Balance of Competences Civil Judicial Cooperation Report: Event in London on 3 June 2013

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

General Observations

Article 81

- It was felt that the remit of Article 81 of the TFEU is appropriate. Participants were in favour of the universal rules of jurisdiction but there was a question of whether it fits into Article 81. It was felt that harmonisation of substantive law has to be renegotiated in a new Treaty.

- It was felt that Article 81 gives a mandate to the European authorities to take things forward but if there are any doubts these should be clarified.

Harmonisation of substantive law

- One participant said that we have a European enterprise. The Germans talk about their law all the time, the English talk about their law, in the presentation about the Insolvency Regulation we heard about French judges. From a Scottish lawyer's point of view, he didn't want Scottish law to be ignored.

- It was said that different jurisdictions deal with this in different ways. In the area of data protection we (the UK) do want harmonisation. Where it is practical it is a good idea. But in other areas it is not practical, for example contract law.

- Someone queried the harmonisation of trust law in the EU and it was noted that some countries do not have trusts but have their own equivalents.

Questions in call for evidence

Question 1 - Advantages/disadvantages to businesses and/or individuals in the UK of EU civil judicial cooperation

- A participant from Scotland said that international cooperation is important. He said that if the UK is in the EU it is important to have cooperation in civil and family matters. It is helpful. He said it leads to better certainty and basically the principles are understood. Different countries will have their own perceptions of substantive law but this is about where things go e.g. jurisdiction.

- It was felt that there is much to be said about EU law which is positive. There are always areas of improvement but lots of times the results are better than national provisions. Participants considered that we needed to be in EU to

improve the practicality of individual instruments. The revised Brussels I Regulation was cited as an example of improvements that could be made to existing EU regulations and addressed concerns raised by Court of Justice of the European Union (CJEU) rulings.

- Participants also agreed with feedback from previous stakeholder meetings that all the instruments can be criticised in one way or another but on the whole they are a good thing.

- A number of observations were made about the CJEU. These included, the CJEU lacks experience/expertise to deal sufficiently well with private international law. It should have a specialist chamber to judge on these areas; the lack of UK intervention in cases such as 'West Tankers' – the UK did not submit reasoning on why we like/don't like Commission proposals; It can take a very long time to bring cases to, and receive judgments from the CJEU; The issue of delay and quality of decisions on child cases (Brussels II a) was raised and there were comments that the quality of reasoning has deteriorated markedly. It was reported that in some cases there is a difficulty understanding what the CJEU judgment was and that another hearing will be needed to determine the original judgment.

<u>Brussels IIa Regulation</u>

- Many of the participants had family law backgrounds. One practitioner said that he was constantly looking at developments in family law. The experience of the International Committee of Resolution (which has 12 members) is that Brussels IIa and the Hague Conventions facilitate the work of family law practitioners.

- Brussels IIa provides rules on jurisdiction in divorce. Participants suggested that those provisions have reduced the scope to argue about where a divorce is harmonised. Litigation of these issues (which was usually expensive) has reduced. Therefore it saves money in private cases but also for government (e.g. legal aid). Brussels IIa on balance reduces litigation which is favourable. In cases where there is an appearance of unfairness, people more or less accepted it.

- It was noted that there is a difference in law between England and Scotland. For example, if a couple divorce in Scotland the ex-wife does not get maintenance, but in England the ex-wife is able to get maintenance for her whole life.

- One practitioner said that unless you are an expert in family law it is hard to get your head round it. How do you interpret the Regulation, what happens if Canada or Australia are involved? For example under the current scheme (Brussels IIa) it is possible for a person of English domicile to apply for a divorce in England even if they do not fit any other criteria. Scotland have a different domestic rule of domicile but under the English rule of domicile you can start a divorce in England if one of the parties is domiciled in England, but case law says that there are certain powers which the English court does not

have in relation to financial matters for example maintenance, it is a complicated matrix of what you can and cannot do.

- There are big debates in international communities – it is a difficult issue and there are differences of opinion.

Rome III

- A participant mentioned the problem with the Rome III Regulation (provides rules on which country's laws should be applied in divorce proceedings) and the maintenance protocol. By way of example, one stakeholder referred to a case that was decided in April involving complicated trusts. It was a Russian couple with trusts in a property in London. The court in England (Chancery Division) said it looked Russian so we will treat it as Russian. The court decided it could apply Russian contract law and it did. The difficulty for family lawyers is that it does not happen in matrimonial cases. Got to look at foreign law but reach an English decision. Applicable law/choice of jurisdiction is in turmoil.

Comments other EU instruments were made. These included the following.

- In businesses companies will want to know if UK law will apply. A degree of certainty for contractual obligations is important.

- It was suggested that the European Commission is of the view that the Service Regulation works 100% but the participants were of the view that this was not the case, particularly if the individual has moved, unless a new address has been notified.

- There was a comment that, if we withdrew from the EU, the competence issue would in fact work in our favour because we would not have to renegotiate individual arrangements with the remaining EU members as the EU would have competence on all the relevant matters to negotiate for them.

Question 5 – Advantages/disadvantages of the opt-in for the UK

- One participant said that the opt-in for the UK is because of English common law. The Scottish could probably do without it. But if English law is as good as we think it is then it is important to preserve the opt-in.

- It was agreed that the opt-in is wise; it works reasonably well and the flexibility of it works well. It also works well with Hague Conventions where there are EU links (where we can make reservations). However one stakeholder said it was frustrating when Denmark didn't opt into Brussels IIa.

- It was felt that in family law the UK has opted in where it should. In relation to the Matrimonial Property Regime, the Scottish perspective is that we should not reject things like that. It was noted that we cannot have different rules for different parts of the UK but it was said that we should think more about it.

- There was a suggestion that there might be 'competence creep' on the part of the EU and that the opt-in in relation to Article 81 might protect the UK.

- Other comments included the opt-in provides a bargaining leverage and it is resented by other Member States. There was also a feeling that the UK was not participating in some EU related matters because of "austerity" and lack of staff.

Question 6 – advantages/disadvantages of the cross- border requirement for the UK's national interest

- One participant commented on the borders within the UK – for example, the Channel Islands are in the Sovereign State but not in the EU

Question 7 – impact any future enlargement of EU might have on civil judicial cooperation

- Family practitioners were unsure of the impact of a country which has a domestic law largely influenced by Sharia joining the EU.

Question 9 – advantages/disadvantages to the UK of the EU's powers to act internationally

- When the EU has legislated it is not open to the UK to conclude bilateral or multi-lateral agreements in areas that the EU has already legislated in. One participant said that this goes with the territory but the Maintenance Regulation shows these things can be worked around. Another participant said it could have advantages, for example the Social Security Regulations which superseded lots of regulations.

- One participant said that the difference over the last few years is that there is panic about the result the EU could have but it is not so bad.

- One of the stakeholders an international family lawyer talked about matrimonial matters and in particular provisions which provide that where a divorce starts is where it will end – no jurisdiction issues. There was another solicitor who could not believe the EU had forced this on the UK but this stakeholder was saying it is not going to be so bad.

- Comments were also made on the application of the 1965 Hague Service and the 1970 Hague Taking of Evidence Conventions, once the EU has legislated for something by for example a Regulation, they assume competence for that subject with all outside countries. So, for example they have Regulations on Service and on Taking of Evidence. The UK is also a member of the Hague Conventions on the same subjects. In the case of the Hague Taking of Evidence Convention, the system is that when another country joins, the existing members have to ratify their accession before the convention comes into effect between those two countries. The UK may not now undertake such ratification because the competence to ratify on our behalf now lies with the EU. This is the case in respect of a great deal of EU legislation - trade treaties

were mentioned. The UK has not ratified the accession to the Taking of Evidence convention of a number of countries because of this. Fortunately the Service Convention does not require this process so we have not been affected there. The point is a wider one though that competence in these matters moves to the EU and is taken away from our government. Once power has been given over we are at the mercy of the ECJ and enforcement of judgments.

- Problems with bilateral investment treaties were raised which was felt to be a concern to business. Bilateral agreements now have to pay second fiddle to EU law. This is a problem because of the length of time taken to negotiate and implement the EU decision.

<u>Question 10 advantages and/or disadvantages to the UK of action being taken at an international rather than EU level</u>

- Participants thought that if we are not within the EU, we'd need some other countries to trade/negotiate with. There are examples where countries have used reciprocity as a criteria for enforcement of judgments but we need improvements on how we enforce judgments in the US - not a perfect system

- Participants thought that it was better to have harmonisation at EU level. Also if we weren't in the EU, we would have to establish relationships between UK and all other Member States and the UK could be frozen out by other Member States.