

European Business Test Panel (EBTP)

Commercial Disputes and Cross Border Debt Recovery

The European Business Test Panel (EBTP) was used to obtain views from the business community on the extent to which commercial disputes arise in cross-border trade in Europe (including the extent to which choice of court agreements are used in international contracts) and the scope for action to facilitate the recovery of debts. The survey was conducted over a one-month period from mid-July to mid-August 2010.

1. Objectives of the consultation

The EBTP survey was designed to provide evidence-based support to the work of the European Commission on possible amendments to the 'Brussels 1' Regulation (Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) and a related initiative to facilitate the recovery of cross-border debt.

2. Respondents

A total of 422 responses were obtained to the EBTP survey with 281 members of the EBTP choosing to complete the questionnaire, i.e. an **overall response rate** of 66%. Further discussion of the results of the survey is therefore based on 281 responses which means that figures provided in the feedback report may differ from those included in the standard summary report generated by the on-line consultation tool and provided together with the feedback report.

The number of respondents who completed the questionnaire ranged from 0 to 81 in the 29 EU/EEA countries in which the EBTP is located. In terms of individual **Member States**, the most represented countries were DE (19%), PL (11%) and LU (8%). Other countries ranged from 0% to 7%.

As regards **business sectors**, the top three most represented sectors were real estate/renting/business activities (20%), manufacturing (19%) and wholesale and retail trade, repair of motor vehicles, motorcycles and personal and household goods (15%). Other business sectors ranged from 0% to 11%. As regards the **size of the businesses** responding to the survey, 63% were small enterprises (<50 employees), 16% medium-sized (>50 but <250 employees) and 21% large enterprises (>250 employees).

3. Analysis of survey responses

Below, we provide a summary of the survey responses. The questionnaire was divided into two main sections – commercial disputes and cross-border debt recovery.

3.1 Commercial disputes

- 83% of the businesses said that they provide services or sell goods to consumers or businesses in another EU Member State.
- 33% of the businesses had been involved in a **commercial dispute** in their own country compared with 23% where the other party was in another Member State and 6% where the other party was outside Europe.
- Amongst the **factors considered important in deciding whether or not to pursue a commercial dispute through the courts in another EU Member State**, the value of the claim was ranked by 92% of the respondents as either 'very important' or 'important', followed by the cost of going to court (88%) and the complexity of the proceedings (84%). These factors were also the top-ranked factors in relation to disputes between parties from the same country but in each case, they were seen as less important in deciding to go to court than in cross-border cases.
- The **costs of litigating abroad** were seen as being 'much more expensive' by 39% of businesses compared with 22% who said it was 'a little more expensive' and 12% who said the costs were about the same. Very few respondents said litigating abroad was cheaper although quite a high proportion (23%) indicated that they did not know.
- **Dispute resolution methods** – under half of survey respondents (42%) who had been involved in a cross-border dispute resolved it by going to court in another country, a significantly lower percentage than in the case of disputes taken to court where the creditor and debtor were in the same country (55%).

- **Choice of court agreements** are broadly used in the international contracts – almost 70% of business providing services or selling goods in another EU Member State have a choice of court agreements in their international contracts. 7,7% of the respondents reported that in the past five years their contractual counterpart did not comply with the clause designating the competent court and took the dispute before a different court.

3.2 Cross border debt recovery

- **Difficulties with debt recovery** when doing business in other EU Member States were seen as 'very important' in deciding whether or not to engage in cross-border trade by 32% of survey respondents and as 'important' by a further 39%. The smaller the business, the more likely it was to highlight the importance of debt recovery issues as a factor in cross-border trade.
- Various methods were used by survey respondents to help with **managing the risk of non-payment** including payment in advance (20% of respondents), factoring, credit insurance, invoice discounting. With the exception of credit insurance, less than half the respondents considered such methods as adequately meeting their needs. Small businesses were more likely than larger firms to ask for payment in advance. The explanation for this could be that smaller firms do not have the cash flow required to defer payment.
- Only 11% of the survey respondents had tried to obtain a **bank attachment order** in another EU Member State (there were nearly twice more (19%) who had done so in their own country). In 53% of cases, the order was granted (that means a lower rate (i.e. of 23%) than for applications through the courts in the home country (i.e. 65%). Concern that the defendant would move his assets away was the main reason for seeking a bank attachment order.
- The EBTP results point to other factors apart from the risk of assets being moved as influencing the **decision on whether or not to apply for a bank attachment order**. In particular, the cost-benefit analysis that applied to decisions regarding cross-border litigation generally also applied with bank attachments with the value of the claim being 'very important' or 'important' to most (96%) respondents followed by the cost of proceedings (67%).
- Very few survey respondents (3%) favoured the **status quo** with the highest proportion (39%) arguing that the rules of different European countries regarding bank attachments should be harmonized so they are the same, or that there should be mutual recognition of national procedures (13%). **A further**

23% favoured a particular method of action through the creation of the **European bank attachment order**. The remaining respondents did not offer an opinion.

- 23% of the EBTP respondents said they would be 'a lot more likely' to be likely to undertake (more) cross-border trade if rules are adopted at a European level making it easier to obtain a bank attachment order. A further 29% said they would be quite likely to do so.

4. Conclusions

Overall, the EBTP survey results indicate that the risk of facing a commercial dispute and non-payment of debts is a significant deterrent to engaging in cross-border trade in the EU's Internal Market.

The figures on the extent of the use of the choice of court agreements in international contracts evidences that such agreements are important tool in the cross-border trade.

The cost of litigating abroad is higher than in the home country and this together with other complications puts businesses off going to court in another EU Member State to try and settle a dispute. Specifically in relation to debt recovery, similar factors mean that the business still hesitates before taking the decision to seek to obtain a bank attachment order in another country. The status quo is not seen as satisfactory and most businesses would welcome an initiative at a European level to improve the situation.