiction (Articles 10 and 11). The Regulation supplements the provisions of the Hague Convention on the Civil Aspects of International Child Abduction as between Member States and this is generally welcomed by family practitioners. Article 11 imposes a 6 week deadline to resolve these cases (subject to exceptional circumstances) and also encourages the voice of the child to be heard, when certain Hague defences are raised.

29. Under Articles 21-52, an order can be enforced directly provided that the appropriate certificate has been issued by the court of origin (Articles 40-42) and *exequatur* is not required (Article 41) which makes the procedure less onerous and time-consuming. This has been a positive step and is generally welcomed by family law practitioners. It means that return orders and access orders can be quickly and easily enforced between Member States. This assists the free movement of persons. (However enforcement is a delicate matter and issues can arise, for example, in attempts to vary an initial access order. For this reason, it would be helpful to develop facilities in a cross-border context to allow for easier participation by parties in court proceedings.)

30. Articles 53-58 have encouraged judicial co-operation and this is generally accepted to be making a real difference to cross-border understanding.[14] The UK also has an International Liaison Judge to facilitate this.

31. On a specific point, some practitioners believe that the continuing requirement in Article 56 for *exequatur* to enable the placement of a child in institutional care or with a foster family in another Member State raises difficulties, including delays which can be detrimental to the children involved.

32. The Regulation has now been in force for 8 years and is well understood by family practitioners. Generally the Regulation is viewed by the family law profession as a positive measure since it provides clarity: the "race to issue" is the main disadvantage and, as we understand, there is likely soon to be an opportunity to propose an amendment to this, which would follow recent amendments agreed to the Brussels I Regulation for a similar problem.

Maintenance Regulation

33. The Maintenance Regulation[15] is more recent and is perhaps less welcome than the Brussels IIa Regulation. The "race to issue" has also been extended to this Regulation (as it

[14] See question 8 for our concerns concerning the UK Government's current failure to opt in to the EU Justice Programme 2014-2020.

had also previously applied in the Brussels I Regulation, which used to cover maintenance matters) which is again unhelpful and frequently perceived as a disadvantage and, as above, the Law Society would support its amendment when the functioning of the Regulation is reviewed in 2016.

34. There may be some cross-over with the Brussels IIa Regulation. Given the different jurisdiction rules in the Brussels IIa and Maintenance Regulations, there is concern that in some cases divorce and financial provision or ancillary relief might be considered in the courts of one Member State while maintenance could be considered in the courts of another. This could lead to practical difficulties.

Choice of jurisdiction

35. The Regulation provides parties with an ability to make a choice of the jurisdiction for maintenance (Article 4). This choice of jurisdiction often appears in pre-nuptial agreements. Article 4 is helpful although practitioners also note that the exercise of the choice of jurisdiction tends to be to the disadvantage of the economically weaker party as there can be a significant disparity in bargaining power in the negotiation of such clauses.

Lack of understanding and awareness

36. The Regulation is not widely understood by family practitioners perhaps stemming from the different methods used to define maintenance in England and Wales (which is more akin to the US concept of alimony) and other jurisdictions in the EU, where the concept concerns being maintained and can therefore relate to capital provision (e.g. provision of a home). The Law Society would support greater awareness-raising in relation to this and similar EU instruments.

37. Further consideration of this Regulation is at question 4 below.

European Small Claims Procedure

38. The Law Society supports the European Small Claims Procedure for use in cross-border cases. The procedure is a helpful tool available for parties in low value cross-border disputes. Further improvements could be made to the procedure (and the awareness of it) and the Law Society has provided input to the European Commission's recent consultation.[16]

39. The Law Society also recognises the value of the European Enforcement Order and the European Order for Payment.

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[15] Regulation 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

[16] European Small Claims Procedure: Law Society of England and Wales' response to public consultation, July 2013: http://international.lawsociety.org.uk/files/LawSociety_response_Consultation_European_small_claims_procedure_June2013.pdf

Mediation Directive

40. The Mediation Directive[17] has received a mixed response from solicitors (and many are not yet aware of it); however, it is believed to be a popular instrument with mediators. The instrument is limited to cross border disputes in civil and commercial matters (and includes family disputes, although this is not stated expressly in the text).

Service of documents

41. The service of legal papers across Member States has also been made easier by the Service Regulation[18] (though it is still quite time consuming) and this assists parties litigating in the UK courts. Further efforts are being made to make the service of documents less time consuming between Member States with a new legislative proposal envisaged soon.[19] The Law Society encourages the UK Government to take an active role.

Taking of evidence

42. Some practitioners have commended the Regulation on the taking of evidence,[20] which has simplified matters.

EU Justice Programme 2014-2020

43. The Law Society believes that it is vitally important that UK opts in to the Justice Programme (see further our response to question 8).

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

44. Overall, the Law Society believes that the majority of EU civil judicial cooperation measures are useful and does not perceive an underlying negative effect on the common law due to such measures. (See however some specific points relating to family law below.)

Civil Justice

45. Please see the answer to question 1 above. From an EU civil justice perspective, the free movement of judgments between Member States and EEA states is of immense benefit to the UK and contributes to making it an attractive jurisdiction in which to litigate. For parties to a dispute, the availability of increased certainty in relation to both the jurisdiction and governing law in a dispute saves time and costs. The Regulations on the service of documents and the taking of evidence have also simplified cross-border proceedings.

[17] Directive 2008/52 of 21 May 2008 on certain aspects of mediation in civil and commercial matters. This was transposed into domestic law by the Cross-Border Mediation (EU Directive) Regulations 2011 No. 1133.
[18] Regulation 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents).
[19] See No. 46 of the Annex to the European Commission's Work Programme for 2013: http://ec.europa.eu/atwork/pdf/cwp2013_annex_en.pdf
[20] Regulation 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

Family law instruments

46. From the perspective of EU family law instruments, comments received were generally positive in relation to the rules determining jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, with the exception that some were seen to promote a rush to issue proceedings in order to secure the jurisdiction which is perceived to be more favourable to one party. As stated above, the Law Society believes that, as the rules on *lis pendens* have just been revised in the recast Brussels I Regulation, a solution is possible in the drafting of the family law instruments. In addition, the Law Society could support further efforts to promote ADR in a family law context in cross-border cases.

47. Most family law practitioners do not support the application of applicable law and this is an area that causes concern when discussing the impact of EU legislation on practice and possible future reform. (In contrast to many Member States, the local law is always applied in the UK.) Further, despite the current Law Commission project considering the assessment of needs, most family law practitioners continue to favour judicial discretion when assessing family law outcomes.[21] This often creates an ill fit when assessing matters in an EU context.

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

48. Civil judicial cooperation is of increasing importance to the functioning of the internal market due to the huge numbers of people who study, work or live in another Member State. It would be inconceivable, in the view of many practitioners, to take away the current level of judicial co-operation.

49. From a commercial perspective, we have already highlighted above the huge importance of the free movement of judgments, together with the increased certainty available to parties in relation to jurisdiction and the applicable law, which saves on time and cost and is therefore important for trading parties.

Access to effective redress

50. As the briefing note explains, very significant amounts of goods and services (with a value of around £234bn in 2011) are exported by the UK to other Member States.[22] In some cases disputes will inevitably arise and it is vital for the confidence of traders and consumers that they are able to resolve such disputes quickly and easily through effective access to redress.

51. A number of civil justice measures complement the internal market measures, for example, in the field of dispute resolution. The Directive on alternative dispute resolution (ADR) for consumer disputes,[23] an internal market instrument that enables consumers to make use of ADR in disputes with businesses in cross-border and domestic cases (due to be transposed

[21] Law Commission for England and Wales ongoing work concerning "Matrimonial Property, Needs and Agreements": http://lawcommission.justice.gov.uk/areas/marital-property-agreements.htm
[22] See page 6, Call for evidence, Civil Judicial Co-operation, May 2013.
[23] Directive 2013/11 of 21 May 2013 on alternative dispute resolution for consumer disputes.

by 9 July 2015), complements the European Small Claims Procedure, which simplifies small claims litigation in cross-border cases (in the case that litigation is necessary to resolve the claim). These instruments are both valuable as further efforts are being made to encourage cross-border trade between businesses and consumers, for example, with the implementation of the Consumer Rights Directive (transposition of which is required by 13 December 2013).[24]

Common European Sales Law

52. While there are a number of areas in which the civil judicial and internal market measures complement each other, an area in which the Law Society is not supportive of current work taking place in the European institutions is the Common European Sales Law (CESL) initiative.[25] The European Commission has proposed an optional EU contract law instrument to be inserted into the national laws of each Member State. The Law Society supports efforts to improve the functioning of the Single Market but does not agree that a need for the CESL has been shown and believes that the initiative would have significant drawbacks and is unlikely to increase trade. We are supportive of the UK Government's position on the CESL.[26]

53. This measure has been proposed with an internal market legal basis (Article 114, TFEU) but the Law Society, among others, is not convinced that this legal basis is appropriate. There is also clear cross-over to the field of civil judicial co-operation (although Article 81, TFEU, is also unlikely to be appropriate). If the instrument were to go ahead, it may be that Article 320, TFEU, is more appropriate.

54. It is possible that further instruments could be proposed following a similar approach. See further our comments in question 5 concerning the proposed legal basis (Article 114, TFEU) and the relationship to the UK opt in.

Cross-border and domestic legislation

55. The briefing note at paragraph 16 states that "the European Commission, which is responsible for legislative proposals, has at times suggested that the EU could pass legislation that would apply purely to domestic matters" and explains that this has been challenged by many Member States.

56. The Law Society holds the view that, as in the case of the European Small Claims Procedure, many measures are best suited to having a cross-border application and would raise practical difficulties if extended to domestic level. However, it is also important to bear in mind that limiting instruments to a cross-border application creates additional complexity in the case of businesses and individuals who are required to be aware of different domestic

[24] Directive 2011/83 of 25 October 2011 on consumer rights.
[25] For further information on the Law Society's current position, please see Joint Bar Council and Law Society briefing on the Common European Sales Law for MEPs, April 2013: http://international.lawsociety.org.uk/files/Law%20Society%20and%20Bar%20Council_CESL%20briefing%20for%20MEPs%20April%202013.pdf
[26] A Common European Sales Law for the European Union – A proposal for a Regulation from the European Commission, The Government Response, 13 November 2012: https://consult.justice.gov.uk/digital-communications/common-european-sales-law/results/cesl-government-response.pdf

and cross-border regimes. (This is one of the reasons why, in the case of instruments with an internal market legal basis, it is possible for them to apply to domestic, as well as cross-border, situations.)

57. In its work relating to the CESL, the Law Society has suggested that, if (despite our reservations) the initiative goes ahead, then it should first be introduced for cross-border contracts with Member States then able to consider for themselves whether they would like to adopt it for domestic contracts within their territory.[27] A further means of considering whether to extend an EU instrument can be through the incorporation of a revision clause in the text.

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.

Maintenance Regulation

58. The Maintenance Regulation (as referred to above) came into force on 18 June 2011. Due to the jurisdiction provisions (see in particular Articles 3 and 7), one impact of the Maintenance Regulation is that the UK has no power to make "needs-based" orders on sole domicile jurisdiction alone even if no other Member State is involved. This has had many adverse consequences and some practitioners believe it should be repealed.

59. A further problem for the UK in respect of the Maintenance Regulation is that there is automatic enforcement of EU orders in the UK whilst, for the non-applicable law jurisdictions (including the UK), there is a modified form of registration still required. Some practitioners believe that it would therefore be beneficial to the UK national interest to play a stronger role in negotiating such Regulations, although the EU "wish" to apply applicable law remains a concern for many family law practitioners.

60. As mentioned above, concerns have been raised regarding the "race to issue" under the Regulation (which had also previously been a concern when the Brussels I Regulation covered maintenance matters). The Law Society would support an amendment to address this issue when the functioning of the Regulation is reviewed in 2016 as has been possible in the recent negotiations concerning the Brussels I Regulation.

Court of Justice of the European Union (CJEU)

61. The Law Society is generally supportive of the role that the CJEU plays. If EU law is to function, then there must be a court able to provide interpretation on the meaning of that law (through preliminary rulings to national courts) and to consider whether EU institutions or Member States have infringed an aspect of that law.

62. As the Law Society stated back at the time of the debate as to whether the Rome Convention should become a Regulation:

[27] See paragraphs 13 and 14, Joint Bar Council and Law Society briefing on the Common European Sales Law for MEPs, April 2013 (as above).

63. *"The Law Society believes that the possibility of rulings from the ECJ [now CJEU] is a key advantage... This could be useful, for example, in defining who is a "consumer" for the purposes of the Convention, as there may well be cases relating to the interpretation of the Unfair Consumer Contracts Directive upon which national courts can draw. Although the acquis communautaire may itself, on occasion, be self contradictory, it would at least provide a common point of reference for national courts. This is a more unified solution than reference to national law alone...".*[28]

64. Preliminary rulings issued by the CJEU generally assist in resolving legal uncertainty for individuals and commercial parties although, from time to time, all courts (including those in Member States) may issue some surprising rulings. The Law Society believes that the common law of England and Wales has exerted a larger influence on CJEU case-law and procedure than is proportionate to the size of the England and Wales jurisdiction in comparison with other Member States' jurisdictions.

65. It is important for the UK to continue to provide submissions in CJEU cases to ensure that the commercial context is understood when the CJEU interprets the instruments.

66. In difficult negotiations legislators (including the Member States) may leave some wording unclear for the CJEU to settle later. If the wording and intention of legislators is clear, it is unlikely that the CJEU would make a ruling that some regard as unsatisfactory and the Law Society encourages legislators to do more in this regard where possible.

67. For commercial parties litigating/arbitrating in England some preliminary rulings were of concern and caused difficulties in the jurisdictional area; nevertheless, the Law Society is pleased that, in at least some cases, legislators have sought to remedy difficulties created. For example:

    i. In *Gasser,*[29] the CJEU had interpreted the Brussels I Regulation to mean that exclusive jurisdiction clauses were subject to the *lis pendens* rules in that Regulation. This meant that if proceedings were started first in another Member State jurisdiction than that selected in the exclusive jurisdiction clause, then the courts in the Member State jurisdiction specified in the clause were unable to progress proceedings (the 'Italian torpedoe'). The Law Society is pleased by the changes introduced in the recast Regulation, which will ensure that exclusive jurisdiction clauses can take effect.

    ii. The CJEU found that an anti suit injunction issued to restrain court proceedings in Italy in favour of an arbitration agreement in London was not compatible with the Brussels I Regulation (*West Tankers*[30]). Again, the Law Society is broadly pleased by the changes introduced in the recast Regulation clarifying what the exclusion of arbitration from the Regulation means - judgments relating to the validity of arbitration agreements do not fall within the scope of the Regulation and are therefore not binding on the forum specified in the arbitration agreement. (However some practitioners feel that little of substance has changed.)

[28] See pages 2 to 3, Law Society EU Committee Response to the Commission's Consultation on the Applicable Law in Contractual Negotiations ("Rome 1"), September 2003.
[29] Erich Gasser GmbH v MISAT Srl (Case C-116/02)
[30] Allianz SpA v West Tankers Inc (Case C-185/07)

iii. Finally, the CJEU held that the exercise by the English court of forum conveniens principles (*Owusu*[31]) in favour of a non-Member State court was incompatible with the Brussels Convention[32] (the predecessor of the Brussels I Regulation). The Law Society notes that the impact of this may be partly alleviated by the introduction in the recast Brussels I Regulation of the ability for Member State courts to give 'reflexive effect' in some circumstances involving non-Member State courts. Member State courts will be able to stay their proceedings but only if proceedings have begun first in a non-Member State court.

Workload and time taken to provide rulings

68. The CJEU has often been slow to resolve issues and that this can be problematic for commercial parties as the time involved in getting a ruling from the CJEU can have an adverse impact on their positions. However, the Law Society is aware that there has been a significant improvement in recent years and that the delays are at least partly due to the lack of resources at the CJEU. The Law Society provided input to the recent House of Lords' EU Select Committee's inquiry on the Workload of the CJEU.[33] It is encouraging that the Council of the EU on 25 June 2013 adopted a decision to increase the number of Advocates General in the CJEU, although it is clear that the CJEU's caseload is still very significant for the number of judges and Advocates-General (and, in the case of the General Court, the Law Society believes that it is extremely important that Member States agree to an increase in the number of judges as soon as possible).

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

69. The Law Society is keen to ensure that the common law continues to play an important role in influencing the development of EU civil judicial co-operation measures as it has in the past. The Law Society would like to emphasise that much can be done to contribute to the future agenda in the area of civil judicial co-operation (and thus make the process of opting in easier) if pro-active steps are taken at an early stage. We understand that the Lithuanian Presidency of the Council "...expects to start discussion regarding the future strategic guidelines for legislative and operational planning within the area of the freedom, security and justice, taking into account the results of the Stockholm programme".[34] The Law Society encourages the UK Government to provide active input early into these discussions as it has in the past. The Law Society is preparing its own contribution.

[31] Owusu v Jackson (Case C-281/02)

[32] Convention on jurisdiction and the enforcement of judgments in civil and commercial matters ("Brussels Convention"), 1968.

[33] House of Lords, European Union Committee, 16th Report of Session 2012-13, Workload of the Court of Justice of the European Union: Follow-Up Report, Ordered to be printed 23 April 2013 and published 29 April 2013:
http://www.publications.parliament.uk/pa/ld201213/ldselect/ldeucom/163/163.pdf
For the Law Society's response, see page 57 of the volume of evidence: http://www.parliament.uk/documents/lords-committees/eu-sub-com-e/FollowupworkloadCJEU/CJEU-Follow-upWrittenOralevidence290413.pdf

[34] See page 23 of the Programme of the Lithuanian Presidency of the Council of the EU: http://static.eu2013.lt/uploads/documents/Programos/Programa_EN.pdf

Opt in

70. There are some advantages but also a number of significant disadvantages to the opt-in rights offered by Protocol 21. On the one hand, if measures are proposed under the Article 81, TFEU, legal basis (civil judicial cooperation), it can enable the UK to stand aside from EU measures which are not compatible with its law or traditions, such as in the case of the matrimonial property regime.

Broader context

71. However, the Law Society believes that decisions not to opt in should be made only where truly necessary and as sparingly as possible. The risk of having a 'default position' not to opt in at the beginning of negotiations is that, overall, the common law loses influence. The incentive to accommodate the common law in legislative proposals diminishes with the expectation that the UK is unlikely to opt in.

72. This issue must also be seen in the broader context of 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 and views as unnecessary and potentially costly for the UK.[35] The Law Society believes that the UK is gradually losing the goodwill of other EU policymakers through failing to opt in / opting out of significant measures in the field of Justice and Home Affairs as a whole. This has a knock on effect on its influence.

73. In the longer term, if the UK remains outside significant legislative developments, it will become more difficult to influence the future development of EU law in the relevant fields, even if that would be of benefit to British nationals or the functioning of cross-border legal practice.

Individual legislative proposals

74. At the level of individual proposals, while all are different and a range of political eventualities arise, it is clear that the UK generally loses influence in the European Parliament and on some occasions in the Council when it decides not to opt in. It is increasingly difficult for British MEPs to become rapporteurs on files where the UK has not exercised its opt in. It is also believed that the parliamentary committees that legislate on measures subject to the Protocol 21 opt in (the Committee on Legal Affairs and the Committee on Civil Liberties, Justice and Home Affairs) may become less attractive to British MEPs deciding on which committees to join, when a strong representation in those committees is vital. It can also be difficult for those from other Member States to understand the reasons why the UK has an opt in decision when specific proposals may be particularly problematic for their own systems.[36]

[35] See Law Society's submissions to House of Lords' European Union Committee, Inquiry into the UK's 2014 Opt-Out Decision ('Protocol 36'): http://www.parliament.uk/documents/lords-committees/eu-sub-com-f/Protocol36OptOut/VolofevidenceP36asat250313.pdf

[36] An example from a criminal justice perspective is that, in relation to the Directive on the right of access to a lawyer, France was required to make very significant changes to its *garde à vue* system, but had no option not to opt in (which the UK exercised). The Law Society had supported a UK opt in.

Choice of legal basis

75. Finally, the Law Society would like to highlight that the choice of legal basis for some legislative proposals can be controversial. As an example, the Law Society does not agree that Article 114, TFEU, is the appropriate legal basis for the Common European Sales Law. There is a risk that, were the UK (and Ireland) to decide regularly not to opt in to proposals under Article 81, TFEU, then this could lessen the attractiveness of using that legal basis for those preparing proposals as, without the UK (and Ireland), any gains from legislation across the EU are likely to be lessened.

Example: Brussels I Regulation negotiations (decision to opt in initially)

76. The benefit of opting in to negotiations at the start was recently seen with the negotiations on the recast of the Brussels I Regulation.[37] This was of significant importance to the UK (and also its legal services sector) and we understand that a number of practitioners were particularly impressed with how the UK Government handled its decision to opt in to these negotiations and the negotiations themselves. Overall, the Law Society is pleased with the improvements that have been made to the Brussels I Regulation and believes that much of this is due to the influence that the UK was able to exert by remaining fully engaged (and being seen to be fully engaged) in the negotiations.

Example: Rome I Regulation (decision not to opt in initially)

77. As the briefing paper explains,[38] the UK decided not to opt in initially to negotiations concerning the Rome I Regulation, the successor to the Rome Convention. We understand that this was due mainly to concerns (particularly from the financial services' industry) concerning legal uncertainty if UK judges were required to apply foreign mandatory rules in domestic courts (a point on which the UK had entered a reservation in the original Rome Convention). The UK was active in the negotiations and, in the final text, the provision on overriding mandatory provisions (Article 9(2)) was much narrower than the previous wording in the Convention.

78. The Ministry of Justice then consulted at the end of negotiations in 2008 on whether or not to opt in. The Law Society supported the final decision to opt in. In the cover letter accompanying the Law Society's response to the consultation (dated 24 June 2008), the then chair of the Law Society's EU Committee commented on the original decision not to opt in:

79. *"We commend the effectiveness of the Government's continued participation in the negotiation notwithstanding the decision not to opt-in from the outset. Those negotiations were clearly fruitful and, given the serious concerns expressed about the implications of the proposal, we also appreciate the reasons for the Government deciding not to "opt in" at that time. However, we do wish to voice our concern that frequent recourse to such an approach*

(See Proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (COM(2011) 326 final).)

[37] See Written Ministerial Statement of 5 April 2011: http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/110405-wms0001.htm#1104069000378

[38] See pages 10 and 13, Call for evidence, Civil Judicial Co-operation, May 2013.

is liable to create bad faith with our European counterparts. Further, we believe the regular exercise of the choice not to opt in has the potential to weaken considerably the UK's position in influencing any future such measures in this field in which it would wish to participate."

Example: Succession Regulation (decision not to opt in initially)

80. The Succession Regulation offered an opportunity for British nationals living elsewhere in the EU (and for nationals of other Member States living in the UK) to have one law governing their succession; thus simplifying significantly the legal complexities and legal uncertainty of dealing with a number of different systems.

81. The UK Government did not opt in initially to negotiations on the proposed Regulation which the Law Society understood was for a number of reasons including concerns (such as on the inclusion of "clawback" provisions) from some stakeholders including the charity sector and the Law Society (though we also recognised the positive benefits). The Law Society had itself stated that:

82. *"We welcome and support moves to simplify cross-border rules and resolve disputes over which laws prevail on death. We consider that it would be beneficial for UK citizens for the UK Government to opt-in to this draft Regulation at some point. Particular advantages of the proposed reforms include greater legal certainty and the introduction of party autonomy. However there are a number of significant concerns, set out below, that would need to be addressed. One issue is that of "claw-back" in relation to life-time gifts.*

83. *"With these concerns in mind we understand that the UK Government may decide not to opt in at the outset within the three month period but to take part in the negotiations with a view to opting-in at a later date. If this approach is adopted we would urge the Government to play an active role in the negotiations with a clearly stated intention of opting-in at the end of the negotiations if the concerns have been met. It is clear that a number of Member States may support the UK's inclusion within the Regulation due to the high number of other European citizens in the UK."*[39]

84. The Succession Regulation is a file on which the Law Society recognises that the UK Government negotiated extremely hard and conscientiously in order to try to secure an opt in, ultimately unsuccessfully. The Law Society believes that the failure to opt in posed a significant difficulty for the UK in its negotiations and posed problems for British MEPs who wished to be active in the process. In the European Parliament, the then Vice-President of the European Parliament, Diana Wallis MEP, explained in a meeting of the Committee on Legal Affairs[40] that she would naturally have been the shadow for her group on the proposal but, having learned of the UK's decision not to opt in, she requested the views of colleagues

[39] Joint position of the Law Society of England and Wales, the Society of Trust and Estate Practitioners and the Notaries Society of England and Wales on the proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, November 2009: http://international.lawsociety.org.uk/files/joint-position-eu-wills-succession.pdf

[40] See from 12.30 of the Committee on Legal Affairs, 28 January 2010: http://www.europarl.europa.eu/ep-live/en/committees/video?event=20100128-0900-COMMITTEE-JURI

on whether it would be appropriate for an MEP from a Member State that was not participating to continue to participate in the committee's legislative work on that issue. The chair of the committee, Klaus-Heiner Lehne MEP, responded that obviously all MEPs have equivalent rights and these could not be limited in the discussion of legislation (and the rapporteur, Kurt Lechner MEP, had also emphasised that he bore the UK and Ireland no ill will); however, this episode illustrates how uncomfortable some British MEPs have felt at trying to influence measures when their Member State is not participating.

85. By not opting in to the Regulation on succession matters, the UK has to some extent isolated itself and lost influence over further EU developments relating to succession and inheritance when this could have benefitted many British nationals. Although we understand that the UK Government may be planning to introduce some domestic legislation to complement the Regulation, British nationals abroad (and nationals from other Member States in the UK) are likely to face greater legal complexity in any case.

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

86. The advantage of the cross-border requirement is that the UK should be able to control and manage its domestic affairs without interference from the EU. However, in question 3 above (see section on cross-border and domestic legislation), the Law Society also highlights the potential downside of additional complexity (particularly for businesses and individuals) in dealing with different domestic and cross-border regimes.

87. In relation to questions 9 and 10 below, some practitioners take the view that the European Commission's assessment that it has exclusive external competence to enter into agreements on behalf of Member States in respect of non-EU countries, indicates that the EU powers in that field may be too expansive; although the matter is complicated by questions of institutional law not directly related to civil judicial cooperation and on which there are different views (see below).

88. In contrast, other practitioners have highlighted the huge benefit that may be brought to bear for the UK through the EU's negotiating weight (having just concluded the recast Brussels I Regulation) on matters such as the Hague Judgments Project (see below).

89. In summary, there are different views among practitioners on what the extent of the EU's extraterritorial capabilities should be.

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

90. As the EU expands, the Law Society is keen to ensure that the common law retains a strong representation and that its concepts are taken into account in the development of legislation.

91. From the perspective of the CJEU, the Law Society believes that any enlargement would need to take into account the risk that the caseload of the CJEU could again increase and the impact of this.

92. It is clear that the numbers of UK lawyers in the European institutions and the corresponding level of knowledge and expertise concerning the UK's legal systems in those institutions are not as great as they once were. The Law Society informs its membership whenever opportunities become available for lawyers from the UK to apply for roles in the European institutions and urges the UK Government to do more to draw attention to the roles in these institutions open to British nationals, although we recognise that there have been some efforts already.

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

93. Assuming that the population of the EU increases in number, there will be increasing numbers of cross-border issues which means that civil judicial cooperation will become more important. There may be more pressure on the UK to apply concepts familiar to the civil law systems such as applicable law and there may be more unification of laws (although the Law Society's experience is that the common law does carry disproportionate influence bearing in mind the size of common law countries in comparison with the rest of the Member States). This may be seen as a challenge to those who are comfortable in the common law system but could also be seen as an opportunity if the UK chooses to market its common law concepts (for example, trusts).

Justice Programme 2014-2020

94. It is vitally important that, as EU law develops, lawyers, judges and parties making use of EU law in the UK have access to adequate training. The Law Society believes strongly that it would be beneficial for the UK to opt in to the Regulation establishing for the period 2014 to 2020 the Justice Programme.[41] This Regulation aims to encourage a more consistent application of EU legislation in the field of judicial cooperation in civil and criminal matters. We understand that the final text will provide for funding for training activities from which legal practitioners will be able to benefit.

95. A failure by the UK to opt in would not prevent legal professionals from the UK from taking part in co-financed training but they would be required to bear the costs themselves without any reimbursement.[42] It is clear that these additional costs would be prohibitive and that all but a few legal professionals from the UK would be unable to attend such training courses on EU legislation. This would put them at a disadvantage to their counterparts in other Member States and could also lead to their clients receiving less advice on EU instruments that could assist them.

[41] Proposal for a Regulation establishing for the period 2014 to 2020 the Justice Programme (COM(2011) 445).

[42] For example, the European Law Academy (ERA) organises many events co-financed by the European Commission. We understand that eligible (and therefore reimbursable) costs for such events comprise travel costs (up to a set maximum of usually 400 EUR) and costs for accommodation and some meals (calculated according to fixed per diems depending on the country in which the course takes place, which generally amount to an additional 300 EUR). In addition, we understand that individuals not eligible for reimbursement would need to cover the so-called direct costs incurred through their participation, i.e. additional costs caused by the participation of one more person (extra catering on ERA premises, extra documentation, etc). These amount to about 200 EUR per person per course.

96. The Law Society further understands that, based on the funding of 2007-2012, 11.48% of the funded applications under the three programmes (Civil Justice, Criminal Justice and Drug Prevention and Information Programme) were granted to UK organisations (at a time when the UK was one out of 27 Member States). The current Justice Programme has therefore provided clear benefits to the UK. The new programme would provide significant benefits for legal professionals from the UK wishing to receive training on EU instruments and we urge the UK Government to opt in.

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

and

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

97. The Law Society does not regard the Hague Conference on Private International Law (a global intergovernmental organisation which seeks to facilitate the negotiation of international conventions) as offering an alternative to the EU.

Brussels I Regulation / Judgments Project

98. A useful example is to consider the development of the work on jurisdiction, recognition and enforcement of judgments in civil and commercial matters at EU level and international level. The Law Society regards the Brussels I Regulation as being of huge commercial importance to the UK through enabling the free movement of judgments in around 30 EU/EEA territories. The UK's accession to the earlier Brussels Convention (originally signed in 1968) took place in 1978 and became part of domestic law in 1982.[43] Since that time the UK has derived significant benefits. In contrast, since 1992 the Hague Conference has tried to secure an international agreement on jurisdiction, and the recognition and enforcement of foreign judgments.[44] Negotiations in this field have proved notoriously difficult and have not yet led to an agreement. Consideration is ongoing as to whether to re-start work on the jurisdiction, recognition and enforcement elements (or at least recognition and enforcement). Although 2005 saw the adoption of the Hague Choice of Court Convention, this has only been ratified by Mexico.[45] (The USA and EU are the only other signatories. The Law Society would like the EU to ratify this Convention, but notes that it would have limited value due to the lack of other participants at this stage.)

99. If the Judgments Project (which would deliver significant benefits for the UK, for example through making the judgments of English courts recognisable and enforceable in a far broader range of jurisdictions) is to succeed, this will depend to a great extent on the EU. Following agreement on the recast Brussels I Regulation by the European Parliament and all Member States, the EU is in a strong position to present a model to the rest of the world,

[43] Civil Jurisdiction and Judgments Act 1982.
[44] A detailed chronology of the Hague Conference's previous work on the Judgments Project, together with relevant documents is available: http://www.hcch.net/index_en.php?act=text.display&tid=149
[45] See Choice of Court Convention status table: http://www.hcch.net/index_en.php?act=conventions.status&cid=98

encouraging non-EU countries to follow (though of course there would need to be some modifications to the approach in the EU instrument, such as stronger safeguards).

100. There are some specific omissions in the Brussels I Regulation that the Law Society would like to see included in the Judgments Project, for example, an ability for Member States to stay proceedings in favour of a non-Member State court, even if the Member State court is first seised; but, overall, the Law Society recognises the value of the EU's negotiating power and the possible advantages that it could bring to facilitating the free movement of judgments internationally.

Service of documents and obtaining evidence

101. In addition, while the Law Society understands that there may be a legal question concerning whether the European Commission has appropriate competence to negotiate with non-EU countries on the service of documents and obtaining of evidence, this is a further area where the EU's negotiating influence may be particularly helpful in relation to non-EU states. As explained above, a further EU legislative proposal is expected soon to provide for more efficient means of serving judicial and extrajudicial documents in civil or commercial matters within the EU - this could be used as inspiration for an international approach.

Road Traffic Accident applicable law

102. There is a more comprehensive and coherent link between the 1971 Hague Convention on road traffic accidents and the Rome II Regulation (2007) than was previously the case. Some Member States choose to use the Convention and some the Regulation to determine the law applicable to traffic accidents. This system appears to work reasonably well.

Influence

103. Whenever the EU asserts that it has exclusive external competence to act on behalf of the Member States (in relation to measures "...having cross-border implications insofar as necessary for the proper functioning of the internal market..."[46]) the UK inevitably loses individual influence in the negotiations at the Hague Conference with non-EU countries. However, there are circumstances in which the EU as a whole can exert more influence by virtue of its size (representing 500 million people), which allows the UK and other Member States to derive benefits (see discussion on the Judgments Project above). The UK also has the ability to exercise significant influence over the EU's negotiating position through providing active input.

Old / new Hague Conventions, further accessions to the Hague Convention on Child Abduction

104. There are a variety of views among family law practitioners concerning the current arrangements for concluding international agreements.

[46] See paragraph 2 of Annex II, Council Decision of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law (2006/719/EC).

105. Some problems and delays have arisen in relation to older Hague Conventions in this field (for example, the Convention on Child Abduction). Prior to 2005, conventions were agreed by Member States with no provision for international organisations, such as the EU, to become parties. This has led to a cumbersome process in agreeing new accessions where the EU now has (or believes it has) exclusive external competence in the relevant field. However, as can be seen below, the current problems are partly due to an important outstanding question of institutional law concerning the EU's exclusive external competence that, once settled, should reduce delays in similar cases. This question is not directly related to matters of civil judicial cooperation. In addition, these issues will not arise for recent and future Hague Conventions (from 2005 onwards), which contain a Regional Economic Integration Organisation (REIO) clause that enables the EU to both sign and ratify such conventions, thus making the process for future conventions smoother. However, we understand that under this new system delays are still possible as Member States must wait for the EU to ratify. For example, we understand that there is a delay to the ratification of the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.

Hague Convention on Child Abduction

106. Accessions to the 1980 Hague Child Abduction Convention were previously agreed by Member States. Following the conclusion of the Brussels IIa Regulation, the European Commission believes that it now has exclusive external competence, having legislated in the field of child abduction. Due to this, (i) the Commission is therefore required to propose (as it has done) to Member States the accession of further states to the convention (e.g. Singapore[47]), and (ii) the Member States must collectively agree to the accessions.

107. In the meantime, Member States cannot enter into further agreements on a bilateral basis. For example, Singapore therefore currently has to be treated by the UK as a non-Hague country due to the UK's membership of the EU. Many practitioners find this situation deeply frustrating and note that the lack of an agreement could cause suffering to the international children involved in cases linked to Singapore.

108. The European Commission has however proposed[48] the accession of Singapore (and a number of other countries) to the Convention. The UK has chosen to opt in to the negotiations but has explained that it has misgivings about the Commission's exertion of exclusive competence.[49] Some, though not all, Member States have already agreed to the accessions, for which unanimity is required within the Council. The Law Society's understanding is that the current delay in obtaining collective agreement is due to a dispute between the Commission and a number of Member States as to whether or not the EU has exclusive external competence in this field. This has meant that some Member States have not yet given their agreement to the accessions. This delay is ultimately due to an institutional law question that, once settled, should reduce delays in securing the accessions of new states in future cases involving older Hague conventions. The Commission has

[47] Proposal for a Council Decision on the declaration of acceptance by the Member States, in the interest of the European Union, of the accession of Singapore to the 1980 Hague Convention on the Civil Aspects of International Child Abduction (COM(2011) 915 final).
[48] See footnote above.
[49] See Written Ministerial Statement by Minister of State for Justice Lord McNally, 23 April 2012, Columns WS148/9: http://www.publications.parliament.uk/pa/ld201212/ldhansrd/lhan291.pdf

requested an opinion from the CJEU.[50] The Law Society would like this question to be resolved as soon as possible. Measures to counter child abduction are clearly very important.

Procedure for the negotiation and conclusion of agreements between Member States and third countries in some family matters

109. Some practitioners are also concerned about the UK's opt-in to Regulation 664/2009[51] which establishes a procedure for Member States to negotiate and conclude agreements with non-EU countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations. It is understood that the UK would have to notify and seek permission from the European Commission to enter into bilateral family law agreements in these cases; however the Law Society recognises that this requirement (set out in Recital 11 and Article 4) is clear and designed to ensure that EU law / external relations are not undermined.[52] It should further be noted that this Regulation has been designed to enable Member States, including the UK, to continue to enter into bilateral arrangements, and is, to this extent, welcome.

[50] Not yet publicly available.

[51] Regulation 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations.

[52] Recital 11 states: "In order to ensure that an agreement envisaged by a Member State does not render Community law ineffective and does not undermine the proper functioning of the system established by that law, or undermine the Community's external relations policy as decided by the Community, the Member State concerned should be required to notify the Commission of its intentions with a view to obtaining an authorisation to open or continue formal negotiations on an agreement as well as to conclude an agreement. Such a notification should be given by letter or by electronic means. It should contain all relevant information and documentation enabling the Commission to assess the expected impact on Community law of the outcome of the negotiations."