



Law Society
of Scotland

Providing a Cross-Border Civil Judicial Cooperation Framework: A Future Partnership Paper

The Law Society of Scotland's Response

February 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Constitutional Law Sub-committee welcomes the opportunity to consider and respond to the UK Government paper consultation: Providing a cross border civil judicial co-operation framework: A future partnership paper. The Sub-committee has the following comments to put forward for consideration.

General Comments

Within the EU, there is an almost complete legal framework for choice of law, jurisdiction and recognition and enforcement of judgments in civil and commercial matters. This framework aims to facilitate the recognition and enforcement of judgments reached by Member States' courts, to achieve free movement of judgments, and rules for jurisdiction and choice of law, and to provide common rules of evidence and service of documents. All of these are important in cross-border matters, and will continue to be relevant after the UK has left the EU.

Existing Models or New Arrangements

The UK and EU will need to agree continued participation in the existing arrangements or develop alternative means of judicial cooperation across Europe. The UK could negotiate to include the Brussels I rules on recognition and enforcement of judgments in civil and commercial matters in the post exit agreement with the EU. This could also include to the Service of Documents and Taking of Evidence Regulations.

- a) There are some existing models which could form the basis of the new agreement. The mechanism established for Denmark in the Area of Freedom, Security and Justice to have access to the Brussels I Regulation. The Danish Protocol extends the application of the instruments to Denmark, but has effect under international law rather than EU Law
- b) The UK could join the Lugano Convention which provides a system of recognition and enforcement of judgments in civil and commercial matters and which reflect aspects of the

Brussels I Regulation. It applies between the EU and EFTA, and is open to the EFTA states and any other states that are invited by the participating states to join it.

Key differences between the Lugano Convention and Brussels I Regulation include:

- (i) Priority to exclusive choice of court agreements – under the Lugano Convention, if there are corresponding proceedings in different member states, no other court can consider the case until the first court first seized has determined whether it has jurisdiction. The Brussels I rules allow for a court second seized to continue with the case where the parties have made an exclusive choice of court agreement.
 - (ii) Ease of recognition and enforcement of judgments - The Brussels I rules provide for automatic recognition and enforcement of judgments, as if they were judgments from the courts of the member state. This increases the speed and certainty of judgments. Under the Lugano Convention, an exequatur is required, meaning there is a need to undertake a recognition process at the courts of the member state seeking recognition and enforcement. This does not present an insurmountable difficulty in practice.
- c) The Hague Conference on Private International Law which works for cross-border cooperation in civil and commercial matters has created several agreements on the recognition and enforcement of judgments.
- (i) The convention on the recognition and enforcement of civil and commercial judgments from 1971.

The Choice of Court Agreements Convention 2005, which covers civil and commercial matters. This has been ratified by the EU, Mexico and Singapore and the UK is already a party to it as an EU member state. The UK should aim to accede to the convention after exit day.

This convention is important to commercial adjudication, as it provides for a recognition and enforcement of judgments where there is a choice of court agreement, but it does not replace the Brussels I Regulation. Both the Brussels I Regulation and the Lugano Convention apply to all judgments in civil and commercial matters, including for example where there is a consumer, employment or insurance dispute.

The Hague Conference has previously adopted conventions on service of documents and taking of evidence and the UK is already a party to these conventions. The conventions have been agreed by many EU Member States: the Service of Documents Convention has been ratified by all EU member states except Austria, and the Taking of Evidence Convention has been ratified by all Member States except Austria, Belgium and Ireland. These conventions may not have the speed or flexibility of the EU Regulations but they set out an international law framework for the service of documents and the taking of evidence in civil and commercial matters.

Whatever solutions are chosen, they will have to take into account the distinct courts and legal system in Scotland. Stakeholders such as the Lord President of the Court of Session, the Lord Advocate, the Scottish Courts and Tribunals Service and the legal profession require to be consulted in connection with any proposals for the Withdrawal Agreement and the ongoing Partnership with the EU see: *Providing a cross-border civil judicial cooperation framework: a future partnership paper published by the UK Government*. The paper acknowledges the need for cooperation with the devolved administrations but this is not sufficient as many aspects of the changes which will be necessary will engage the Courts, Judiciary and legal profession across the UK. The UK Government consulted with The Law Society of England and Wales and the Bar Council in the preparation of this paper. We believe all the UK legal professions should be consulted further in the upcoming negotiations.



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