

Civil Justice Systems, Choice of Forum and Choice of Contract Law in Europe

Introduction

This speech will be more Barack Obama than Hillary Clinton. By that, I mean that it will concentrate more on 'the vision thing'. He has famously asked the voters in the US to have the audacity to hope. I will ask you similarly to have the audacity to believe – and you will find out in what by the end of this speech.

I am also similar to Barack Obama, because I am not here because of my experience. Although I have been listed in the programme as a practitioner, I am not a practitioner. When the phone rings in the White House at 3 am and there is someone asking for legal advice, you do not want it to be me who answers. I am a policy maker. The organisation I represent, the Council of Bars and Law Societies of Europe or CCBE, brings together the bars from 31 countries in Europe, with a further 6 observer members. Through our member bars, we represent over 700,000 European lawyers on policy issues to the European institutions and elsewhere.

Policy on EU civil justice systems

I have been asked to look at the policy implications of the survey undertaken on civil justice systems in Europe. I begin by looking at the policy choices facing European legislators when they wish to intervene on civil law matters. The choices include the following:

- 1) **harmonisation**: which can be of national rules across the EU, or only for cross-border cases (convergence and approximation are also terms which crop up in this discussion);
- 2) **an optional instrument**: where the parties can choose to be bound by a common third rule;
- 3) **a conflicts rule**: which decides which rule should be chosen if there are different possibilities;
- 4) **mutual recognition** of acts and decisions which have taken place in another Member State;
- 5) **doing nothing**: which in the circumstances of European contract law, for instance, means freedom of contract.

Choice 2) is related to Choice 1), since both are aspects of harmonisation. Choices 3) and 4) are, similarly, both aspects of mutual recognition. This means that the two main lines of policy development, if doing nothing is excluded, are harmonisation and mutual recognition.

Which way forward?

The next question is which way legislators are likely to go. There is a variety of indications. The starting point are the Tampere conclusions, which first established the competences of the European institutions in the field of civil justice. This is what was said:

"B. A GENUINE EUROPEAN AREA OF JUSTICE

28. In a genuine European Area of Justice individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States.

VI. Mutual recognition of judicial decisions

33. Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities.

37. The European Council asks the Council and the Commission to adopt, by December 2000, a programme of measures to implement the principle of mutual recognition. In this programme, work should also be launched on a European Enforcement Order and on those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of Member States.

VII. Greater convergence in civil law

38. The European Council invites the Council and the Commission to prepare new procedural legislation in cross-border cases, in particular on those elements which are instrumental to smooth judicial co-operation and to enhanced access to law, e.g. provisional measures, taking of evidence, orders for money payment and time limits.

39. As regards substantive law, an overall study is requested on the need to approximate Member States' legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings. The Council should report back by 2001.¹

In other words, the conclusions begin with mutual recognition – described as the cornerstone of judicial co-operation - and then move on to speak about greater convergence in certain specific matters.

But there are pointers beyond the Tampere conclusions. There is an existing Treaty obligation, Article 5², which requires that the principle of subsidiarity – whereby acts should be undertaken at European level only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States – shall always be taken into account:

“Article 5

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.”

After that, there is the case-law of the European Court of Justice, where we can find a string of cases such as the *Cassis de Dijon*³ case, which emphasise the mutual recognition principle.

Finally, there is the proposed amendment in the Lisbon Treaty⁴ to Article 65⁵, which provides the legal basis for the European Commission to act in this area, and which will in future highlight the importance of mutual recognition. A comparison between the old and the new articles is instructive in seeing how much the institutions will now rely on mutual recognition:

New

<p>“JUDICIAL COOPERATION IN CIVIL MATTERS 66) Article 65 shall be replaced by the following Chapter 3 and Article 65: "CHAPTER 3 JUDICIAL COOPERATION IN CIVIL MATTERS ARTICLE 65</p>

¹ http://www.europarl.europa.eu/summits/tam_en.htm#b

² <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf>
³ (C-120/78)

⁴ <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML>

⁵ <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf>

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

- (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
- (b) the cross-border service of judicial and extrajudicial documents;
- (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
- (d) cooperation in the taking of evidence;
- (e) effective access to justice;
- (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
- (g) the development of alternative methods of dispute settlement;
- (h) support for the training of the judiciary and judicial staff.

3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament. The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision."

Old

"Article 65
Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper functioning of the internal market, shall include:

- (a) improving and simplifying:
 - the system for cross-border service of judicial and extrajudicial documents,
 - cooperation in the taking of evidence,
 - the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;
- (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
- (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States."

The conclusion I draw from these several and important examples is that nearly everything points in the direction of mutual recognition as the path of first choice for resolving matters relating to civil justice systems in Europe.

What already exists

At the same time, there is a growing list of measures which have already been drawn up by the institutions under the heading of mutual recognition:

- **Brussels I** (judgements in civil and commercial matters)⁶
- **Brussels II** (judgements in matrimonial matters and matters of parental responsibility, now a regulation)⁷
- **Insolvency proceedings** with cross-border implications⁸

⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:EN:PDF>

⁷ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:338:0001:0029:EN:PDF>

⁸ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:160:0001:0018:EN:PDF>

- **European enforcement order** for uncontested claims⁹
- Regulation on **service of documents**¹⁰
- Regulation on the **taking of evidence**¹¹
- European order for payment procedure¹²
- European small claims procedure¹³

And the following measures are in the pipeline under the same heading:

- Green paper on transnational successions¹⁴
- Green paper on applicable law and jurisdiction in divorce matters¹⁵

It is easy to see from these examples how mutual recognition is fulfilling the stated aim of becoming the cornerstone of civil judicial co-operation envisaged by the Tampere conclusions.

Mutual recognition and lawyers

Lawyers are in any case used to mutual recognition. The very directives¹⁶ which regulate legal practice across borders are based on the principle. Without going into the detail of the directives, which is not the subject of this talk, they allow a lawyer from one Member State to:

- provide temporary services in another Member State without notifying the bar or any other authority in that Member State, and even to appear in court in that other Member State in conjunction with a lawyer from that Member State;
- qualify as a lawyer in another Member State without visiting it, just by taking a small number of exams (the aptitude test) on the differences in the law between the two Member States; and
- establish under home title in another Member State after registering with the bar there, being able then to practise home law, European law and host law; and after three years of practice of host law, to qualify more or less automatically and without examination as a lawyer of that Member State.

The interesting thing about these examples from lawyers' practice is that they teach us the fundamental quality of mutual recognition, which is trust. We cannot say that we do not want in our country lawyers who do not have to pass a bar exam (such as is still the case in Spain, until their new law becomes operational), or that we do not want lawyers who do not have compulsory professional indemnity insurance (for instance, from Greece), or that we do not want lawyers who have not taken a law degree (which is possible from the United Kingdom). No, we have to take all lawyers once their title is recognised in the directives, no matter how they became lawyers and no matter what we think of them. That is what mutual recognition is all about.

Position of the CCBE

⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0805:EN:HTML>

¹⁰ http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Regulation&an_doc=2000&nu_doc=1348

¹¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R1206:EN:NOT>

¹² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:399:0001:01:EN:HTML>

¹³ http://ec.europa.eu/justice_home/doc_centre/civil/doc/com_2005_087_en.pdf

¹⁴ http://ec.europa.eu/justice_home/doc_centre/civil/doc/com_2005_065_en.pdf

¹⁵ http://ec.europa.eu/justice_home/doc_centre/civil/doc/com_2005_082_en.pdf

¹⁶ Lawyers services directive 1977 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31977L0249:EN:HTML>); Mutual recognition of diplomas directive 1989, replaced by the Recognition of professional qualifications directive 2005 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:255:0022:01:EN:HTML>); Lawyers' establishment directive 1998 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0005:EN:HTML>)

The CCBE's own position in this regard can be summarised by a speech given some years ago by our then President in the European Parliament:

"The CCBE would first like to highlight that when it comes to harmonisation of law and procedures, given the attachment that citizens rightly feel to their own legal systems, subsidiarity should be the presumption, unless it causes an injustice of one sort or another. The sort of injustice the CCBE is referring to is an obstacle of undue expense or delay in obtaining a remedy in one Member State as compared to another. This general line ... can be summarised by the phrase "subsidiarity unless injustice" ...

The CCBE would also like to propose that the Commission establishes a top level group of experts, including both legal practitioners and business experts, which would develop a global vision of existing and future harmonisation of law and legal procedures across the Member States. This has already been suggested by the CCBE in its comments to the Commission communication on harmonisation of contract law. The CCBE would like to stress, once again, the need to draw together the different initiatives which contain overlapping areas of harmonisation , e.g. the Green papers on the European payment order, small claims and the Rome Convention, further harmonisation of consumer protection, harmonisation of contract law etc. Otherwise, there is a real danger that issues will be addressed by different, and maybe conflicting, rules within the EU.

The CCBE would also like to underline the crucial role which lawyers play ... Lawyers have the training to protect the needs of citizens, whether claims are large or small, contested or uncontested. Especially in cross-border cases, it is of particular importance that legal advice is provided by a professional who has the necessary qualification and expertise. Lawyers have also an important role to play in order to avoid the risks of misjudgement and unprofessional /unethical handling of cases, which are detrimental to citizens and to general trust in the legal system. Therefore the CCBE would strongly recommend that any future legislation at the EU level should take into consideration the necessity to maintain high professional standards in all legal proceedings, whether small or large, disputed or undisputed, in the interest of citizens."

In other words, our policy has the following three strands:

- (a) subsidiarity should be the rule in relation to exercises relating to Member States' legal systems, and where there is subsidiarity, mutual recognition is the obvious complement to make the single market work; there should be no harmonisation just for the sake of it, say for some idealised European project – rather, harmonisation should be used where subsidiarity and mutual recognition fail, for instance where they cause a cross-border injustice;
- (b) there should be a proper strategy and co-ordination between all the different kinds of cross-border harmonisation of laws and procedures currently being proposed by the European institutions; and
- (c) lawyers play an important role in the administration of justice, and so their role, which exists to promote the public interest and the interests of clients, should not be overlooked in the various ongoing harmonisation exercises.

Questionnaire

Turning now to the questionnaire which was prepared in advance of this conference on civil justice systems, I have a number of comments.

First of all, and most disappointingly, there is no question on the attitude of the respondents to mutual recognition, which, as I have mentioned, is frequently stated to be the cornerstone of judicial co-operation in civil justice matters, and which I hope I have shown to be one of the central planks of existing measures. In Question 45, which is the question which addresses respondents' attitudes to future changes in the EU regarding civil justice systems, the following is found:

- "45. Which of the following options would be preferable for your business?*
- a. A European civil justice system that replaces national civil justice systems*

- *b. A European civil justice system for cross-border transactions in addition to existing national civil justice systems*
- *c. Greater alignment of civil justice systems*
- *d. None of the above*
- *e. Don't know"*

I would have preferred to discover also what they think about the most likely option, and the one which is already in operation across a range of areas: mutual recognition.

Interestingly, there is also no question, in the section asking respondents why they prefer certain civil justice systems to others, on the merits of the '*titre exécutoire*'. That is the quality of the '*actes authentiques*' of notaries in the Latin notary system, which covers much of Europe, and which notaries frequently pray in aid when claiming that their system is better than the common law and more useful to the sound transaction of business. That is because the '*titre exécutoire*' permits someone to treat such a notarial document as having the force of a court order, able to be enforced without more. There is a danger of looking at civil justice systems through particular eyes only, without taking account of the strengths of other systems – which is another reason to prefer mutual recognition, which avoids such value judgements.

Finally, it would be good if the valuable data contained in the study were co-ordinated with other work going on at European level on similar topics at the moment. Here are three instances of such other work:

- (1) Costs of justice study¹⁷ – this is a European Commission funded study on the transparency of costs of civil judicial proceedings in the EU, due to be published in mid-2008.
- (2) Council of Europe study¹⁸ - the Council of Europe, an inter-governmental body, has established the European Commission for the Efficiency of Justice (CEPEJ) as one of its working groups. The CEPEJ has produced a report on evaluating European judicial systems. The report is full of extremely valuable data, which is being updated and further studied by CEPEJ.
- (3) EU Justice Forum¹⁹ - the Directorate General Justice, Freedom and Security of the European Commission is launching a Justice Forum on 30 May 2008, to bring together EU authorities and practitioners to discuss legislative proposals in the pipeline, and also the impact of EU legislation already implemented.

Conclusions

I said at the beginning that I was asking you to have the audacity to believe. You may think that belief in mutual recognition is hardly the stuff of Barack Obama's dreams. But you would be wrong. Mutual recognition is based on trust, and on belief in the equality of treatment between civil justice systems in the EU, whatever their differences. It is not the only tool available, nor should it be followed blindly. Harmonisation has its role when injustices would otherwise be caused. But mutual recognition is an essential building block of Europe, based on the trust between nations that underlies the great European experiment, and I ask you all to believe in it.

Jonathan Goldsmith
Secretary General, CCBE

¹⁷ <http://costsofjustice.org/>

¹⁸ <http://www.coe.int/t/dg1/legalcooperation/cepej/>

¹⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0038:FIN:EN:HTML>