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C H A N C E

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Ministry of Justice
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Dear Sirs

Review of the Balance of Competences: Civil Judicial Cooperation (the "Review Paper")

We write to respond to the Call for Evidence in relation to Civil Judicial Cooperation within the Government's Review of the Balance of Competences between the United Kingdom and the European Union.

Our response is concerned solely with commercial law as it affects businesses trading with other businesses (B2B transactions) and, as a result, primarily focuses on the EU's Brussels I, Rome I, Rome II and Insolvency Regulations. Within that context, we consider that the current arrangements between the UK and the EU are advantageous to the UK.

Issues affecting business arising from what the Review Paper calls Civil Judicial Cooperation (but which are more usually called conflict of laws or private international law) are neither new nor confined to the EU. Every time a UK business conducts cross-border trade it is faced with conflict of laws issues, such as what law should govern a contract, what courts should have jurisdiction if a dispute arises and what the consequences of its counterparty's insolvency might be. This is the case whether the trade is with enterprises in, say, Germany or Brazil, France or China, or Spain or South Africa. There is nothing peculiar to the EU in these issues. Historically, the UK has addressed these issues through bilateral or multilateral conventions.

A key issue for any business with regard to all these issues is certainty as to what its rights and obligations are. This applies when entering into transactions as much as when legal difficulties arise later. If, for example, a business cannot be sure what law will apply to a particular situation because different courts apply different conflict of laws rules to determine

the applicable law, it will necessarily be unsure as to its rights and obligations. As a result, the harmonisation of conflict of laws rules so that parties can know what law will be applied by a wide range of courts is an important element in enhancing commercial certainty.

In this context, the EU offers the means to harmonise conflict of laws measures across the single most significant block with which the UK trades. Consistency of approach to the conflict of laws within all EU countries enhances commercial certainty and reduces costs to business because it is necessary to take legal advice in fewer countries. Contractual parties, for example, can be confident that their choice of law will be respected, as will their choice of court to determine any dispute that may arise, subject in both cases to well-defined and limited exceptions.

The content of the EU's legislation relating to the conflict of laws may in some areas be open to criticism, but the same was true of the conflict of laws rules applicable in England and Wales before their replacement by EU measures (we are not qualified to comment on Scottish law). We do not, however, consider that there are any flaws in the EU's legislation of a magnitude that would justify the UK's opting out of that legislation. Similarly, the EU may trespass into areas where, in practice, its intervention offers few practical benefits (eg the small claims procedure and the mediation directive) but, equally, they do little harm. In our opinion, the EU's legislation regarding the conflict of laws works well in practice overall. Its benefits significantly outweigh any defects.

Even if flaws emerge in the EU's legislation, those flaws are not necessarily immutable. For example, the recast Brussels I Regulation will amend the previous Regulation in ways satisfactory to the UK (particularly, with regard to jurisdiction agreements), and the Regulation as passed omitted the European Commission's less practical proposals (eg as to the jurisdiction of third party states). Where there are problems in the EU's legislations, those problems can therefore be corrected.

Further, if the European Commission were to propose any measures that the UK considered especially disadvantageous, the UK could decline to opt in to that measure under Protocol 21 of the Treaty on the Functioning of the European Union, as happened with the Commission's proposal for the Rome I Regulation initially and the proposal for a European Account Preservation Order. This offers the UK an important safeguard.

If the UK were not subject to the EU's conflict of laws measures, the UK could negotiate arrangements with individual countries within the EU or, more likely (given the EU's exclusive jurisdiction in the area), negotiate replacement treaties with the EU as a whole. This would only be necessary where mutual recognition was required (as with the enforcement of judgments), but the reality is likely to be that the EU would expect the UK simply to adopt whatever measures the EU already had in place, giving the UK little or no

bargaining power or influence on the content (for example, the Lugano Convention with EEA members). Even where mutual recognition is not required (eg in the choice of applicable law), the UK could only secure the benefits of commercial certainty if it implemented domestically - at least in large part - the relevant EU measures. Again, the UK would have no influence over the content of those measures. Further, although the UK courts would at least have regard to judgments of the CJEU, there would be a greater risk of differing interpretations of what was in substance the same instrument, which would reduce the certainty that is the prime benefit of international instruments.

The EU's measures also in general enhance the single market. For example, the Brussels Convention, and now the Brussels I Regulation, aims to secure the free movement of judgments within the EU. This is an important aspect of the internal market. Goods and services may be traded freely across the EU's internal borders, but if a judgment given in one EU member state were not enforceable in another the confidence necessary to trade across borders within the EU may be harmed. At the least, trade would become more costly as enterprises sought to protect their positions contractually (eg with letters of credit) in transactions with a counterparty in another member state.

There are areas where elements of the EU's conflict of laws legislation does not necessarily promote the internal market (eg article 6 of Rome I), but there may be policy reasons for that and, again, amendments can be sought within the EU as appropriate.

The Review Paper also refers to the EU's (arguable) inability to legislate for matters that are purely internal to each member state. There may be good reasons to ensure that the EU does not legislate for matters internal to member states, but it is also necessary to consider whether, in any particular situation, there should be two sets of rules - one applying to cross-border situations, the other to the purely domestic. In some cases, having two regimes will make little difference, but in others it will be prudent for the UK to enact legislation applicable internally that mirrors the EU's external legislation (as with, for example, section 16 and Schedule 4 of the Civil Jurisdiction and Judgments Act 1982 in relation to jurisdiction between the three parts of the of the United Kingdom).

In general, therefore, we consider the UK's current arrangements with the EU regarding conflict of laws to be advantageous to the UK.

Yours faithfully

Clifford Chance

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