MASTER OF THE ROLLS

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A UK Perspective On EU Civil Justice - Impact On Domestic Dispute Resolution

EU Civil Justice Day Conference 2007

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Check Against Delivery

1. It gives me great pleasure to be here this morning on what I believe is the fourth annual EU Civil Justice Day, the main objective of which is to '*bring civil justice closer to [the EU's] citizens*' through, as the former EU Commissioner for Justice and Home Affairs, Antonio Vitorino described it, the creation of:

   "*. . . a symbolic event, a date on which we recall that justice is first and foremost a service to citizens which enables them to settle their private conflicts and assert their rights.*"[1]

2. With such an array of speakers from both the UK and Europe I am sure that today will not only prove to be both enjoyable and enlightening, but will go some way to achieve that aim.

3. I can certainly agree with the sentiment that emphasises the fundamental importance of civil justice to the lives of ordinary citizens. Criminal justice undoubtedly has a higher profile in the UK – as Lord Falconer in fact acknowledged in 2005, "*In the UK, the balance in terms of debate and public focus has long-favoured criminal justice. And in the EU too, civil justice has been too far down the agenda, for too long.*"[2] Emphasising the importance of civil justice, as Lord Falconer rightly went on to accept, does not mean reducing the importance of criminal justice – this is not, as economists might put it, a zero-sum game. It is simply to acknowledge that, as Sir Jack Jacob, the doyen of English civil proceduralists put it, civil justice

[1] EU Justice and Home Affairs press release 25 October 2003.
[2] Lord Falconer, *Opening Speech for European Contract law Conference*, (26 September 2005)

". . . plays a role of crucial importance in the life and culture of a civilised community. It constitutes the machinery for obtaining what Lord Brougham called 'Justice between man and man.' It manifests the political will of the State that civil remedies be provided for civil rights and claims, and that civil wrongs, whether they consist of infringements of private rights in the enjoyment of life, liberty, property or otherwise, be made good, so far as practicable, by compensation and satisfaction, or restrained, if necessary, by appropriate relief. It responds to the social need to give full and effective value to the substantive rights of members of society which would otherwise be diminished or denuded of worth or even reality."[3]

4. Effective civil, criminal, and of course, family justice are essential aspects, not just of all our lives, but of our commitment to the rule of law. Raising civil justice's profile today, both here and across Europe, helps to give proper expression to this commitment. With this in mind I should now turn to what might be taken to be a UK perspective on EU Civil Justice. I should add that I hope Scotland and Northern Ireland will forgive me for speaking for them.

5. One of the fundamental strengths of the English common law is its ability to evolve creatively and to absorb learning from other nations. English commercial and mercantile law, as developed in the 17th and 18th centuries owes much to the continental and civilian legal tradition. Today thanks to the efforts of those who have followed the dream of Jean Monnet and Robert Schuman over the last half century our interaction with the European legal tradition is probably stronger than it has been since those now long gone days when Lord Mansfield shaped the development of English commercial law with an eye to the continental tradition.

6. I am sure that organisations such the Civil Justice Council, which has recently established a Comparative Law Committee, and the Law Society's Brussels office, will play an important role in transmitting ideas both into the UK from continental Europe, and vice versa, in years to come. I am confident that we will all will benefit from this and that we will become more aware of our strengths and weaknesses. We judges have not always been willing to confess our weaknesses. This can be seen from the attitude of the Lord Justices of Appeal in 1882. For those here whose memories don't stretch back that far, in 1882 the judges of the Court of Appeal of England and Wales were asked to draft an address to Queen Victoria on the occasion of the opening of the new Royal Courts of Justice. The first draft began:

   "*Ma'am, conscious as we are of our manifold weaknesses we wish to congratulate your Majesty . . .*"

   One of the Lords Justices said that the draft would not do: he was not conscious that he had any weaknesses, whether manifold or otherwise. Lord Justice Bowen suggested that the draft be amended. He suggested that it should read:

   "*Ma'am, conscious as we are of each other's manifold weaknesses . . .*"

[3] Jacob, *The Reform of Civil Procedural Law*, reprinted in *The Reform of Civil Procedural Law and Other Essays in Civil Procedure*, Sweet & Maxwell, (1982) ('*RCP*') at 1.

7. I do not, of course, suggest that the CJC and the Law Society's Brussels office will – or should – focus on each other's manifold weaknesses. They will I am sure highlight our relative strengths as well as the common ground upon which we all stand: so that we can all, in the UK and in continental Europe, learn what it is we do best, so that we can all learn what is best about our respective systems, gain new insights and perspectives and improve all of civil justice systems. We all have much to learn from each other and much to contribute. In fostering that learning process, the UK, our continental partners and the European Union itself, will I hope fulfil, at any rate in the context of civil justice, the ideal enshrined in the European Union's motto, which is of course United in Diversity.

8. Those are perhaps general considerations. Today's conference will focus on a number of specific topics. In doing so it offers an excellent overview of the most important developments in EU Civil Justice, which are taking place at the present time and which will have a significant, and I hope, positive impact on the ability of UK citizens to enforce their rights. I thought I would say a short word about some of those issues. I leave the detail and the discussion to the expertise of your speakers; all of whom will know far more about these matters than me.

9. The growth of the internal market has been at the forefront of the European Union's development. One manifestation of this is the ever increasing ability of our citizens to not simply travel easily within the EU, but to purchase products and services either in person, over the telephone or by mail, across member state boundaries. The growth of the internet in recent years has, of course, fuelled this even further. As a result it is now as easy for consumers to purchase products over the internet from inside the UK as it is for them to purchase them over the net from Poland, France, Italy or any of the other member states. This brings with it many benefits. It also carries risks. The House of Lords' European Union Committee put it this way:

   "*Transactions always carry risk and a consumer dealing with a foreign company or making purchases while abroad may face additional difficulties if something goes wrong. Consumers may not immediately look to the courts for redress if they experience a problem. Indeed many problems that consumers face can often be resolved amicably and free of charge by contacting the seller or supplier directly. . .*

   [But in] some instances consumers may be faced with the choice of litigation or abandoning their complaint – for example, there may be no available complaints procedure or the supplier may simply deny all responsibility "[4]

10. In circumstances where the consumer is faced with the choice of litigation or abandoning his complaint, an effective civil justice system must provide the means whereby the consumer can vindicate his or her rights. As the House of Lords report went on to say, echoing Sir Jack Jacobs' sentiments: "*Rights are of little value if they cannot be enforced.*"[5] That is of course to understate the matter. Rights that

[4] House of Lords, European Union Committee, *European Small Claims Procedure*, Report with Evidence (HL Paper 118) at 7

[5] House of Lords, European Union Committee, *European Small Claims Procedure*, Report with Evidence (HL Paper 118) at 8

cannot be enforced and enforced effectively are not worthy of the name; they are pious hopes. In this context the development by the European Union of two mechanisms to be discussed today are to my mind of fundamental importance. These are the European small claims procedure and the European Payment Order.

11. Since 1999, when the political mandate was given by the European Council at Tampere[6] for the creation of a European small claims procedure there has been considerable discussion, both here and throughout the other EU member states about its introduction. Earlier this year it was finally approved and will in the main come into force on 1 January 2009.[7] This new procedure establishes a simplified, cost-effective and efficient procedure through which European consumers and small businesses can bring cross-border civil and commercial claims with a value of less than 2000 Euros. The UK consumer or small business will I hope find it easier to seek redress through the use of this procedure in our courts for disputes which arise in respect of, for instance, goods purchased over the internet from other member states.

12. In a similar fashion the European Payment Order (Regulation 1896/2006 EC) promotes the effective enforcement of rights. From the 12 December 2008 it will apply across Europe to uncontested money claims. As with the European small claims procedure it is, as I see it, entirely consistent with the ideals which Lord Woolf's Reforms introduced into England and Wales' civil justice system: it is a simply, cost-effective and efficient cross-border procedure. Both these measures are to be welcomed.

13. Underlying both the European small claims procedure and the European Payment Order is a principle which has been at the heart of European Civil Justice since the European Union's inception: that is the importance of citizens to the European Union. This has been recognised judicially since, at the least, the European Court of Justice's decision in *Van Gend en Loos*[8] where it stated that:

"*The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted . . . to the diligence of the Commission and of the Member States*"[9]

14. The protection of civil rights is, to borrow a phrase, a public – private partnership. This partnership, which as Commissioner Kroes has acknowledged, gives, '*EU citizens a central role in our European project*'[10] is central to the current European debate on collective redress and the review of the Consumer Acquis.[11] It is central because, in the absence of effective supervision mechanisms through the courts, private vigilance is mere curtain-twitching.

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[6] See Tampere Conclusions, paragraph 30.

[7] Council of the European Union Press Release June 2007 at 56 (http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/jha/94682.pdf).

[8] *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1; as recognised in the Annex to the European Commission Green Paper on Damages (Com (2005) 672 Final) at 8.

[9] [1963] ECR 1

[10] Kroes, *The Green Paper on antitrust damages actions: empowering European citizens to enforce their rights*, (Brussels) (06 June 2006) (Opening speech at the European Parliament workshop on damages actions for breach of the EC Antitrust rules) at 6.

[11] *EU Consumer Policy strategy 2007 – 2013* (Com (2007) 99)

15. I turn to collective redress, which is the means by which large numbers of consumers can collectively prosecute civil claims in one procedure. It is one of those areas which have been examined from time to time over the years. We, in England and Wales have, discussed collective redress mechanisms since at least the 1970s.[12] The 1988 Civil Justice Review, for instance, suggested that it was an aspect of civil justice which needed to be examined more fully. We, of course, now have Group Litigation Orders under CPR 19.11. Also, following the amendment of the Competition Act 1998, by section 19 of the Enterprise Act 2002[13], we now have a mechanism through which private actions can be brought on a collective basis by representative bodies, such as the consumer group 'Which.'[14]

16. We are not the only European nation to have introduced in recent years some forms of collective action to enable the effective enforcement of civil rights. In its Green Paper on competition law damages the Commission said however that this is an area which is one of '*total underdevelopment.*' in Europe.[15] That conclusion is supported by Leuven University's weighty study of this and related areas published earlier this year.[16] That study forms part of the European Union's present examination of collective redress mechanisms, which is being spearheaded by DG Competition and DG Sanco. It is central to EU consumer protection policy; the importance of which is said to be '*at the heart of the next phase of the internal market*'.[17]

17. The Green Paper has perhaps been catalyst for renewed interest in collective redress in the UK. The 2007 Budget statement, echoed the Green Paper in its acknowledgment of the importance of private actions to the competition regime. It put it this way:

> "*An effective [private action] regime would allow those affected by anti-competitive behaviour to receive redress for harm suffered and broaden the scope of cases that can be investigated, promoting a greater awareness of competition law and reinforcing deterrence, without encouraging ill-founded litigation.*"[18]

18. The budget statement's acknowledgment of the importance of private actions has been complemented by the discussions which have arisen from the Office of Fair Trading's 2007 discussion paper.[19] Discussions which the Civil Justice Council has taken an active part in. These discussions, and those taking place in Europe, are at an early stage. There are many issues both of principle and of practice which need to be fully and properly explored. It is my hope that all parties who have something to contribute to that discussion do so, both here and elsewhere. Only after such a

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[12] See, for instance, Jolowicz, *Representative Actions, Class Actions and Damages – A compromise Solution*, (1980) 39 Cambridge Law Journal 237; Lord Chancellor's Department, *Representative Claims: Proposed New Procedures*, (February 2001) (http://www.dca.gov.uk/consult/general/repclaims.htm#part6).
[13] Section 47B of the Competition Act 1998 (as amended)
[14] Special Body (Consumer Claims) Order 2005 (2005/2365)
[15] Com (2005) 672 Final (19 December 2005) at 4
[16] Stuyck et al, *An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial* proceedings, (Leuven University) (2007).
[17] *EU Consumer Policy strategy 2007 – 2013* (Com (2007) 99) at 2
[18] Her Majesty's Treasury, Budget 2007, (HC 342) at 53 (http://www.hm-treasury.gov.uk/budget/budget_07/report/bud_budget07_repindex.cfm).
[19] Private Actions in Competition Law: effective redress for consumers and business. Discussion paper (April 2007).

debate will we be in a proper position to consider how we can best facilitate effective consumer redress. I look forward to that debate.

19. Finally, I wish to say something about mediation. Alternative dispute resolution in its many forms is now rightly acknowledged to be an essential aspect of a properly functioning and effective 21st Century Civil Justice. The truth of this was recognised here both in the 1993 Heilbron/Hodge Report on behalf of the Bar Council and the Law Society and in the Interim Woolf Report. As Lord Woolf put it:

"*. . . the philosophy of litigation should be primarily to encourage early settlement of disputes.*"[20]

20. That commitment is, of course, now firmly established in the CPR and is given expression in CPR 1.4 (2) (e), which states that as part of the court's case management powers the court should encourage parties to use ADR to resolve their disputes. As that power is one of the means by which the court furthers the overriding objective, litigants, as part of the duty they owe the court to assist it to further the overriding objective[21], must consider such methods of dispute resolution. As Lord Justice Ward has very recently put it in *Egan v Motor Services (Bath) Ltd*

"*In so many cases . . ., the best time to mediate is before the litigation begins. It is not a sign of weakness to suggest it. It is the hallmark of commonsense. Mediation is a perfectly proper adjunct to litigation. The skills are now well developed. The results are astonishingly good. Try it more often.*"[22]

I agree and, as we sometimes say in the Court of Appeal, there is nothing I can usefully add.

21. It is perhaps to be regretted that the EU's draft Directive on Mediation in Civil and Commercial Matters appears to have languished in obscurity since 2004. It should form the focus of a real debate in Europe so as to ensure that both in member states and in cross-border disputes proper provision is made for mediation. The draft Directive rightly identifies that:

"*The concept of access to justice should . . . include promoting access to adequate dispute resolution processes for individuals and businesses, and not just access to the judicial system.*"[23]

22. With the establishment of the European small claims procedure and the payment order it is to my mind time for us all, both here and in the European Union, to focus more clearly on alternative dispute resolution.

23. With those considerations in mind I hope today marks, both here and throughout Europe, a time when we can all turn our minds to how best we can improve our civil

[20] Lord Woolf MR, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO) (1995) Chapter 2.7.
[21] CPR 1.3.
[22] [2007] EWCA 1002 at [53]
[23] *Proposal for a Directive on certain aspects of mediation in civil and commercial matters* (Com (2004) 718) at 2

justice systems so that they can provide a first class service to our citizens – a service that both helps them where possible '*settle their private conflicts*'[24] amicably and effectively assert their rights where necessary. I am sure that today's conference will go some way towards focusing our minds in this direction and raising our awareness of UK as well as European civil justice and how our civil justice system can best serve all our citizens.

[24] EU Justice and Home Affairs press release 25 October 2003.