Balance of Competences Civil Judicial Cooperation Report: Event in London 20 June 2013

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

Call for Evidence questions

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

- One practitioner said that it would be difficult to contemplate a situation where the UK was not a part of these EU instruments. It would be impossible to go back to national rules after the experiences of using the Brussels IIa Regulation. It was not just the family instruments but also those on taking of evidence, service and legal aid that were important. That was not to suggest that everything was perfect, however. There were concerns about how some of the instruments extended beyond EU borders and whether there was a mandate to regulate relations with non-EU countries. This had been a problem in the Maintenance Regulation where English people who had worked abroad for a significant period had found that the English courts could not consider maintenance claims. There was also a question of external competence where Member States were being prevented from deciding for themselves whether to agree the accession of countries to the 1980 Hague Convention. It was explained that most Member States were opposing the European Commission on this point and that might lead to a referral to the Court of Justice to the European Union (CJEU).

- Participants considered that in private international law the EU measures were making life much easier. Everyone in business says that the UK would be mad to leave the EU (although the view in London is different to the view elsewhere in England). It was felt that the general public are not aware of how good these instruments are for the public and the lives of children.

- Advantages are that it allows a joint approach to family matters and provides a sense of uniformity – everyone should know what is supposed to happen. However, it was noted that what happens in practice can be different to what is supposed to happen in theory for example, in some countries there are cases where a non-return decision has been made under Brussels IIa or the 1980 Hague Convention based on a child's objection but the child is only about three. A lot of countries are not meeting their obligations under Brussels IIa or the 1980 Hague.

- One of the participants referred to the 6 week guideline for children to be returned and said she is aware of a case where a child has been abducted to another Member State and it is only now just going down the appeal process, some 18 months after the abduction has taken place. You would expect the child to be settled in the new country by now.

- The suggestion is not that we should remove ourselves but we could work with countries to improve things. For example, training and exchange of good practice so that all Member States understand the detail and implications of the instruments. Make them understand that they are part of the EU, they have obligations and there are consequences if they breach them.

- Other suggestions to improve the practicality of the measures were potentially redrafting certain bits of the instruments to make them clearer and less ambiguous. Also, sort out different arrangements in different Member States – i.e. in Poland there are a number of judges in different parts of the country who can hear Hague cases so there is no centre of expertise and we get consistent outcomes. It was agreed that there needs to be a more consistent approach and better methods of sharing information. Furthermore practitioners need to be more aware (which relates to the training point) about available options.

- A point was also made about nationality. Some participants suggested that there was a bias towards nationality in some Member States which overruled other considerations when courts decide whether a child should/shouldn't be returned. It should be child abduction but these countries see the child as their nationality and refuse to return to the UK.

- There was some discussion of the CJEU. It was agreed it was important to have a court to be able to clarify issues in instruments and while there were some concerns about how slow the process could be it was thought that in general it made the right decisions, although one practitioner thought it had made some strange decisions in cases involving children. There was consensus that the UK should make more observations to help influence the decisions.

- With succession cases Brussels I causes problems as if minor children in England inherit property in France they have to go to the High Court in London to deal with it. In Poland for example, if a minor child inherits assets or inherits debt, it can be disclaimed on their behalf. There is no disclaim procedure in England. There are still lots of areas where people cannot make it work. Practitioners are getting questions from clients asking why the EU hasn’t sorted this out yet.

- A practitioner mentioned that some matters affected everyone. Not everyone would get divorced but all would die so succession matters applied to everyone. Many ordinary people had cross-border connections such as holiday homes, and not all of them could afford to instruct London firms with experience in this area. Many practitioners did not know that there were rules of private international law to apply to the cross-border succession issues that they encountered in practice. It would be helpful if these rules were codified in English law, whether by opting into the Succession Regulation or by enacting parallel rules (e.g. in the same way that the provisions of a Hague Convention had been written into a schedule to the Mental Capacity Act

2005[1]). Even though the UK was not participating in the Regulation, the fact that there were codified rules for most of the rest of the EU was helpful.

- It was explained that during the negotiations the UK had been near a solution on clawback (our main concern) but had not been able to persuade other Member States to compromise on the point. There had been some discussion as to whether we could change our domestic system to align it more with the Regulation but unless we participated in the Regulation we would have none of its advantages. During the negotiations it had become apparent that there was massive ignorance about how other national systems worked. While the Regulation would align issues it might prove difficult to work in practice and we would be able to observe that from the sidelines.

- Another observation made was that even though the UK was outside of the Succession Regulation practitioners would still need to be aware of it.

- It was said that Rome III this had helped to improve legal certainty in the area of choice of law in divorce. The use of enhanced cooperation had proved that those with a common legal heritage were able to move ahead in a way that helped them without having to involve others. That was better than nothing.

- The Maintenance Regulations was not ideal but it was better than nothing and better than having the UK outside of the regime.

Question 2 – Impact of EU civil judicial cooperation on UK civil and family law

- One stakeholder questioned whether it is EU civil judicial cooperation having an impact or is it that it is more global and the law is actually following the way the world is changing.

- In Brussels there are people experiencing these problems which is why the EU are trying to sort them out. It was noted that it much more common now for people to get married in other member states. The way Spain applies English law is different to the way England applies English law. It takes time for different member states to catch up. Different Member states have very different systems.

- It was agreed that there are problems with bilateral arrangements - for example, the Wills Convention is not signed by US, Canada and others. The problem with Hague Conventions is that it is up to each member state to interpret what they think it means. With children's cases, bilateral arrangements would create inconsistencies and uncertainty. For example, Sharia law cases are so different from an EU approach. Other problems raised with bilateral agreements are non-compatibility and countries signing up in theory but either having no intention of complying fully or their infrastructure prevents them from complying successfully. Gives hope when

[1] The Hague Convention of 13 January 2000 on the International Protection of Adults and it is (largely) written into Schedule 3 to the Act.

there is none. Examples were given of bilateral agreements that didn't work; between Spain and Morocco; UK and Pakistan; and UK and Egypt. It was agreed that we would be going backward by having bilateral agreements.

- It was felt that Brussels IIa is a more rigid instrument and it is better for the UK to be in it. For the return of the child it is the best instrument and it is fast. It is a good thing the UK is in Brussels IIa as far as child abduction is concerned.

- It was agreed that if the UK opted out it would create uncertainties and the UK would become the 'enemy state' as other countries wouldn't know whether they could get an order enforced here. Judicial cooperation is about trust in judicial systems and working together and having good relations with other member states. It was also agreed that this needed to be maintained.

- It was thought there had been huge changes to national law with regard to cross-border cases. While there had been some problems – e.g. the rush to court in Brussels IIa cases – the EU instruments had increased legal certainty.

<u>Question 4 – Areas where EU competence has led to unintended or undesired consequences</u>

- Although not an issue of EU competence, some commented that there is a problem with the European Court of Human Rights for example, the delay in getting cases to the court and then the time it takes to get a decision. By the time a decision is made, a child could be settled in a new country and it is not in the best interest of the child to move back.

- There is also a question concerning the ability of the court to make informed decisions – opinion is that it is not competent/skilled enough. With the 1980 Hague, it is not a welfare based convention and the court does not understand the principles of it. For example, in the Neulinger case the court admitted in its decision that it (i.e. the court) was part of the problem and that the child should have been returned but because it took so long (4 or 5 years) it should not be returned – issue of habitual residence.

- Participants agreed that a clear definition of habitual residence was needed. Reference was made to a CJEU case (Chafin v Chafin) in which habitual residence was defined but this was not a family case.

- It was noted that there is an expedited procedure in the CJEU and it can turn around cases quickly but there is no alternative with bilateral arrangements.

- It was agreed that it is better to have something in place and work towards perfection.

- The problems with the Commission's proposals on Hague 1980 accessions were mentioned again together with the concerns that had earlier been

mentioned about the Maintenance Regulation and a need to improve the jurisdiction provisions of Brussels IIa.

Question 5 advantages/disadvantages of the opt-in for the UK

- It was agreed that the opt-in was very beneficial in general terms although there was some discussion as to whether more use of the decision not to opt in had an adverse effect on the UK's negotiating position with other Member States.

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

- The participants commented that the family instruments were of their nature cross-border.

Question 7 – impact of any future enlargement of EU on Civil Judicial Cooperation

- It was generally seen as a good thing for more countries to join in respect of the protection of children. But we need to continue judicial and academic debates to get to the right points.

- In relation to the court process in Turkey, the court hears a case and every case can be appealed but the problem is there is no appeal court so every case that is appealed goes to the Supreme Court. If Turkey joined the EU they would need to correct the position (i.e. creation of appeal court) which would be beneficial.

- In relation to the 1980 Hague Convention, it is difficult to implement in the new Member States but it is much better to have them taking part than not at all. Training needed before they join the EU so they can be prepared. Japan was cited as an example of a country which has been coming over to the UK for the past 18 months in preparation for ratification of the 1980 Hague. When a new Member State joins, the number of abductions rises at first and then settles down. Important to start to look at where the next rises will be occurring - Romania, Bulgaria, Croatia etc. Turkey?

- In relation to future enlargement it was said that Regulations have to be interpreted by the CJEU – the language used by the court has to be interpreted to 28 plus member states so the judgments need to be constructed in a certain way. Member states can interpret things differently. But linking up training and increasing understanding of the court of justice role will help to make better references to the court.

- Some concerns were expressed about the possible need to accommodate Sharia law.

Question 8 future challenges and opportunities are there in the area of EU civil judicial cooperation

- All wanted an emphasis on good workable instruments and current ones should be amended where it was considered necessary. It was thought that the Commission might do more to improve implementation throughout the EU by encouraging cooperation of family law associations at the EU level.

- There was a call to look again at whether English courts should apply foreign law. German judges had handbooks which set out the main provisions for the laws of different countries and that seemed to work well. However it was pointed out that capacity issues in courts and changes to legal aid would make it difficult for English courts to apply foreign law. The best outcome might be to use the law of the last joint habitual residence as that would be most likely to be the law of the forum. To gauge the likely extent of the need to apply foreign law it would be useful to know the numbers of non-UK nationals there were living in the UK alone with family abroad.