**Review of the Balance of Competences**

**Ministry of Justice: Call for Evidence – Civil Judicial Co-operation**

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**As academic experts in private international law, the authors, over a long period of years, have been consulted by relevant Government departments on the detail of individual legislative proposals. With regard to the EU legislative programme in civil judicial co-operation, they have long experience of teaching and writing thereon, and analysis thereof.**

**The questions posed in the Review could be expounded upon at great length and in great detail, not only as to the broad programme, but also as to each individual instrument. Since, however, this is not a commissioned report, the observations set out below constitute only a bare summary of the essentials of our position.**

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

The construct of European rules concerning jurisdiction, judgment enforcement, applicable law and procedure set in place since 1997 across civil, commercial and family law is a remarkable achievement, which has a number of advantages for businesses and individuals in the UK, and certain disadvantages.

The regime generally is thought to deliver greater certainty and predictability to business and individuals in their commercial/private lives, and in the event of litigation.

Brussels I Regulation/Regulation 1215 and Brussels II *bis* has/will provide(d) a coherent set of rules in jurisdiction and judgment recognition/enforcement, on a broadly civilian template which the UK has embraced. Only in respect of a few notable (major) instances (e.g. Article 19, Brussels II *bis*; *Gasser* problem; *Owusu* problem; *West Tankers* problem) have UK courts and lawyers expressed serious disquiet, but since reservations are not competent in the framework of a European Regulation, the only opportunity for change in the drafting of terms comes at the point of formal review of an instrument.

To the extent that they are utilised (in respect of which up-to-date statistical information would be welcome), procedural instruments such as Regulation 1206/2001 on taking of evidence and Regulation 1393/2007 on service of documents are of assistance to business and individuals in the UK.

In choice of law, while the Rome I and Rome II Regulations comprise harmonised applicable law rules for most contractual and non-contractual issues, it can be argued that for UK parties the pre-existing national choice of law rules were adequate. The main benefit of harmonisation in the choice of law context is to reduce the significance of forum.

The combined effect of Brussels I Regulation and Rome I Regulation is to guarantee for perceivedly disadvantaged parties (consumers, employees, insured persons) the protections of

their 'own' court/law. As a theoretical construct, the protections are admirable, but suspicion remains as to the extent to which they are utilised in practice.

With regard to choice of law, the benefit of harmonisation resides rather in predictability than necessarily in substantive outcome of applying the harmonised rules. Some harmonised rules, such as Rome II, Article 15(c) – assessment of damages according to the *lex causae* – could be argued to be disadvantageous to a litigant in a UK court.

The case for certainty can be exaggerated, for although the content of a harmonised choice of law rule itself may be plain, the interpretation of the rule may vary across EU forums, and the result of applying it may be unpredictable (e.g. Rome II, Art 4.3).

A demerit which is becoming increasingly apparent is the proliferation of instruments as a result of the EU harmonisation agenda, and also as a result of the co-existence of EU measures and Hague Conference measures. Such proliferation inevitably raises complex questions of ranking of instruments, and sphere/extent of operation of instruments.

The growing incidence of a 2-tier Europe ('participating Member States'/'non-participating Member States'), together with exercise by the UK/Ireland of the right to decline to opt-in, produce a legal landscape which is unnecessarily complex, and which renders it ever more difficult for legal professionals to give clear and certain advice.

Demarcation between/among EU instruments can be difficult, e.g. European Order for Payment/European Enforcement Order.

**2. What is the impact of EU civil judicial co-operation on UK civil and family law?**

In can be seen that from 1999, there has been a marked increase in the volume of legislation on private international law, including legislation (or parts of legislation) which can hardly be defended as necessary for the proper functioning of the internal market (e.g. Rome II, Art 12). Much of the current family law provision can be justified on a generous interpretation of Art 81, TFEU, but the detail of rules is not always helpful (e.g. *lis pendens* in divorce jurisdiction).

UK conflict of laws rules have become EU-centric. For a country such as the UK whose citizens are likely to have many commercial and personal links with countries outside Europe, in particular, with USA, Asia and Australia, the EU dominance of our private international law is not always helpful or necessary. The EU-centric rules, particularly of jurisdiction, may act as a disincentive to resort to UK courts by non-EU parties.

The ever expanding EU agenda has led to a loss of UK parliamentary and judicial autonomy.

For commercial reasons, it is essential to preserve the integrity and attractiveness of UK legal systems (and the English system, in particular), for use by contracting parties and putative litigants/disputants from outside the EU.

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

Art 81 enjoins the European Parliament and the Council to adopt measures, particularly (but not exclusively) where necessary for the proper functioning of the internal market, aimed at ensuring points (a) – (h). While (a) – (h) undeniably come under the heading of civil judicial co-operation, that which is not established is the extent to which these aims are necessary for

the proper functioning of the internal market. Whereas proof that the aims and their fulfilment were necessary for the functioning of the internal market previously was a requisite, now it is no more than a desideratum. The loss of this requisite renders it more difficult to challenge EU competence to legislate in different areas.

A case can be made that civil judicial co-operation is necessary to support free movement of persons, goods and services, but the *degree* to which such co-operation is necessary is questionable. The point is that it is more difficult to argue that co-operation is *not* (at all) necessary, e.g. to facilitate free movement of persons, goods and services (and judgments) than it is for the Commission to assert (partly by means of an Impact Assessment) that it is necessary. The veracity/accuracy of statistics put forward by the Commission to support a new proposal cannot be checked (e.g. in applicable law in divorce, or matrimonial property, or succession; key terms such as 'international marriages' or 'international successions' often are not defined precisely), and therefore it is difficult to refute the 'evidence' on which the premise is made that a given measure is required.

In the area of civil judicial co-operation, it is difficult to point to any instrument which has 'hindered' the functioning of the market. But whether the market needed all instruments, or whether value has been added by all instruments, is debateable, especially in family law.

**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.**

The major unintended consequence is the surprising (to UK lawyers at least) ambit of the EU regime of rules. The application of EU rules of jurisdiction (even when *ex facie* a subject matter is excluded from their scope, e.g. arbitration) has been found to be capable of including non-EU legal systems. The interpretative power of the ECJ/CJEU, which, to the UK mind, always seems to be exercised in favour of an inflexible devotion to the rules of the EU regime, sometimes jeopardises UK relations with non-EU States. In jurisdiction, this has manifested in the *Owusu* and *West Tankers* problems.

An undesired consequence is the multiplicity of layers of law (e.g. in the UK in relation to choice of law in tort and delict), the ranking of which lies at the heart of many conflicts cases. An associated topic is the problem of hybridity.

A second undesired consequence has been the loss of UK sovereignty in negotiation of, and decision-making in relation to, international instruments. It is far from clear what the bargaining power/voting rights of the UK is/are in the formulation of a 'co-ordinated EU position' to take forward, e.g., to the Hague Conference.

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

The opt-in is a device of crucial importance and high value to the UK, permitting the UK to stand aside from any instrument the proposed content of which does not appear to benefit UK citizens. It is a reasonably flexible tool insofar as opt-in is possible from the outset, or at any time after adoption of an instrument by the participating Member States (albeit that the power to influence an instrument will be reduced if the UK does not opt-in to a proposed measure from the outset).

A serious question exists as to how the opt-in would operate in/survive the advent of a 'Yes' vote in the Independence Referendum to be held in Scotland in 2014. It seems likely that an independent Scotland (if and when admitted to the EU) would lose the default opt-out position, whereas England & Wales and Northern Ireland, as the Continuing State, would

continue to enjoy the privilege. If Scotland were automatically to be bound by every resulting European private international law instrument (and perhaps ones that already exist), it would be a disastrous result, from a technical conflict of laws perspective and from a human perspective.

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

Art 81.1 proceeds on the basis that the Union shall develop judicial co-operation in civil matters having cross-border implications. The phrase 'cross-border implications' is ambiguously worded, arguably opening the door to EU regulation of domestic law, but we agree with the UK's hard resistance to the adoption of legislative proposals which concern purely domestic matters. With regard, e.g. to the Mediation Directive (2008/52/EC), the UK wisely has confined operation thereof to cross-border cases.

At the other end of the spectrum, EU competence should extend no further than cases in which an *intra-EU* cross-border issue arises. A case such as *Owusu*, where there was no intra-EU, cross-border element, produced a result which dismayed many in the UK. It is a great relief that Regulation 1215 has drawn back from its earlier threatened incursion (*sub nom* 'operation of the Regulation in the international legal order') into matters concerning national residual rules of jurisdiction and Member State relations with Third States. The staunch adherence of the ECJ/CJEU to the construct of rules of civil jurisdiction of the Brussels regime has had the unintended and regrettable consequence of impacting on the jurisdiction of non-EU courts (as of Jamaica, in *Owusu*). On the other hand, we support the adoption in EU civil and commercial instruments of the principle of universal application, given the complex factual matrix which may present in a civil/commercial case properly brought in the court of an EU Member State. *Contra*, the universality principle in choice of law in family law was one of only many problems which caused serious anxiety in the UK in considering the UK position on Rome III.

**7. What impact might any future enlargement of the EU have on civil judicial co-operation?**

Geographical enlargement inevitably will mean that unanimity of decision-making is more difficult to achieve. In family law, this is likely to lead to increased use of the enhanced co-operation power, with consequential exacerbation of the '2-speed' Europe problem. Moreover, the admission of countries whose legal system may be founded on certain religious principles can be expected to increase the difficulty of achieving consensus, especially in family law.

Since the UK is unlikely ever to want to eat *à la carte* from the European menu, it is all the more important that the opt-in be preserved for the UK.

**8. What future challenges and opportunities are there in the area of EU civil judicial co-operation?**

In view of different voting requirements, the characterisation of a measure as relating to 'family law', or not, and therefore subject, or not, to the unanimity requirement is clearly extremely important. It can be expected that this descriptor will be strictly (i.e. narrowly) construed by the EU institutions. Experience shows that conditions/terms/provisions tend to be defined strictly or not according to the overriding political purpose of the EU undertaking. In our view, the EU institutions are prone to take a 'pro-EU-expansion' interpretation.

Increased use of enhanced co-operation procedure is liable to create more differences among Member States, insofar as it will introduce two categories, viz. participating Member States and non-participating Member States, and in so doing will increase the importance of forum, and inevitably add to complexity. This undermines one of the espoused benefits of harmonisation.

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

Negotiation and voting by the EU *en bloc* at, e.g. the Hague Conference, is both a challenge and a threat.

It is far from clear to parties not involved in the negotiating process what the bargaining power/voting rights of the UK is/are in the formulation of a co-ordinated EU position to take forward, e.g., to the Hague Conference. Given that the sensitivities of family law have secured for the present a unanimity requirement, does, for example, that safeguard carry through to the formulation of a co-ordinated EU position vis-à-vis a proposed Hague Convention? Or would the 'co-ordinated' EU position be struck on the basis of QMV/ 'consensus'/other? Similarly doubtful, especially given ambiguities surrounding EU external competence/shared competence (the issue whether or not an international agreement would 'affect the operation of an EU measure' is not always straightforward), is the extent of UK autonomy to participate as a national sovereign state at the Hague in a subject area in respect of which it has chosen not to opt-in to a proposed EU measure.

We are not convinced that the ceding of UK competence on the international stage carries any advantage other than weight and size of bargaining power. Increased weight and size of bargaining power is advantageous to the UK only if the UK supports the 'co-ordinated' EU stance.

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

First, there are certain subject matters which, in principle, would be better regulated on a global rather than on a European basis. One example, of current urgency, is the provision of rules of jurisdiction and applicable law in respect of cross-border surrogacy.

Secondly, interesting examples can be found of the inter-relationship of international and regional instruments. One model pertains to the relationship between the 1980 Hague Abduction Convention and Art 11 of Brussels II *bis*. BII *bis* imposes an intra-EU qualification on a successful international instrument – though whether or not the qualification in this instance is wise is another matter. This approach in drafting terms (i.e. imposing a regional gloss on an existing international instrument) seems to be an appropriate way of proceeding if closer integration/approximation is thought achievable and deemed necessary/desirable on a regional, if not global, level.

A different, and positive, example of EU/Hague cross-fertilisation is provided by the changes which occur in Regulation 1215 to the application of the *lis pendens* system where it is accepted that parties have made a choice of court. Here, the reformed European instrument appears to have followed the example set in the 2005 Hague Convention on Choice of Court Agreements, and therefore may facilitate the EU's ratification *en bloc* of that Convention.

Politically at the Hague Conference, the UK in many areas now will be seen merely to be part of Europe, and to have lost its independent identity. This might prejudice certain non-EU alliances which hitherto the UK enjoyed.

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