



**THE**

**BREXIT**

**PAPERS**

The Bar Council Brexit Working Group



## CONTENTS

Foreword by the Chairman of the Bar	3
Paper 1: Jurisdiction and enforcement of judgments	5
Paper 2: Access to the EU legal services market	18
Paper 3: The impact of Brexit on international arbitration	28
Paper 4: The implications of Brexit for insolvency and restructuring	35
Paper 5: Brexit and intellectual property	44
Paper 6: The impact of Brexit on UK tax	54
Paper 7: The impact of Brexit on family law	62
Paper 8: The impact of Brexit on criminal justice	68
Paper 9: Brexit and competition law	75

## FOREWORD BY THE CHAIRMAN OF THE BAR OF ENGLAND AND WALES

Brexit: There has not been a more profound legal and constitutional challenge in living memory with which the UK Government has had to grapple, in terms of legal complexity or significance for the long-term health and stability of the economy.

As the lead representative body for the Bar of England and Wales, the Bar Council set up a working group this year to examine the legal issues arising from Brexit. Led by Hugh Mercer QC, the group draws on the combined expertise and experience of the profession across a wide range of practice areas.

The Brexit Papers, which represent the first fruits of the Working Group, have been written to help the Government evaluate a range of pressing public interest concerns arising from the UK's decision to withdraw from the EU. These include such matters as cross-country co-operation for the speedy arrest of suspects, child protection across the EU, ensuring firms of all sizes can compete and trade profitably, managing changes to intellectual property law so that our creative industries can flourish, and maintaining current levels of consumer protection and of course our human rights.

The range of expertise on which these papers are based is considerable, involving practitioners from criminal, Chancery and family law, as well as many areas of commercial law including intellectual property, competition, tax and insolvency.

The barristers who have contributed to these papers have given freely of their time to serve the public interest by helping to manage the impact of Brexit on justice and our legal system and by promoting public legal education about Brexit and its consequences.

The Bar Council did not take a position on leaving or remaining in the EU. As the representative body for the Bar we are doing what can to identify the key legal issues which we believe need to be addressed by the Executive and the Legislature in order to facilitate a transition that minimises the risk of legal uncertainty, the loss of rights, and possible adverse consequences to the national economy, and capitalises on the opportunities for post-Brexit global Britain.

It is clear that there is a great deal of work to be done. These papers indicate the scale of the task that lies ahead. The resources of the Brexit Working Group, as well as those of the Bar Council and of the Bar as a profession, are being made available to the Government, parliamentarians and the media, as well as to the public.

Our interest is in helping to ensure that Brexit delivers the best deal possible for Britain.

Chantal-Aimee Doerries QC

**Chairman of the Bar**

**December 2016**



## **PAPER 1**

### **Jurisdiction and enforcement of judgments**

#### **Summary**

The ability to enforce judgments of the courts from one state in another is of vital importance for the functioning of society and for retaining the position of England and Wales as the leading dispute resolution centre in the world, with the important economic benefits that follow from this.

Commercial parties require continuity and certainty. The Recast Brussels Regulation ((EU) No 1215/2012) confers important advantages both in terms of recognition and enforcement, which would be lost unless equivalent arrangements are entered into.

- We urge the Government to enter into an agreement based on the Denmark-EU Jurisdiction Agreement and also to sign and ratify the Lugano II Convention and the 2005 Hague Convention on the Choice of Court Agreements.
- We also urge Government to replace Service Regulations with an agreement based on the EU-Denmark Service Agreement. For choice of law, the Rome I and II Regulations can be adopted into domestic law by Act of Parliament.

# PAPER 1

## Jurisdiction and enforcement of judgments

1. The effective enforcement of judgments is fundamental to the functioning of society. Without it, the rule of law does not exist. If a contract cannot ultimately be enforced by a judgment, it becomes a meaningless piece of paper. If a person who has been injured by the negligence of another cannot be compensated through a judgment of the courts, that person must either be compensated by government or left to suffer the consequences of injustice.

2. In a globalised world, therefore, it is crucial that the judgments of one state are enforced by the courts of another. The current EU regime on enforcement of judgments is effective in ensuring this is the case amongst Member States, and the UK is unique in currently having reciprocal arrangements not only with the EU but also with former commonwealth countries. It is of the utmost importance that UK citizens, businesses, institutions and the UK government retain the right to have judgments which they have obtained in the UK courts efficiently enforced, and to have the jurisdiction of the UK courts recognised, throughout the EU. Such an ability is also of the utmost importance in retaining the position of England and Wales as the leading dispute resolution centre in the world, with the important economic benefits that this brings.

3. EU Member States have a similar interest in relation to their citizens/businesses trading with the UK; to the activities of UK citizens within their territory; and in relation to enforcement over assets in the UK to satisfy EU judgments.

## The current position

4. The current position is governed by the Regulation (EU) No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ('the Recast Brussels Regulation'), in force since January 2015. This applies to "*civil and commercial matters*" and provides that:

4.1. Judgments of the courts of EU Member States are to be enforced throughout the EU as if they were judgments of a court of the Member State in which enforcement is sought. This includes "*protective measures*" such as injunctions freezing assets.

4.2. The courts of one Member State may apply "*protective measures*" to assist with proceedings in another Member State.

4.3. Subject to a number of notable exceptions, persons domiciled in an EU Member State should be sued in that Member State and where this is not what has happened courts are required to decline jurisdiction.

4.4. Where the parties have specified in their contract that disputes should be heard in a particular jurisdiction (an exclusive jurisdiction clause), the courts of other Member States are required to abide by the terms of that jurisdiction clause and to decline jurisdiction.

4.5. Where a person is one of a number of Defendants, he may be joined to proceedings which are commenced in another Member State where he is not domiciled if those proceedings are "*so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments*".

4.6. Where proceedings have already been commenced in one Member State, the courts of other Member States are required to stay any subsequent proceedings dealing with the same subject matter until jurisdiction has been decided by the court first seized of the matter (the *lis alibi pendens* principle).

4.7. Clarifies the scope of the exclusion of arbitral proceedings from the jurisdiction rules.

5. Another vital element of legal process is the service of claims by claimants on defendants. Without proper service, as a general rule, a claimant cannot bring a claim against a defendant. The position as to service has also been regularised within the EU. The current position with regards to service is governed by the Service Regulation<sup>1</sup>, which has applied in the UK since 13 November 2008. It creates a 'European judicial area' for the free movement of judicial and extra-judicial documents.

6. These are achievements for which the UK has lobbied hard and effectively in Brussels over many years. They are vital for the healthy functioning of the UK economy in general and the UK legal sector in particular.

### **The importance of an effective jurisdiction and judgments regime – the UK**

7. As already mentioned, it is of the utmost importance that English<sup>2</sup> judgments are enforced and the jurisdiction of the English courts is recognised in as efficient a manner as possible throughout the EU. If a company obtains a judgment in the English courts against an EU party, it is vital that it can be enforced against that EU party's assets

---

<sup>1</sup> Council Regulation (EC) No.1393/2007.

<sup>2</sup> The term "English" is used here and elsewhere in this paper as a substitute for "England and Wales". England and Wales as a jurisdiction is the focus of this paper, but most of the points made in relation to England and Wales are likely to pertain for Northern Ireland and Scotland too.



abroad. International trade would be fundamentally undermined if this became too cumbersome or expensive. If a child is injured through the negligent driving of a national of another EU state, it is important that that child is able to obtain the compensation he or she has been awarded by an English court. If the UK government brings proceedings against an EU polluter and obtains judgment in its favour, that judgment should be capable of easy enforcement throughout the EU.

### **The Importance of an effective jurisdiction and judgments regime – the legal sector in England and Wales**

8. England and Wales is the leading centre for dispute resolution worldwide. The English legal sector generated £3.3 billion of revenue in 2015.

9. The reputation of England and Wales as the pre-eminent destination for international dispute resolution will be damaged if appropriate steps are not taken to ensure that the position as to the jurisdiction of the English courts and the enforcement of English judgments are protected. Much of the international dispute resolution work carried out by English lawyers comes to them because the parties to a dispute (either before or after the dispute has arisen) have chosen to have their dispute resolved in the English courts. If jurisdiction clauses designating the English courts are not effectively respected in the EU, this will make English jurisdiction clauses considerably less popular. Further, if the EU *lis alibi pendens* rules do not apply to proceedings in English Courts such that subsequent proceedings in EU Member States' Courts will not automatically be stayed, this will deter parties from including English jurisdiction clauses in their agreements.

10. Similarly, if the judgments of the English courts are more difficult to enforce in the EU, then jurisdiction clauses naming England and Wales will become a great deal less

attractive. The same point applies to “*protective measures*”, like interim injunctions. If it is more difficult to enforce the “*protective measures*” of the English court in EU Member States, or if EU Member States decline to make use of their own “*protective measures*” in support of English proceedings, English jurisdiction clauses will become a great deal less popular.

11. That fact that England and Wales is such a significant hub for international dispute resolution has important knock-on advantages for the UK as a whole. There is, of course, the fee income and tax revenues which flow from the sector. However, there are other advantages too. Given the widespread acceptance of English law as an effective law for governing commercial relationships, and the choice of the English courts as a corollary of this, UK parties can often negotiate that English law be the law which governs their commercial relationships with international parties and that their disputes will be resolved in the English courts. This gives those UK parties the “*home advantage*” of being able to use a law and courts with which they are familiar, even though they are trading internationally.

12. Finally, a great deal of the attractiveness of the UK in general, and London in particular, as a hub for business (particularly financial services) derives from the attractiveness of the English legal sector. As discussed immediately above, this attractiveness will be considerably diminished if steps are not taken to ensure an adequate legal framework is put in place to ensure that English judgments and jurisdiction clauses are effectively and efficiently enforced.

## **The position if nothing is done**

### **Jurisdiction and judgments**

13. Commercial parties value continuity and certainty. The Recast Regulation confers important advantages both in terms of recognition and enforcement, which would be lost unless equivalent arrangements are entered into. If the UK becomes a 'third state' for the purposes of the Recast Regulation, the Lugano II Convention and the 2005 Hague Convention, the status of English jurisdiction clause and judgments in other Member State courts will become more open to question. It is likely that, if parties consider that the answer to the questions of "Will my jurisdiction clause be respected?" and "Will my judgment be enforced?" will involve adding time and expense as well as uncertainty to any transaction, then this may encourage them to amend their contractual clause in favour of resolving disputes before other Member State courts.

14. There is an increased risk that commercial parties' negotiated and contractually agreed English jurisdiction clauses will not be respected by the courts in Member States and that the parties are more likely to become embroiled in proceedings in a court other than the court that they have chosen. This is demonstrated by the survey conducted by members of Simmons & Simmons' offices in Germany, France, Italy, Spain and the Netherlands as to their courts' approach to English jurisdiction clauses post-Brexit which revealed that over 50% of clients were considering moving away from English choice of law or jurisdiction clauses (see the Simmons & Simmons' survey at Appendix 1 (the "Survey")).

15. Competitor jurisdictions are likely to take advantage of such uncertainty but would be reassured if there was good reason to believe that continuity was likely. The

Survey showed that 88% of clients thought the UK Government should make a public and early statement.

16. Further, it is likely that even where the English courts continue to respect jurisdiction clauses in favour of Member State courts under common law rules, applying the principle of *forum conveniens*, there may be increased uncertainty as to the approach of the English courts on jurisdictional issues generally.

17. There are some areas where Brexit may have a particular impact. For example, some market participants might consider moving away from English law as the governing law of asset purchase and sale arrangements in securitisation. Similarly, post-Brexit, formerly 'safe harbours' will no longer be available in the context of the insolvency or reorganisation commenced in another Member State.

18. Anecdotally, the Bar Council has heard of a number of cases where parties are being advised not to choose English jurisdiction clauses in their contracts, where previously this would have been an almost automatic choice, because of the uncertainty surrounding the jurisdiction and judgments regime. Similarly, anecdotal evidence in September 2016 suggests that cases are already being commenced in other EU jurisdictions which would otherwise have been commenced in England due to the uncertainty over the ultimate enforceability of an English judgment. Large-scale litigation would frequently take longer than two years. Therefore it is of vital importance that interim measures are put in place.

## **Service**

19. The Service Regulation will cease to have effect upon Brexit. At this point the residual service framework will revive which includes the methods of service permitted

by the common law and the Hague Service Convention<sup>3</sup>. If the UK does not enter into an agreement akin to the Denmark-EU Service Agreement<sup>4</sup>, services of process will become more difficult and expensive as permission to serve out of the jurisdiction may be required and the permitted methods of service will be more cumbersome.

## **Recommendations – Long-term**

20. The UK Government should:

20.1. Enter into an agreement based on the Denmark-EU Jurisdiction Agreement, both with the EU and with Denmark albeit with a clause providing not for interpretative jurisdiction of the CJEU but for 'due account' to be taken of the decisions of the courts of all 'Contracting Parties';

20.2. Sign and ratify the Lugano II Convention, to preserve the present regime vis-à-vis Norway, Iceland and Switzerland;

20.3. Sign and ratify the 2005 Hague Convention on Choice of Court Agreements;<sup>5</sup>

20.4. Enter into an agreement based on the Denmark-EU Service Agreement, both with the EU and with Denmark;

20.5. Adopt the Rome I and II Regulations (which deal with choice of law) in domestic law by way of an Act of Parliament; and

---

<sup>3</sup> Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters.

<sup>4</sup> Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2005] OJ L/299/62, 16 November 2005

<sup>5</sup> As its name suggests, this Convention is concerned with one aspect of jurisdiction and enforcement: the effect of choice of court agreements. This is not a substitute for the Brussels-Lugano regime.

20.6. Adopt specific transitional arrangements to clarify the date on which various features of the above agreements will come into force.

21. Further, the UK Government needs to:

21.1. Make a decision that these will be its aims as soon as possible and that is publicly stated; and

21.2. Ensure that these arrangements take effect immediately upon Brexit so that there is a seamless transition between the existing and new regimes.

### **Recommendations - Transitional arrangements**

22. The UK Government should expressly provide for transitional arrangements in any agreement that it concludes with the EU in order to prevent uncertainty. The following transitional arrangements are suggested, which should be adopted in parallel:

22.1. As to the agreement based on the Denmark-EU Jurisdiction Agreement:

22.1.1. The Agreement shall apply only to proceedings instituted after its entry into force.

22.1.2. If proceedings in the state of origin were commenced before the entry into force of the Agreement, judgments given after that date shall be recognised and enforced in accordance with the Agreement.

22.2. As to the Lugano II Convention and the 2005 Hague Convention, the UK is limited by the fact that those treaties are already concluded, meaning that specific transitional regimes are less likely to be agreed. However, the UK might consider issuing a declaration upon ratification of those Conventions to provide for their seamless operation.

22.3. As to the agreement based on the Denmark-EU Service Agreement, no specific transitional arrangements are likely to be required, other than to specify the date of the entry into force of the Agreement.

**Brexit Working Group**

**Bar Council**

## Appendix 1

### **Survey of likely responses to English jurisdiction clauses in EU Member States (conducted by Simmons & Simmons)**

Once the UK has left the EU, how will civil courts in Member States approach the following scenarios, assuming that (i) the UK is not a signatory to any relevant conventions and (ii) the agreement between the parties contained a jurisdiction clause in favour of the English courts?

*If the clause were an exclusive jurisdiction clause, would the court enforce it and decline jurisdiction?*

Under their domestic provisions, courts in Member States would be likely to recognise an exclusive jurisdiction clause in favour of the courts of a non-Member State.

Exceptions include disputes involving rights granted by EU law, such as those relating to consumers, employment contracts, and compensation for commercial agents on termination of a relationship.

*If the clause were a non-exclusive jurisdiction clause, would the court decline jurisdiction if proceedings had already commenced in England?*

Courts of Member States would have a discretion not to decline jurisdiction in these circumstances. Objections could be raised in the Member State court on the basis of *lis pendens* by the party who had commenced proceedings in the court first seised.

In all jurisdictions we surveyed, the court would accept jurisdiction regardless of the parallel proceedings if a judgment of the court first seised would be unenforceable in its jurisdiction.



Other factors that might be considered include whether there is a significant link between the dispute and the state where the court is first seised, public policy considerations and whether there will be a fair hearing.

*Would it make any difference if neither party were resident in the UK?*

If the defendant were domiciled in a Member State, the Recast Regulation would apply, but would not alter the position from domestic rules. In France, the domicile of the parties would have no effect on the situation where an exclusive jurisdiction clause was present, but might affect it where a non-exclusive jurisdiction clause had been used as the French court would then consider whether a substantial link to the UK had been established.

*Would the Brussels Convention, or any bilateral convention that pre-dated it, still be considered applicable to the choice of jurisdiction?*

In at least Italy and Germany, the Brussels Convention would still be considered binding.

*If the UK had ratified the 2005 Hague Convention, would the court decline jurisdiction over a dispute where neither party was resident in the UK, but they had agreed to the exclusive jurisdiction of the English courts?*

Yes, as long as one of parties is resident in a contracting state that is not a Member State and the dispute is within the scope of the Convention. This requires it to be an international dispute, so the parties would need to be from different domiciles.



## PAPER 2

### Access to the EU legal services market

#### Summary

The UK legal services market generated £3.3bn of our net export revenue in 2015. More importantly, our exporters' confidence in doing business abroad depends greatly on the ability of their lawyers to establish and provide services in the countries where they seek to trade and invest.

The EU Legal Service regime which we may lose, permits UK lawyers with unfettered and non-bureaucratic access to all legal services throughout the EU.

- We therefore urge the Government to preserve in the negotiations the rights of UK lawyers under the Lawyers Services and Establishments Directives to ensure that they may represent clients before the European Court, maintain rights to legal professional privilege and retain freedom of movement for immigration purposes.
- In order to maintain the position of England and Wales as a leading arbitration centre we also urge Government to ensure that immigration hurdles are not imposed for parties, lawyers and arbitrators from EU jurisdictions.

## PAPER 2

### Access to the EU legal services market

1. The UK legal services market is a significant revenue generator for the Exchequer, worth £25.7 billion in total, employing approximately 370,000 people and generating an estimated £3.3 billion of net export revenue in 2015. Central to this is the ability of barristers, solicitors and other legal professionals to provide legal services, including advocacy, across national borders within the EU and EEA. In 2015, of the 1,100 cases registered at the Commercial Court, more than two-thirds had one non-UK based party to proceedings. Equally importantly, our exporters' confidence in doing business abroad depends greatly on the ability of their lawyers to establish and provide services in the countries where they seek to trade and invest.

2. Although a significant body of work comes to the UK independent of our membership of the EU, there is a very strong business case for maintaining the greatest possible extent of cross-border rights for UK lawyers post-Brexit. We address primarily the position of barristers (including Scottish advocates).<sup>6</sup> But these issues are likely to be equally significant for the solicitors' profession,<sup>7</sup> and of course many barristers are employed by UK and non UK-law firms.

3. On the other side of the coin, around 100 EU law firms together with a significant number of individual lawyers are established in London and high ranking French Bar representatives have expressed their strong desire to retain free movement rights for

---

<sup>6</sup> There are c. 15,500 members of the Bar in England and Wales, 450 practising advocates in Scotland and 753 practising barristers in Northern Ireland.

<sup>7</sup> The solicitors' profession in England and Wales has c. 138,000 practising members, and the solicitors' profession in Scotland has c. 11,000 practising members.

French lawyers in the UK, both for establishment of new law firms and also fly in fly out provision of services.

4. Currently, there are numerous aspects of barristers' work which will no longer be possible if the UK leaves the EEA, unless cross-border rights are preserved. Cross-border rights include, in particular:

4.1. Establishment on a permanent basis in other Member States – currently possible under the Lawyers Establishment Directive 98/5/EC, which allows registration with the host State Bar and, after three years of effective and regular practice in the host Member State, permits an application to acquire the professional title of the host State without any further qualification requirements. (A barrister may also requalify as a full member of the local Bar under Directive 2005/36/EC on the recognition of professional qualifications, by taking an aptitude test.) Some barristers are established in Brussels; many are employed by firms of solicitors in other Member States e.g. in Brussels, Paris and the Netherlands;

4.2. Advising clients in other Member States on a temporary basis, whether on issues of EU law, domestic law (including the law of the host Member State) or international law – currently possible under the Lawyers Services Directive 77/249/EC, with no requirement to register with the local Bar. This Directive creates both substantive rights and (where local rules are obscure) regulatory certainty. Barristers regularly advise clients throughout the EU, often within the jurisdictions of other Member States;

4.3. Representing clients in the domestic courts and tribunals of other Member States – currently possible under the Lawyers Services Directive, provided that advocacy is undertaken in conjunction with a host state lawyer. Again, there is

no requirement to register with the local Bar, nor any restriction as to the issues on which the advocate may present argument;

4.4. Advising and representing clients in Commission investigations, including in particular competition proceedings – in practice only possible for EEA-qualified lawyers, since the EU rules only recognise legal professional privilege in relation to lawyers entitled to practise in a Member State. If UK lawyers were to fall outside that principle, even UK clients would have to instruct lawyers from other Member States to advise and represent them in these proceedings. It is for this reason in particular that hundreds of solicitors are now registering with the Law Society of Ireland;

4.5. Representing clients in intellectual property proceedings before the EU Intellectual Property Office – currently possible because barristers are legal practitioners established in the EEA that are entitled to act before the UK Intellectual Property Office; and

4.6. Representing clients in the European Courts – Article 19 of the Statute of the Court of Justice states that only a lawyer authorised to practise before a court of a Member State or an EEA State may represent or assist a party before the European Court. That extends even to being named on a pleading in the European Court. Absent a specific amendment this means that from the moment the UK exits the EU law no UK-only lawyers will be able so to act. Currently this does not also require EEA nationality, but there is a considerable risk that this too could be changed post-Brexit.

**Examples:** in the Commission's current EIRD investigation, both JP Morgan and HSBC were represented by UK barristers. Likewise, Intel has instructed UK barristers for its European Court appeals against a Commission antitrust decision. Similar instructions will

not be possible post-Brexit unless the UK either remains within the EEA or negotiates an arrangement to allow continued free access to the EU legal services market (including European Court practising rights).

5. In addition, at present barristers who hold the nationality of an EU/EEA Member State are able to move, without immigration controls or prior authorisations, from one Member State to another for the purposes of work on a permanent or temporary basis. This free movement right is the basis upon which barristers physically move within the EU and EEA to work, establish themselves, provide services, and exercise rights of audience in courts physically located in EU/EEA Member States. It is imperative that this right is maintained, if barristers are to be able to continue to work in other EU and EEA Member States.

**Cross-border rights under FTAs – CETA case study:** In the case of a so-called “hard Brexit”, the position of UK lawyers would be identical to other third country lawyers. By way of example we attach at Annex 1 a table which compares the position of UK lawyers to that of Canadian lawyers at present (pre-CETA). There are significant restrictions, in particular no rights to appear in court. Even if CETA is ratified, the position of Canadian lawyers will not change. Although CETA provides a framework for the negotiation of Mutual Recognition Agreements covering the recognition of professional qualifications, this does not improve the market access of European lawyers to Canada. It merely offers encouragement to professional regulatory bodies in the EU and Canada to agree to reduce the number of steps involved in requalification in either direction, where this is possible. Furthermore CETA does not change the fact that requalification is simply not possible in many EU Member States due to nationality requirements.

6. The importance of cross-border rights to the provision of legal services by barristers is most obvious in relation to the practice of EU law itself. Outside Brussels, London in particular has the highest concentration of lawyers with specialist EU law knowledge and experience anywhere in the world. As the examples above demonstrate, those lawyers are in demand not just for domestically-focused EU law, but also for advice and representation services on behalf of EU and third country clients, including in the national courts of other Member States, Commission investigations, and European Court proceedings.

7. Barristers also advise and represent clients across the EU in commercial proceedings under the Services Directive, for example where an international contract has an English choice of law clause, and in arbitrations conducted in English. Barristers also act as arbitrators in numerous EU Member States, an activity which in the absence of EU-equivalent guarantees could not be guaranteed to continue in any Member State which classed it as the supply of a legal service. Advisory and advocacy work across the EU in the areas of private and public international law, and in fields such as international financial services and wealth management, is also dependent on the cross-border rights that the legal profession currently enjoys. The cross-border rights of UK lawyers thus help to support the current dominance of English common law as an international benchmark, and of UK financial services in Europe.

8. All these streams of business rely on UK legal professional qualifications being recognised in other Member States and in the European Courts. These are high-profile and lucrative activities. In EU competition proceedings alone, multinational clients who have been represented by the Bar in recent years (including some major ongoing proceedings) include Microsoft, Google, Apple, Samsung, Ryanair and AstraZeneca. In European Court proceedings, barristers also frequently represent not only major private

clients from across the EU and third countries, but also the European Commission, other EU institutions such as the European Parliament and the EMA, and foreign governments (both EU and non-EU).

9. Equally importantly, London is a hub not only for EU transactional work such as merger filings, but also, increasingly, for litigation in the EU courts and follow-on damages litigation related to Commission competition investigations. The same is true for complex multi-national intellectual property litigation in which London is a widely acknowledged centre of expertise with a specialist bar. Major international clients are sophisticated litigators, and are choosing to bring cases in the UK rather than in other Member States because of the critical mass of experience and expertise of UK lawyers, as well as litigation advantages of the UK courts (such as the disclosure rules). A vast amount of this work will be lost if UK lawyers lose access to the EU market for legal services. This will in turn reduce the attractiveness of London to (for example) top US law firms who currently establish offices in the UK and use these as their passport into the EU legal market by instructing or employing barristers.

10. In conclusion, whilst some lawyers will doubtless be in high demand in the short-term, for new, Brexit-related work, the medium and long-term uncertainty in established areas and types of practice is high. The Bar Council therefore urges the government, in formulating its negotiating strategy, to have regard to the contingent nature of much of the legal work that comes to the UK as a consequence of the UK legal profession's expertise, not least in the law of the EU. The enduring international appeal of the UK for its legal standing will depend on the ability of UK lawyers to provide legal services, including representation, to clients across the EU and elsewhere.



## **Recommendations**

Any post-Brexit arrangement with the EU should, at the very least:

- (1) Preserve the rights of UK lawyers under the Lawyers Services Directive 77/249/EC and the Lawyers Establishment Directive 98/5/EC;
- (2) Ensure that lawyers entitled to practise before UK courts may represent parties before the European Court;
- (3) Ensure that UK lawyers enjoy the same rights to legal privilege under EU law as lawyers of EU Member States;
- (4) Maintain freedom of movement for immigration purposes for barristers (and other lawyers), as currently provided for in Articles 45, 49 and 56 TFEU and Directive 2004/38/EC.

## **Brexit Working Group**

### **Bar Council**

## Annex: Practical consequences of a WTO rights based Brexit solution

	<b>Restrictions faced by an English lawyer in the EU today</b>	<b>Restrictions faced by non-EEA lawyers</b>	<b>Practical Consequences of a WTO rights based Brexit solution</b>
<b>Limits on ability to provide legal services without needing to open an office</b>	None	Non-EEA lawyers must register a physical presence in Austria, Belgium, Bulgaria, Cyprus, Estonia, France, Finland, Germany, Hungary, Italy, Latvia and Spain in order to practise law.	UK lawyers could no longer provide cross border advice from the UK to clients in these 12 EU member states, including to UK citizens resident in the EU on purely UK matters.
<b>Limits on ability to give advice attracting legal professional privilege to clients</b>	None	Communications with and advice given to clients in the EEA by non-EEA lawyers cannot be kept private. They may be obtained and used by the European Commission in competition proceedings against clients.	Businesses would no longer wish to use UK lawyers for deals between UK and EEA businesses or proceedings arising from them.
<b>Limits on ability of independent lawyers or lawyers under contract to obtain work permits</b>	None	Economic needs tests apply to non-EEA lawyers working as independent professionals in Belgium, Bulgaria, Czech republic, Denmark, Greece, Spain, Finland, Hungary, Italy, Latvia, Malta, Romania, Slovenia and Slovakia.	UK Lawyers would only be able to obtain contracts to provide services in 14 Member States of the EU if no EEA lawyers were qualified to undertake the work required.
<b>Limits on ability to open an office</b>	Must take one of forms permitted to local lawyers (varied ability in member states to form MDPs, have non-lawyer participation – otherwise no restrictions	Cannot open a fully owned law office in Austria, Denmark, France and Portugal – must have local lawyers involved.  Cannot go into partnership with lawyers from Bulgaria, Denmark, Estonia, France, Ireland, Latvia, Lithuania, Malta and Slovenia. Residency for foreign partners required in Sweden and Luxembourg.	UK law firms with a presence (branch or subsidiary) and US law firms operating under UK regulatory banner in these 15 member states would need a different regulatory authorisation and possibly restructuring to remove UK only qualified lawyers and/or head quartering in another EU member state in order to maintain a presence in those member states.

<b>Limits on ability to acquire right to advise on local law</b>	None	<p><u>No right to requalify in 13 Member States:</u> Austria, Greece, Croatia, Bulgaria, Cyprus, Estonia, Greece, Hungary, Lithuania, Malta, Poland, Portugal, Slovenia.</p> <p><u>Limited rights in 8 Member States:</u> Belgium (reciprocity), Czech Republic, Latvia (language test); Denmark, France Germany, Netherlands, Spain (local qualifications or assessment required).</p>	UK lawyers no longer entitled to requalify as local lawyers within the EU – i.e. ability to provide joined up services possible through EU membership cannot be replaced by acquiring local title in a majority of EU MS.
<b>Limits on ability to draw up contracts</b>	None	<p>No right to draw up a legal contract in Croatia, Cyprus, Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovenia and Slovakia</p> <p>Contracts drafted outside France and Denmark applying in those countries no longer valid</p>	Provision of legal advice to UK businesses continuing to operate within the EU and across different member states could no longer be done without greater recourse to local lawyers. Advice to UK citizens and businesses will be more expensive and not subject to the protections of UK regulators
<b>Limits on ability to represent clients in national courts</b>	Must be introduced by a local lawyer	No right of foreign lawyers to appear except in limited and ad hoc circumstances; following application process in Bulgaria, Cyprus, Luxembourg and Poland.	Emergency representation of e.g. UK citizens arrested in EU, of children of mixed EU nationality marriages etc. no longer possible for UK lawyers, neither would be increasingly frequent co-counselling arrangements in commercial matters.
<b>Limits on ability to represent clients in European proceedings</b>	None	Cannot provide any representational services before the courts of the EU institutions	Any representation of UK or international clients in cases before the EU courts would go to lawyers with EEA qualifications i.e. Post Brexit litigation on behalf of UK companies not in the hands of UK lawyers



## PAPER 3

### The impact of Brexit on international arbitration

#### Summary

For decades, London has been the seat of choice for parties seeking to resolve international commercial disputes through arbitration.

But the capital's dominance as a seat for arbitration is not assured. It competes with Singapore, Hong Kong and Dubai as well as with the other well-established arbitration centres in Paris, Geneva, New York, Zurich and Stockholm. There is a risk that, if barriers to entry are created (or even appear to be created) for parties, their lawyers or for arbitrators, business will move elsewhere.

Additionally, there is an obvious risk to the continuation of English lawyers appearing as counsel or arbitrators in overseas hearings should it be made (or even appear) more difficult for English lawyers to appear in arbitrations which take place in the European Union.

- We urge the Government to preserve the rights of UK and EU lawyers under the Lawyers Services Directive 77/249/EC.
- We further urge the Government to maintain the freedom of movement for immigration purposes for arbitrators, arbitration lawyers and clients both from the EU and to the EU as currently provided for in Articles 45, 49 and 56 TFEU and Directive 2004/38/EC.

## PAPER 3

### The impact of Brexit on international arbitration

1. The Commercial Bar Association is the specialist association of the English and Welsh Commercial Bar. It represents over 1,500 individual members and 38 leading barristers' chambers, all of whom provide specialist advice, advocacy and mediation services in relation to commercial law for businesses, individuals and other organisations. Its members carry out work nationally and internationally, in the context of transactions, arbitration and litigation.

2. This short paper has been prepared by the Commercial Bar Association's sub-group considering the effect of Brexit on international arbitration work both in London and overseas. It supplements and supports a paper prepared by the Bar Council concerning access to the EU Legal Services Market Post-Brexit – and is intended to provide some insight into the market for arbitration services in London and the EU. It is provided in advance of a more detailed paper that is intended to provide guidance more broadly on the effect of Brexit on international arbitration in London and steps that might be taken to strengthen London's position as a leading seat for the resolution of international disputes.

3. Arbitration is regarded by many now as the principal method of resolving international disputes involving states, individuals and corporations<sup>8</sup>. For decades London has been a dominant seat for arbitrations in the maritime and insurance sectors. Over the past 20 years London has become one of the dominant seats for the resolution of international commercial disputes of all varieties by arbitration.

---

<sup>8</sup> *Redfern and Hunter on International Arbitration*, 6<sup>th</sup> ed, 2015, para 1.01.

Respondents to a recent (2015) survey by White & Case LLP and Queen Mary, University of London<sup>9</sup> revealed that London was both the most used<sup>10</sup> and the preferred<sup>11</sup> seat for arbitration.

4. That position has been achieved<sup>12</sup> in part because of the supportive legislative and judicial environment, in part because of the high quality of the legal services market in London and in part because of the (relative) ease of access to the market. Indeed, these latter two factors explain why it is not uncommon for parties to agree that arbitrations seated outside the UK, should be heard in England.

5. The principal institutions administering arbitrations in London are the London Court of International Arbitration ("the LCIA") and the International Chamber of Commerce ("the ICC"). In addition, there is a large volume of arbitrations undertaken under the rules of the London Maritime Arbitrators' Association ("the LMAA") and a large number of ad hoc arbitrations which are not governed by any institutional rules.

6. Commonly in an international arbitration in London neither of the parties will be English, some of the lawyers (whether counsel or lawyers instructing counsel<sup>13</sup>) will be based overseas and one or more of the arbitrators will be based overseas too. So far as each of these elements is concerned:

---

<sup>9</sup> <http://www.arbitration.qmul.ac.uk/docs/164761.pdf>

<sup>10</sup> The ranking was London (45%), Paris (37%), Hong Kong (22%), Singapore (19%), Geneva (14%), New York (12%), Stockholm (11%)

<sup>11</sup> The ranking was London (47%), Paris (38%), Hong Kong (30%), Singapore (24%), Geneva (17%), New York (12%), Stockholm (11%)

<sup>12</sup> In addition to the factors mentioned here, London's position has doubtless been assisted by the UK's reputation as a centre for study for law students and young lawyers from overseas.

<sup>13</sup> The counsel may be, and frequently are members of the English Bar, but sometimes are specialist arbitration counsel within solicitors' offices or foreign law firms.

a) Parties: English law remains the most popular choice of law to govern international commercial contracts. The choice of English law for global commercial contracts is in part driven by the UK's reputation as the leading centre for international dispute resolution<sup>14</sup>. Where English law is chosen, London is a natural (but not necessary) choice of seat and venue for resolution of the dispute;

b) Lawyers/counsel: given that there are no restrictions on rights of audience before an arbitral tribunal, not infrequently a London-based arbitration will involve no participation from lawyers based in London. Typically, however, one or more of the English law firms or London-offices of the international law firms will appear. Frequently members of the English Bar will be instructed to appear as counsel either instructed from the UK or overseas<sup>15</sup>;

c) Arbitrators: the rules of the LCIA and the ICC impose certain nationality requirements on the selection of arbitrators (see e.g. Article 15.5 of the ICC Rules and Article 6.1 of the LCIA Rules). Thus, if one of the parties is British (or majority-owned by UK shareholders), the chairman of a tribunal appointed under those rules is likely to be from overseas.

7. Although information is still awaited from the ICC, the latest statistics from the LCIA and LMAA reveal that:

---

<sup>14</sup> See page 6 of The City UK "UK Legal Services Report 2016" at <https://www.thecityuk.com/research/uk-legal-services-2016-report/>

<sup>15</sup> The City UK estimates that over 1,500 members of the Bar of England and Wales now receive instructions from abroad. See page 6 of The City UK "UK Legal Services Report 2016" at <https://www.thecityuk.com/research/uk-legal-services-2016-report/>

a) LCIA: 326 arbitrations were referred to the LCIA in 2015. So far as the parties to those arbitrations are concerned, 25% were from Europe<sup>16</sup>, 15.6% from the UK, 14.8% from Russia and the CIS, 12% from respectively Asia and the Caribbean<sup>17</sup> and smaller numbers from the US, Middle East and Latin America. The LCIA does not keep statistics as to the nationalities of the lawyers involved. However, the arbitrators (other than those from the UK) came from Australia, Austria, Brazil, Belgium, Canada, China, Cyprus, Denmark, the Netherlands, France, Germany, Greece, Hungary, Iran, Ireland, Italy, Latvia, Lebanon, New Zealand, Nigeria, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, Tunisia, Ukraine and the US<sup>18</sup>;

b) LMAA: there were approximately 2,000 new arbitration references in 2015 of which probably no more than 100 were seated outside London. Approximately 85% of those cases are dealt with on documents alone – and European lawyers would be involved in about 50% of those cases. In about 5% of the cases that go to a hearing there will be overseas arbitrators and in perhaps 25-30% overseas lawyers will attend (often with English counsel).

8. It will be appreciated from this description of common practice that, despite the stable legislative and judicial environment for international arbitration in the UK, the attraction and success of London as a seat for arbitration may be affected by any restrictions to the ease of access to London for parties, lawyers and arbitrators from overseas, including the EU.

---

<sup>16</sup> For these purposes Europe includes Germany, Netherlands, Cyprus, Switzerland, Eastern Europe and other Western Europe categories. The Cypriot companies are likely to be foreign-owned

<sup>17</sup> Most of the Caribbean companies will be foreign-owned companies

<sup>18</sup> Further information can be found at <http://www.lcia.org/LCIA/reports.aspx>



9. Moreover, London's dominance as a seat for arbitration is not assured<sup>19</sup>. In view of the international nature of much of the arbitration work in London, it has to compete with other (often more geographically convenient) locations, including Singapore, Hong Kong and Dubai as well as with the other well-established arbitration centres in Paris, Geneva, New York, Zurich and Stockholm. There is a risk that, if barriers to entry are created (or even appear to be created) for parties, their lawyers or for arbitrators, business will move elsewhere<sup>20</sup>.

10. Similarly, however, given the prevalence of an English choice of law in commercial practice and the high-standing in which English lawyers are held internationally<sup>21</sup>, it is very common for English lawyers to appear as counsel or arbitrators in hearings that are held overseas, including in Paris and Stockholm. It has not been possible in the time available to obtain any detailed figures relating to those appearances. There is an obvious risk to the continuation of some of that work should it be made (or even appear) more difficult for English lawyers to appear in arbitrations which take place in the European Union.

11. In those circumstances, although London's reputation as a leading centre for the resolution of international disputes is richly deserved and London remains a robust seat for international arbitration, it is important that the rights of UK and EU lawyers under the Lawyers Services Directive 77/249/EC are preserved and that freedom of

---

<sup>19</sup> In the Queen Mary survey referred to above, London was identified as the least improved seat over the past five years. See also page 17 of The City UK "UK Legal Services Report 2016" at <https://www.thecityuk.com/research/uk-legal-services-2016-report/>

<sup>20</sup> In this context it is important to bear in mind that those advising on or agreeing to the insertion of arbitration clauses do not always consult specialists in the field and may simply take what they perceive to be a "safe" approach.

<sup>21</sup> The high-standing in which English advocates are held is a consequence of their expertise in advocacy and in certain specialist sectors, but also their exposure to arbitration users; hence the importance of maintaining that exposure.

movement for immigration purposes is maintained for arbitrators, arbitration lawyers and clients both from the EU and to the EU.

### **Recommendations**

Any post-Brexit arrangement with the EU should, at the very least:

- (1) preserve the rights of UK lawyers under the Lawyers Services Directive 77/249/EC
- (2) maintain freedom of movement for immigration purposes for barristers (and other lawyers), as currently provided for in Articles 45, 49 and 56 TFEU and Directive 2004/38/EC.

### **International Arbitration Sub-Committee**

#### **Commercial Bar Association**



## PAPER 4

### The implications of Brexit for insolvency and restructuring

#### Summary

In general terms, the existing EU legislation governing insolvency and restructuring works well, and the amendments reflected in the upcoming Recast EUIR (Regulation No 1346/2000) have been broadly welcomed by practitioners as sensible improvements.

The UK is undoubtedly seen as a centre of excellence in this field and this can be maintained with some effort, provided that there is sufficient clarity at an early stage as to what the legal consequences of Brexit will be.

As in civil and commercial matters, and perhaps even more so in the context of insolvency and restructuring, it is generally accepted that it is essential to have a clear and consistent basis for the allocation of jurisdiction in insolvency proceedings, and the recognition and enforcement of orders made in those proceedings.

- We urge the Government to consider that there is increasing national competition in this field. Singapore is aggressively promoting its legal system in international restructuring and insolvency cases. In addition, certain EU member states (for example, the Netherlands) have adopted, or are in the process of adopting, restructuring regimes analogous to schemes of arrangement which may be an attractive alternative for businesses with a significant presence within the EU.
- We therefore urge the Government to seek a successor regime which keeps these advantages.

## PAPER 4

### The implications of Brexit for insolvency and restructuring

1. This note sets out the potential consequences of Brexit in the field of restructuring and insolvency law. It forms a part of a larger project being undertaken by the Bar Council intended to consider the effect of Brexit on civil justice, criminal justice and legal services. It should be read in conjunction with the papers which consider the effect of Brexit on (a) jurisdiction, and the recognition and enforcement of judgments, in civil and commercial matters<sup>22</sup>, (b) the authorisation and regulation of banks and other financial institutions, if any, and (c) the authorisation and regulation of the insurance sector if any.

2. At present, the principal pieces of EU legislation which govern insolvency and restructuring generally (both corporate and individual) are the Council Regulation (EC) No 1346/2000 on Insolvency Proceedings ("the EUIR") and Regulation (EU) No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("the Recast Brussels Regulation").

2.1. The EUIR determines which member state has jurisdiction to open insolvency proceedings, provides for the proper law to be applied in those proceedings and provides for EU-wide recognition and enforcement of orders made in those proceedings, with only a limited basis for refusal of recognition. So far as main proceedings are concerned, it uses the "centre of main interests" ("COMI") test for jurisdiction. COMI is a concept which has generated controversy, in particular where COMI-shifting is employed to enable a debtor

---

<sup>22</sup> See the Bar Council's paper on this subject dated 11 November 2016.

to take advantage of a more debtor-friendly jurisdiction. It nevertheless appears to be accepted as a sound basis for the allocation of jurisdiction, and for the purposes of recognition and enforcement, and it was subsequently adopted as the basis for recognition of main proceedings under the UNCITRAL Model Law, which is dealt with below.

2.2. The EUIR applies only to many but not all types of insolvency proceedings (those identified in its annex) and, further, applies only to proceedings which are particularly "insolvency" in nature. A notable exception from the ambit of the EUIR are schemes of arrangement under the Companies Act 2006 ("the 2006 Act"). Complex cross-border schemes, including in respect of foreign companies, have been a notable feature of the UK legal market over a number of years. Although there remains a degree of uncertainty, the current view is that schemes fall within the Recast Brussels Regulation. So also do proceedings which, although taking place in an insolvency context, are not necessarily "insolvency" in nature; for example, proceedings against a director for breach of duty. These too fall within the Recast Brussels Regulation.

3. In relation to the EUIR, two further points should be noted:

3.1. The EUIR is shortly to be replaced by Regulation No. 2015/848 ("the Recast EUIR"), which will come into force on 26<sup>th</sup> June 2017. This followed the 10-year review of the application of the EUIR, which the EUIR itself required. It has made certain amendments to the EUIR, in particular in relation to the COMI test, the scope of proceedings capable of falling within the EUIR, and better coordination between main and secondary proceedings, as well as in the context of group insolvencies.

3.2. Neither the EUIR nor the Recast EUIR attempt to harmonise the substantive insolvency law applicable to insolvency proceedings falling within the EUIR. However, on 22<sup>nd</sup> November 2016 (and following the EC's recommendation of 12<sup>th</sup> March 2014 and as part of the Capital Markets Union action plan of September 2015) the EC published its Proposal for a Directive on Insolvency, Restructuring and Second Chance. The focus of the proposal is very much on restructuring and rehabilitation, and current UK law is essentially consistent with much of its content (note also that the Insolvency Service is conducting a consultation, based on its consultation paper "A Review of the Corporate Insolvency Framework" published on 25<sup>th</sup> May 2016, which covers some of the same ground as the proposal). Nevertheless, the proposal represents a significant change of EU legislative intent in this area.

4. In general terms, the EUIR seems to have worked reasonably well, and the amendments reflected in the Recast EUIR were (I think) broadly welcomed as sensible improvements. As in civil and commercial matters, and perhaps even more so in the context of insolvency and restructuring, it is generally accepted that it is essential to have a clear and consistent basis for the allocation of jurisdiction in insolvency proceedings, and the recognition and enforcement of orders made in those proceedings.

5. In addition to the general EU legislation referred to above, there is "sector specific" EU legislation dealing with the insolvency and restructuring of particular types of businesses which are excluded from the scope of the EUIR, and which are subject to wider legislative regimes; namely, insurance businesses, and banking and other financial institutions.

6. Provision for jurisdiction and enforcement is made by the Insurers Winding Up Directive and the Credit Institutions Winding Up Directive “the CIWUD”), which have been transposed into UK law by the Insurers (Reorganisation and Winding Up) Regulations 2004 and the Credit Institutions (Reorganisation and Winding Up) Regulations 2004. In summary, reorganisation and winding up measures proceed only in the “home member state” (the state with responsibility for authorising the conduct of business by the relevant entity), there can be no secondary proceedings, and the proceedings are automatically recognised and given effect throughout the EU (in other words, there is no need for separate recognition and enforcement proceedings).

7. Further, and in relation to the financial sector and banking and other financial institutions, there has been an increasing trend towards harmonisation of substantive law, historically to prevent systemic risk and more recently as a response to the 2008 financial crisis.

7.1. So far as systemic risk is concerned, there is:

7.1.1. The Settlement Finality Directive, which was transposed into UK law by the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 and which inter alia protects transfer orders entered on designated payment and settlement systems from specified provisions of insolvency law; transaction avoidance provisions

7.1.2. The Financial Collateral Directive, which was transposed into UK law by the Financial Collateral Arrangements (No 2) Regulations 2003 and which inter alia exempts security falling within scope from effects which would otherwise follow; for example, stays on enforcement.

7.2. The EU response to the 2008 financial crisis (or one of them) is the Resolution and Recovery Directive ("the BRRD"), which provides for a minimum degree of harmonisation of the laws of EU members states and a common approach to the recovery and resolution of banks and investment firms falling within its scope. It sits alongside the jurisdictional and recognition provisions of the CIWUD. The BRRD was transposed into UK law inter alia by way of amendments to the Banking Act 2009 and the Financial Markets and Services Act 2000.

7.3. It is difficult to form a view about the operation of these "sector specific" provisions. It is probably fair to say that the resolution of the affairs of at least some financial institutions, and therefore the operation of the CIWUD, both before and after the coming into force of the BRRD, has been controversial. However, this is perhaps inevitable, or at least not unlikely, in an area where a single business can be so critical to the stability of an economy, and where the resolution or reorganisation of its affairs is or can be a highly political endeavour (particularly where it consists of or includes the exercise of bail-in powers).

8. The potential impact of Brexit will be obvious from the brief summary of the existing position set out above.

8.1. The basis upon which the UK courts can or should assume jurisdiction in respect of the restructuring, management and winding up of the affairs of insolvent or financially distressed debtors will become uncertain and will require to be developed. Where a debtor's affairs are conducted in the UK and in EU member states, there is at least a risk of a clash of jurisdictions, which is undesirable.



8.2. Recognition, and the enforcement of orders and judgments made and given in, foreign insolvency proceedings will no longer be automatic where those proceedings are being conducted in an EU member state. The giving or recognition and assistance will be governed instead by

8.2.1. The common law doctrine of modified universalism which allows for recognition and assistance, but not the enforcement of orders and judgments: *Rubin v Eurofinance SA* [2012] UKSC 46; *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36;

8.2.2. Section 426 of the Insolvency Act 1986, which gives a statutory power to assist upon request for assistance by courts of designated jurisdictions, which are for the most part Commonwealth jurisdiction, but including one EU member state - the Republic of Ireland;

8.2.3. The Cross-Border Insolvency Regulations 2006 ("the CBIRs"), which enact into UK law the Model Law adopted by UNCITRAL in 1997. The CBIRs provide for recognition and the giving of assistance, but not the enforcement of orders and judgment (although UNCITRAL is currently considering the extension of the Model Law to cover enforcement); and

8.2.4. Probably, so far as enforcement is concerned, and in the absence of any other treaty or convention, the common law principles governing the enforcement of the orders of foreign courts.

8.3. In general terms, so far as UK restructuring and insolvency proceedings are concerned (including schemes of arrangement under the 2006 Act), recognition, assistance and enforcement in the EU will depend upon the domestic private international law principles applied by the courts of the

relevant EU member state. In this context, it should be noted that only four EU member states (Greece, Poland, Slovakia and Slovenia) have incorporated the UNCITRAL Model Law into their domestic law. There will be, therefore, a considerable degree of uncertainty as to the extent to which UK insolvency proceedings, and orders made by UK courts, will be recognised and enforced in EU member states.

8.4. Where EU legislation provides for or contemplates “third state” or “third country” recognition (as does, for example, the Recast Brussels Regulation and the BRRD), then these provisions will take the place of the existing regime. However, recognition and enforcement is obviously less certain in the case of third country recognition.

9. It is difficult to assess with certainty what impact Brexit will have on the legal market for the provision of services in this field. The UK is undoubtedly seen as a centre of excellence in this field and, anecdotally, at least some hold the view that this can be maintained with some effort, provided that there is sufficient clarity at a sufficiently early stage as to what the legal consequences of Brexit will be. However, there is increasing national competition in this field; Singapore is aggressively promoting its legal system in international restructuring and insolvency cases, and certain EU member states (for example, the Netherlands) have adopted, or are in the process of adopting, restructuring regimes analogous to schemes of arrangement which may be an attractive alternative for businesses with a significant presence within the EU.

10. Apart from the points dealt with above, Brexit will create a very substantial task of legislative drafting and amendment. This is obvious and common across the legal sector, and so is not dealt with further.

## **Recommendations**

Any post-Brexit arrangement with the EU should, at the very least:

- (1) Ensure that, as part of the agreement between the UK and the EU governing the UK's departure from the EU, provision be made for the continuing application of the EUIR (or at least as many provisions thereof) after Brexit.
- (2) In any event, and particularly if no such agreement is possible, it will be crucial to ensure that clear transitional provisions are put in place to cater for UK insolvencies which commenced before Brexit but which will be concluded after Brexit.

## **Chancery Bar Association**



## PAPER 5

### Brexit and intellectual property

#### Summary

The UK is a highly attractive place for R&D and the creative industries, in which intellectual property plays a key part, but it may not remain so if it is not central to European activities.

The intellectual property bar is very active and the excellence of the courts is widely appreciated, making a significant positive contribution to our success in this field.

However, given the large degree of EU harmonisation of laws in this field, the consequences of Brexit could be particularly severe.

Particular dangers exist where rights are directly granted under EU law which are effective in the UK (such as EU registered trade marks and designs). The impact of ceasing to be a member of the EU would be that the rights in question would cease to exist in the UK (unless otherwise provided for).

To counteract this, UK Intellectual Property Office is considering whether to provide for equivalent rights under English law or, at least a set of transitional measures to ensure that existing rights owners do not face a gap in protection.

- We urge the Government to ensure that the UK remains more efficient and quicker as a litigation forum than other EU countries and EU courts. If the Unified Patent Court goes ahead, which the Government very recently said it will participate in, the UK should be fully able to participate in it post-Brexit.

## PAPER 5

### Brexit and intellectual property

1. Intellectual property disputes in the English courts mainly concern the following areas, although some cases cover overlapping areas:

a. **Patents:** These tend to be high value (>£10 million) disputes which are currently heard in the High Court, Patents Court, predominantly between international litigants fought over multimillion pound markets and some smaller cases <£500,000 value fought before the Intellectual Property Enterprise Court (IPEC). Barristers are heavily involved in both kinds of case. Although patent law is mainly derived from the EPC, not from EU law, significant areas of patents have been harmonised by EU law including the important area of Supplementary Protection Certificates and the areas of biotech inventions and Compulsory Licences.

b. **Trademarks and passing off:** These are largely disputes heard by the High Court and IPEC, and before the UK Intellectual Property Office (IPO) (and on appeal to the Appointed Persons or the High Court) and the EUIPO (and on appeal to the General Court and CJEU). Many of these cases, particularly of higher value or importance, involve barristers. Almost all trade mark law is derived from the EU either by way of the Trade Marks Act 1994 (implementing the Trade Marks Directive) or by way of the EU Trade Mark Regulation providing for EU Trade Marks (EUTM). The English court has regularly made references to the CJEU in these disputes.

c. **Copyright and designs:** There is a great diversity in copyright cases—some involve very substantial industry disputes (over, for example, rights licensing principles) and in cases between individual rights owners and users, often in IPEC. Barristers are involved in a large proportion of them. A large proportion of copyright law is derived from EU law, through the implementation of EU Directives.

There is also a EU Registered Designs system and a UK system pursuant to EU law. Legal representation in such cases (large and small) is often undertaken by teams involving barristers.

d. **Confidential information:** These cases are very diverse. Higher value cases are brought in the High Court and barristers are almost always involved. The principles of trade secrecy law have recently been harmonised by a EU Directive although the UK has not yet implemented it. Those principles are broadly similar to those already existing in English law and English law may be influenced by the development of EU jurisprudence in this area.

e. **Related areas of law:** Other kinds of work which may be undertaken by barristers include Plant Varieties, Protected Geographical Indications and Protected Designations of Origin, which are the subject of EU laws.

In addition, intellectual property cases often involve elements of EU competition law in which barristers are involved. There is a significant element of EU law relating to remedies for breach of intellectual property rights under the Enforcement Directive.

## Impact of Brexit

2. Brexit is likely to have an impact on intellectual property practice in the following ways.

a. **Substantive law:** In areas where rights are directly granted under EU law which are effective in the UK (such as EU registered trade marks and designs), the impact of ceasing to be a member of the EU would be that the rights in question would cease to exist in the UK (unless otherwise provided for). To counteract this, the UKIPO is considering whether to provide for equivalent rights under English law or, at least, a set of transitional measures to ensure that existing rights owners do not face a gap in protection. These considerations will address the various complexities, including the basis upon which the rights of proprietors and third parties may be protected. In this, the UK Government faces a challenging exercise, with no guarantee that the outcome will satisfy everyone. Assuming UK rights can be secured in this way, it seems unlikely that they would be identical to those conferred by the EU systems. That said, in many cases they would probably be similar. Moreover, this is likely to be an issue for specific areas of intellectual property law since much of it is enacted in domestic legislation or SIs made under the ECA 1972. The latter SIs would probably fall with simple repeal of the ECA but could be preserved by appropriate UK legislation.

Consideration will also need to be given to the future application of the principle of the free movement of goods and the doctrine of exhaustion of rights, whereby the proprietor of a UK IP right cannot exercise his right to prevent the importation and sale in the UK of goods which were first placed on the

market in another EU Member State by him or with his consent (i.e. parallel imports).

**b. Interpretation of law:** As indicated above, a significant proportion of current intellectual property rights are conferred pursuant to EU legislation (arising under EU Regulations or UK statutes implementing EU Directives) and their scope ultimately falls to be determined by the CJEU upon reference from national courts. If that ceases to be possible following Brexit, the UK courts would have the final say as to the scope of rights originally conferred under EU law. There is a real risk of jurisprudential divergence. Moreover, unless provision was made to ensure that the UK (and undertakings in the UK) could continue to present arguments at the CJEU, including in cases pending at the date of exit, by way of interventions, the influence of English law principles, which has been considerable (and positive), in this area would be seriously diminished.

**c. Development of law:** After Brexit, unless steps are taken to ensure that the interests of businesses in the UK and of businesses in other countries wishing to continue trading and to protect their rights in the UK, are taken into account in developing new IP regimes in the EU, such undertakings will not be adequately catered for in the UK and may be less able to influence the legislative process. At present, the UK's voice is of considerable importance both at the legislative stage and in interpretation of the law at CJEU level. For example, the EU is currently undertaking a thorough revision of its copyright regime, an exercise in which the UK ideally should be influential.

**d. New courts and tribunals – the UPC:** In the field of patents, the coming into effect of the Unified Patent and the Unified Patents Court regime currently depend on ratification by the UK. The UK government has indicated that it was



proceeding with preparations to ratify the UPC.. The UK has been important in establishing the UP/UPC and is currently set to play a major role in it. London was strongly promoted by the UK Government as the location of one of the central divisions under the UPC. Patents with life sciences as their subject matter are to be litigated in this division. It is therefore of significant economic importance, not simply from the point of view of the provision of legal services but in other respects that life sciences patent litigation under the UPC to be conducted in London. London and the South East is one of the world's most important clusters of activity in this area. However, at the moment, it is unclear whether and upon what terms the UK would be able to participate in the UPC (and the Unified Patent) following Brexit.

e. **Recognition and enforcement** The Bar's concerns about the potential loss of the Brussels I regime are set out in *Paper 1: Enforcement of judgments*, which we endorse. Suffice it to say here that those calls for a new post-BREXIT arrangement should also cover the special provisions in the Brussels I Regulation recast relating to claims concerned with the validity of IP rights.

f. **Professional practice.** At present, English barristers are entitled to represent clients before the following EU courts and tribunals (or would be once the UPC is established):

- CJEU
- General Court
- EUIPO
- EU IPO Boards of Appeal
- Unified Patent Court (when active).

3. A significant proportion of cases involving patents and designs, copyright and trade marks originally commenced in English courts give rise to issues which are also litigated before these courts and tribunals. There is often parallel litigation in which English barristers may be instructed both before the UK and parallel EU courts or tribunals. Unless specially provided for, and unless possibly the UK became a member of the EEA, Brexit would mean that, uniquely among lawyers in the present EU, English barristers would not be able to provide clients a full service of representation before all of these tribunals, thus placing them at a competitive disadvantage.

### **EU market access**

4. Please refer to *Paper 2: Access to the EU Legal Services Market* for an overview of the current EU arrangements allowing UK lawyers to offer their services on a permanent or temporary basis in other EU Member States, including their enjoyment of rights of audience.

5. These market access rules give clients freedom of choice to include English barristers in their legal teams regardless of forum<sup>23</sup>. The advantage to both the clients and the Bar would be lost if these rules do not survive Brexit.

6. Moreover, to the extent that Brexit adversely affects the practices of solicitors' firms, and patent and trade mark attorneys which frequently instruct barristers, that will have an additional impact. Those firms may lose the possibility to present themselves as able to perform the lead litigation/co-ordination role in the EU. If, as is likely to happen unless steps are taken to prevent it, the rights of those Attorneys to

---

<sup>23</sup>For example, English barristers work closely with Irish barristers in substantial multinational patent cases in the courts of Ireland. Moreover, US firms (for example) frequently instruct English barristers in preference to other EU lawyers in cases where they have a choice.

represent parties before the EUIPO are also adversely affected, there is likely to be a loss of work for barristers who are instructed by them which may be significant.

7. Overall, unless specific steps are taken to remedy the damage that Brexit may cause, the demand for the services of the English Bar is likely to fall.

#### *Infrastructure for R&D and creative industries*

8. These adverse impacts are all the more regrettable, since intellectual property law is an area which provides essential commercial infrastructure to the research intensive and creative industries in the UK.

9. More generally, the UK is a highly attractive place for such activities, but it may not remain so if it is not (or is not perceived to be) central to European activities. London and its periphery, in particular, provide a cluster of activities both in R&D and creative industries and their support services, of which intellectual property protection is a significant part.

### **Recommendations**

10. Intellectual property services are currently a flourishing area in the UK and the UK has significant influence in this area. Rights are well protected but subject to sensible defences. The intellectual property bar is very active and the excellence of the courts is widely appreciated, making a significant positive contribution. It is suggested that the UK Government (HMG) should do the following to ensure that this remains the case:

11. Secure rights to provide professional services, including:

- (a) *Rights of representation/practice* - The IPBA joins and endorses the recommendations and requests set out in Paper 2:: *Access to the EU Legal Services Market*
- (b) *UK as forum of choice* - HMG should explore ways to ensure that the UK retains its position as a forum of choice for intellectual property matters in Europe. This should include steps to ensure that the UK remains more efficient and quicker as a litigation forum than other EU countries and EU courts. It should also include attempts to ensure that the UK is able fully to participate in the UPC post-Brexit and that, if the UK is not able to do so, the UK is nonetheless well-placed to remain a first-choice forum for resolution of patent disputes in Europe.
- (c) *Prioritisation*. HMG should ensure that the area of specialist legal services, including rights of representation in intellectual property cases, is given no less priority than that given to any other area of services provision in Brexit negotiations in which rights of access to the EU may be important.
- (d) *Avoidance of approaches to Brexit which would be most likely to damage this sector*. The UK should avoid any general approach to Brexit which would make such arrangements harder to secure.

12. Ensure that post-Brexit there is equivalent protection for intellectual property in the UK as currently exists under harmonised EU law, that there is no gap in protection with regard to existing rights, and that defences which currently exist to infringement of intellectual property rights continue to apply unless and until specifically altered.

13. Ensure the continuing influence on substantive and procedural EU law which may affect industry in the UK

- (a) HMG should take steps to ensure that the UK perspective continues to be heard by EU legislative and judicial authorities, where decisions are made that may have an impact on UK law and practice.
- (b) This may involve ensuring that HMG makes timely responses to EU consultations on legislative change and that it intervenes (and ensures generous rights of intervention for others) in CJEU cases which may have a direct impact on UK undertakings and an indirect impact on UK law after Brexit.

The IPBA would be happy to assist the UK Government in formulating appropriate strategies to this end.

**Intellectual Property Bar Association**



## PAPER 6

### The impact of Brexit on UK tax

#### Summary

Should the UK decide to leave the Customs Union, which would almost certainly increase the costs of trading with the EU, one of the main challenges will be to develop a comprehensive Customs Code.

The UK currently benefits from free trade agreements entered into by the EU with third countries which give access to preferential duty rates. Unless and until the UK has its own agreements with such third countries, duty rates faced by UK exports are likely to increase.

In the area of VAT, post-Brexit, decisions of the European Court will effectively be remain 'binding' in the UK for so long as the UK's system mirrors that of the EU. The UK courts will however no longer be able to seek guidance from the CJEU nor will the UK have any influence over how EU law is developed by the CJEU.

At present the UK benefits from EU-wide administrative cooperation on exchanging information and tackling tax evasion, in particular in the form of the Mutual Assistance Directive which enables cross-EU border enforcement of tax debts. This will only be able to continue to the extent that the UK has or enters into bilateral agreements replicating this network.

There are also a number issues to address on direct taxation, stamp duties, and state aid.

- As with all aspects of Brexit negotiations, the Government's approach to arrangements on tax law will be contingent on other considerations which will reflect the Government's political leadership. We therefore urge the Government to consider the implications of the different approaches, as outlined in this paper.

## **PAPER 6**

### **The impact of Brexit on UK tax**

1. Taxpayers, particular business taxpayers, need certainty as to the legal and fiscal position in order to make sensible commercial decisions as to investment, jobs, etc. Recent UK Governments have gone some way towards achieving this by outlining a “Business Tax Road Map” which has sought to identify policy goals and broad routes to achieving such goals. That process is now under considerable pressure as a result of the vote to leave the EU, the current debate as to how and when to trigger Article 50 and the absence, as yet, of any published guidance as to how the Government sees the UK tax system developing in a post-Brexit world.

2. There is anecdotal evidence, at least, that some investment destined for the UK has been re-routed elsewhere or deferred and that plans are now well advanced to move businesses (and jobs) out of the UK if greater clarity is not achieved, particularly in the financial services sector. While tax is only one factor in such considerations it is an important one. What follows is an outline summary (no doubt incomplete) of the main issues that will need to be resolved over the next two years or so.

#### **Customs duties**

3. At present the UK is a part of the EU customs union which allows free of movement of goods between member states without any customs formalities or duties/tariffs. On leaving the EU the UK will need to decide if it is to remain inside the customs union and, assuming that it does not, the UK will need to introduce its own comprehensive customs code. This will require the UK to determine how it wishes to

categorise goods, what goods will suffer what duties and how it is to operate customs formalities (clearance mechanisms, financial security for duties, registration requirements). As it is likely that duties/tariffs will be imposed on trade in goods between the UK and the remaining EU member states, the administrative costs of trading with the EU will increase.

4. Furthermore, the UK currently benefits from free trade agreements entered into by the EU with third countries which give access to preferential duty rates. Unless and until the UK has its own agreements with such third countries, duty rates faced by UK exports are likely to increase.

## **VAT**

5. VAT is an EU tax, derived from (now) the Principal VAT Directive ("PVD"). Post-Brexit, the UK will need to introduce its own VAT system and, in theory at least, the UK has full freedom to design the new UK VAT system as it sees fit, irrespective of the PVD. However, while some 'UK specific features' might be expanded (e.g. an extension in the scope of zero rating or changes in rates), in practice the new UK VAT system will likely have to mirror very closely the EU equivalent so as to ensure that UK business can trade with the EU, and EU businesses can trade with the UK, on an equal footing without the fear of VAT double-taxation or VAT non-taxation.

6. This is likely to mean that decisions of the European Court ("CJEU") interpreting the PVD will, de facto, remain 'binding' in the UK for so long as the UK's system mirrors that of the EU. This is particularly so since the UK courts have to interpret the UK VAT legislation in accordance with the legislative intention of the UK Parliament and the intention of Parliament when enacting the majority of the current UK VAT legislation was to ensure a harmonised VAT system with the rest of the EU. The UK courts will



however no longer be able to seek guidance from the CJEU nor will the UK have any influence over how EU law is developed by the CJEU<sup>24</sup>.

7. Other specific issues that will need to be resolved in a new UK VAT system include: (1) whether the UK will continue to benefit from the EU 'one-stop shop' mechanisms that are designed to remove the burden for a business requiring 28 VAT registrations across all member states; (2) whether the UK will continue with the principles of 'triangulation' whereby goods move from (say) a manufacturer in EU member state 1 to the end customer in EU member state 3 without the supplier in EU member state 2 being required to VAT register in either state 1 or 3; (3) in the financial services and insurance sectors, transactions with non-EU counterparts give rise to VAT recovery on costs for UK businesses; it is unclear whether this is to continue post-Brexit and whether it will then apply to transactions with any non-UK counterpart; (4) under the PVD, travel in the EU is taxed under the tour operators' margin scheme whereas non-EU travel is not; how is non-UK travel to be taxed post-Brexit?

## **Direct taxes**

8. The UK's direct tax legislation (corporation tax, income tax etc.) is made by the UK Parliament and, in the main, not based on EU law. Such taxes are, however, subject to the principles of EU law which require, e.g. freedom of establishment and free movement of capital. Such principles have therefore shaped and adapted the UK direct tax code. It is currently unclear whether such principles will continue to influence the courts in the UK as regards future, post-Brexit, periods. In particular, in the context of group reliefs (for e.g. losses) it is EU law principles that have required the

---

<sup>24</sup> The CJEU is continuing to hear UK cases which were referred prior to the referendum and new VAT cases are still being sent from the UK. It is unclear what will happen to references in the pipeline at the CJEU as Brexit approaches.

concept of a group to be traced through international and not just one member state entities; it remains to be seen whether the UK will return to defining groups by reference only to UK entities. Similarly, the scope and content of the UK's controlled foreign companies regime has been heavily influenced by freedom of establishment principles and, again, it is to be determined how such rules might be applied going forward where such freedoms have (let's assume) no further role to play.

9. In addition, there are some areas of direct tax where EU Directives require particular legislative regimes in the UK. To take three main examples:

10. The Parent-Subsidiary Directive provides that a parent company in one EU member state which receives distributions from a subsidiary company in another member state cannot be taxed in the member state of the parent company. Post-Brexit a group of companies with a parent company in the UK and subsidiaries in an EU member state (or with a parent company in a member state and subsidiaries in the UK) may become subject to double taxation in respect of profit distributions unless a double tax treaty or similar arrangement prevents this.

11. The Merger Directive is designed to remove fiscal obstacles to cross-border reorganisations. In the case of mergers involving a company transferring assets and liabilities to one or more companies in a different EU member state, the Directive provides for a deferral of the taxes that could be charged on the difference between the real value of such assets and liabilities and their value for tax purposes, subject to certain conditions.

12. The Interest and Royalties Directive ensures that interest and royalties can be paid free of withholding taxes from one EU country to another. This freedom from

withholding taxes will disappear unless a given payment is protected by the network of the UK's bilateral double tax treaties.

### **Stamp duties**

13. At present the UK is subject to the Capital Duties Directive which prevents, in some instances, EU member states charging indirect tax in respect of the raising of capital by companies (for example, by issuing shares or other securities). UK legislation currently imposes a 1.5% SDRT charge on issues of shares and securities to depositary receipt issuers and clearance services in certain circumstances. However, as a result of the Capital Duties Directive and decisions of the CJEU and the UK courts the UK no longer imposes this charge. Post-Brexit the UK would be free to impose this SDRT charge and also to impose a new capital duty.

### **Administration**

14. At present the UK benefits from EU-wide administrative cooperation on exchanging information and tackling tax evasion, in particular in the form of the Mutual Assistance Directive which enables cross-EU border enforcement of tax debts. This will only be able to continue to the extent that the UK has or enters into bilateral agreements replicating this network.

### **Other issues**

#### *State aid*

15. Assuming the UK is no longer part of the EU, the EEA and does not join EFTA, it will no longer be subject to EU law restrictions when seeking to grant state aid. The corollary of that, however, is that it will no longer have any recourse through the EU against member states introducing state aid that disadvantages UK businesses. The

EU may well, however, in that situation seek to introduce some form of State aid or subsidy control in any trade agreement that is negotiated with the UK.

*“Abuse of law” and anti-avoidance*

16. The decision of the CJEU in *Halifax & Others* (Case C-255/02) introduced into English law, at least for the purposes of VAT, the concept of abuse of law, a principle relied on heavily by HMRC in recent years. The concept presupposes an attempt to achieve as result contrary to the purpose of the PVD which will not work, or work as well, once the UK adopts its own VAT system. One solution, not without some difficulty where the UK adopts a model based on the current, EU derived, VAT system, would be to extend the GAAR regime to include VAT.

*Grandfathering and transitional rules*

17. Taxpayers, particularly businesses, will need to know well in advance of the post-Brexit new world becoming operational, when and in what circumstances there will be grandfathering and/or transitional rules.

**Revenue Bar Association**



## PAPER 7

### The impact of Brexit on family law

#### Summary

Huge numbers of families in which the partners are from different Member States will be affected by Brexit in relation to divorce and children matters. UK citizens have benefitted in particular from two directly applicable EU Regulations:

- Brussels IIa (Regulation 2201/2003) which covers divorce and custody of children, both in disputes between parents and also where local authorities are involved, and
- The Maintenance Regulation (Regulation 4/2009) which covers disputes about family maintenance obligations.

These instruments provide certainty about jurisdiction, helping affected families to determine where issues concerning the welfare of children, divorce and maintenance can be resolved. They also assist with enforcement and cooperation between authorities on the protection of children's welfare.

Other conventions and measures would fill some of the gaps if Brussels IIa were to fall away, but not all, and the international protection of children would be weakened by its loss. The 2007 Hague Convention on maintenance, to which the UK could accede, would to a much lesser extent fill the gap left by the Maintenance Regulation.

- We urge the Government to replace the Brussels IIa and Maintenance Regulations on the same basis as the Recast Brussels Regulation and to ensure that the agreement in relation to the Brussels IIa Regulation will apply equally to the proposed Recast Brussels IIa Regulation when that comes into force.
- We also urge the Government to ensure that the new agreements will come into force seamlessly on Brexit in order to protect the welfare of children and the stability of families.

## PAPER 7

### The impact of Brexit on family law

1. English family law is particularly affected by two directly effective EU Regulations:

1.1. Regulation 2201/2003, known to English family lawyers as '**Brussels IIa**'. This Regulation establishes the jurisdictional framework (a) for divorce and (b) for issues about children, both in the private law sphere (disputes between parents and other family members); and also in public law cases where local authorities are involved. This Regulation also has provisions which reinforce the 1980 Hague Convention on international abduction of children.

1.2. Regulation 4/2009, known as the **Maintenance Regulation**. This establishes the jurisdictional framework for all disputes about family maintenance obligations.

2. Both these Regulations have the same origin as the **Recast Brussels Regulation** and they share many features with it. In particular they have similar provisions for:

2.1. Recognition and enforcement in other Member States;

2.2. Protective measures;

2.3. Jurisdictional rules;

2.4. In the case of the Maintenance Regulation (but not Brussels IIa) the right to enter into exclusive jurisdiction clauses;

2.5. 'First in time' rules, so that where proceedings have been commenced in one Member State, the courts of other Member States are required to stay any subsequent equivalent proceedings until the jurisdiction of the first court has been established.

3. One feature of both Brussels IIa and the Maintenance Regulation is that each Member State is required to designate a Central Authority. The Central Authorities have roles both in cross-border enforcement of orders and (in Brussels IIa) in the exchange of information and general cooperation in matters concerning the welfare of children.

4. The Brussels IIa Regulation is currently undergoing a revision process similar to that which led to the Recast Brussels Regulation. The UK Government opted into the negotiations about this process in October 2016. It is expected that the **Recast Brussels IIa Regulation** will come into force at some point in 2019.

5. Both Brussels IIa and the Maintenance Regulation have presented some difficulties since they respectively came into force. The interaction between them is sometimes obscure. However, they have been shown to have enormous advantages which far outweigh these difficulties. For example:-

5.1. Certainty about jurisdiction. The millions of couples who are of different nationalities and/or live in a Member State other than their own can readily find out where issues concerning the welfare of children, divorce and/or maintenance can and should be resolved.

5.2. Ease of enforcement. Orders concerning arrangements about children and also about maintenance must be recognised and enforced in other Member States.

5.3. Cooperation between Central Authorities is a valuable bulwark for the protection of children's welfare.

5.4. Protective measures pending resolution of disputes are also a valuable tool for the protection of children's welfare.

6. If either Brussels IIa or the Maintenance Regulation were to cease to have effect in the UK without a replacement framework being in place, there are other international instruments which would or could help to fill the gaps:-

6.1. The 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (which the UK has already ratified) would significantly (but not entirely) fill the gap left by the children aspects of Brussels IIa. The international protection of children would be weakened by the loss of Brussels IIa.

6.2. The 2007 Hague Convention on maintenance would to a much lesser extent fill the gap left by the Maintenance Regulation. The 2007 Convention does not contain jurisdictional rules. The UK is currently bound by the 2007 Convention as a result of membership of the EU. Once the UK leaves the EU, it will need to accede to the 2007 Convention on its own account. The EU will then be required to accept the UK's accession, but there may be a risk of a hiatus before that happens.

6.3. If the UK were to ratify the Lugano II Convention post-Brexit, this would fill the gap left by the Maintenance Regulation to a much greater extent.



7. There would nevertheless be major gaps if the two Regulations fell away, including:-

7.1. The jurisdictional rules for divorce in Brussels Ila, together with the 'first in time' rule summarised above.

7.2. Unless the UK ratifies the Lugano II Convention, the jurisdictional rules (and first in time rule) in the Maintenance Regulation.

8. The loss of the first in time rules would have an important practical consequence. At present when competing divorce and/or financial proceedings are issued in England and in a country which is not a Member State, the English court will decide whether England or the other country provides the '*forum conveniens*', i.e. the place where the issues can more suitably be tried. This is a very fair system, but it is slow, expensive, and places additional demands on court time. If the first in time rules in the EU Regulations fell away, *forum conveniens* principles would be applied as between England and the continuing Member States (as they used to be before the Regulations came into force).

9. The legal systems of different Member States in relation to matrimonial finance provide very different outcomes. Many spouses would have an incentive to argue about which country was the *forum conveniens*. In view of the number of couples who have a substantial connection both with England and with another Member State, there would be likely to be a large increase in the number of disputes of this kind, placing a major additional burden on the already overstretched family court system.

## **Recommendations**

10. The UK Government should:-

10.1. Enter into agreements to replace the Brussels Ila and Maintenance Regulations on the same basis as the agreement recommended in relation to the Recast Brussels Regulation.

10.2. Ensure that the agreement in relation to the Brussels Ila Regulation will apply equally to the proposed Recast Brussels Ila Regulation when that comes into force.

10.3. Ensure that the new agreements will come into force seamlessly on Brexit in order to protect the welfare of children and the stability of families.

## **Anticipating other EU developments that could affect English family law**

11. This paper would not be complete without a mention of other EU activities that may soon affect family law in England and Wales.

12. In July of this year, the EU adopted Regulation (EU) 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union. This regulation will do away with the need for authentication and translation of a range of civil status documents, including marriage and divorce certificates, adoption certificates etc, when persons are moving from one state to another. Its value added is clear. The main elements are due to enter into force in February 2019, which may well precede formal BREXIT.

13. Having received several petitions, including complaints against UK authorities, the European Parliament is pressing for EU action on cross-border and forced adoptions.

14. These are just two examples of further family law-related EU developments that may become live, and the merits of which will therefore need to be addressed, while the BREXIT process is underway.

### **Family Law Bar Association**



## PAPER 8

### The impact of Brexit on criminal justice

#### Summary

In this field, the Bar Council is asking the government to consider a number of public security and human rights.

- Firstly, the Government should negotiate a reciprocal measure to replace the European Arrest Warrant which has worked well in securing the speedy arrest of suspects combined with due process and respect for fundamental rights.
- The Government should further seek agreement for the use of Joint Investigation Teams and allow rapid access to identification databases in order to investigate international crime.
- We also urge Government to find an equivalent mechanism for the European Investigation Order which will come into force by mid-2017. The package should further include continuing cooperation through Europol, Eurojust and the European Public Prosecutor's Office, as well as provide for a measure to transfer prisoners to their home countries.
- We further urge the Government to ensure that British citizens subject to investigation and prosecution in other Member States continue to benefit from the safeguards set out in the European Council Resolution of 30 November 2009, on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.

## **PAPER 8**

### **The impact of Brexit on criminal justice**

1. Crime, especially more serious and organised crime, increasingly does not recognise national borders. Even less serious crimes are likely to have a cross-border element as citizens of the EU have for the last 43 years exercised their Treaty rights of freedom of movement and establishment, and availed themselves of goods and services sent from, or supplied in, EU and other states. British citizens and foreign nationals who commit crimes flee across borders seeking to evade justice. Some crimes can be committed easily across national boundaries, such as child exploitation, fraud and identity theft, often exploiting new technologies. Police and the judicial authorities need to cooperate internationally to combat crime and bring perpetrators to justice.

#### **The EU's approach to the fight against crime**

2. Fighting cross-border crime based on case by case contacts, or even bi-lateral agreements to cooperate, especially where several states are involved, is likely to be slow and cumbersome. Under the EU framework we have been doing so by mutual recognition of key elements of each other's systems, with minimum standards applicable in all states for certain factors, together with mutual legal assistance measures that are understood and apply in all the Member States.

3. The EU has been especially active in recent years in identifying cross-border policing issues and putting in place regimes to tackle them, such as Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims; Directive 2011/92/EU on combating the sexual abuse and sexual

exploitation of children and child pornography; and Directive 2011/99/EU on the European Protection Order. The UK will probably wish to continue co-operation in these areas and provide legislation to enable reciprocal arrangements to continue.

4. It is illustrative to refer back to the review of EU competences in the area of criminal justice, carried out three years ago in consequence of the negotiated option contained in Protocol 36 of the Lisbon Treaty for the UK to opt out of all pre-Lisbon criminal justice measures after a five-year transitional period. This detailed process concluded that 35 EU measures were crucial to UK law enforcement, leading to the UK opting-back into them. Many of the remaining measures had been superseded<sup>25</sup>. While this took place in the context of other EU competences continuing, given the geographical proximity of other European nations, the rise in technology-based crime that knows no borders, and the undoubted need to continue some form of trade and service agreements, the Bar would argue that the assessment by UK law enforcement professionals that these instruments are necessary to enable us to combat cross border crime remains an important and relevant consideration in deciding on UK priorities for the forthcoming negotiations with the EU.

### **Recommendations for the UK, post-BREXIT**

5. Thus, as we withdraw from the EU, the UK will need to seek, if possible, measures in an agreement with the EU, including but not limited to ones that:

- 5.1. Secure the speedy arrest of suspects with minimum bureaucracy, but with judicial process and respect for grounds of refusal and fundamental rights, via use of the European Arrest Warrant, of those wanted by the British police

---

<sup>25</sup>

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/235912/8671.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235912/8671.pdf)

who have absconded to the EU. There will need to be some reciprocal measure;

5.2. Provide for the use of Joint Investigation Teams to investigate criminal networks that operate across national borders;

5.3. Secure evidence from overseas, using EU mechanisms such as the European Investigation Order, which is due to be implemented into national law by mid-2017;

5.4. Provide rapid access via fingerprint and other identification databases to overseas convictions, for sentencing and other purposes; and

5.5. Provide for the transfer of prisoners or suspects to their home countries to serve their sentence or await trial subject to bail conditions.

6. The courts and police will continue to want properly to identify suspects and defendants from outside the UK with whom they deal, so that justice can be done, and the public protected so far as is possible.

7. Moreover, whatever the outcome of the negotiations on free movement of people, free movement of (criminal) funds across national borders will continue to pose challenges for the criminal justice system, and measures to combat this will need to be included in the package.

8. It is unlikely that the UK Government will want to negotiate 27 separate treaties, or indeed that the remaining EU members will want to negotiate separately either, given the growth in co-operation through Europol, Eurojust and the European Public Prosecutors Office.

9. In addition, the UK will undoubtedly want to secure some bilateral recognition of systems to protect the UK nationals living in and visiting EU states. They, for example, make up the largest group of non-nationals living in France and Spain, and the second largest living in Germany. The largest non-national groups living in the UK are the Polish and the French, followed by the Portuguese and Spanish. Whilst some people may move country after Brexit, substantial numbers of EU citizens are likely to remain. In addition, if Britain is to be open to the world for business, substantial numbers of visitors can be anticipated.

10. The UK will therefore need to engage with Europol, Eurojust, and the European Judicial Network. If we were to revert to non-EU-led cooperation in the fight against crime, we would be relying on intergovernmental conventions that need to be ratified. There is ample evidence from the past that this is not an effective approach, since there is no obligation for other countries to prioritise requests from the UK, and would be even less so in the face of the growth of technology-enabled crime. The current mechanisms require requests from other EU Member States to be treated with the same celerity as domestic cases and must be answered within a specific period. Moreover, cross-border surveillance is now greatly improved. The police, even at local level, will themselves generally know how the system works, allowing them to deal with cross-border issues themselves. This was not the case even ten years ago. This increases efficiency and speed, which is often of the essence in such cases.

### **Procedural Safeguards – the EU’s approach**

11. The investigation and prosecution of crime necessarily requires procedural safeguards to be in place to ensure fair process, from the moment a person is made aware that they are a suspect of crime. Research has repeatedly shown that the European Convention on Human Rights (the “Convention”) is an insufficient tool to



ensure effective protection of suspects' and accused persons' rights in the context of enhanced cooperation arrangements.<sup>26</sup> Moreover, to varying degrees, all Member States have been found by the European Court of Human Rights to be in violation of Convention rights. It was therefore acknowledged in the Council Resolution for a Roadmap on procedural rights 2009 that the EU should enhance rights protection for suspected and accused persons.<sup>27</sup> Recognition by the EU in the Lisbon Treaty and subsequent implementing laws that these safeguards are necessary is a positive and welcome recognition of fair trial processes, which the Bar endorsed.

12. The EU has so far passed six detailed, concrete Directives<sup>28</sup> binding upon most<sup>29</sup> Member States, that provide rights for all individuals (regardless of nationality) and are

---

<sup>26</sup> See T. Spronken and M. Attinger, *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*, (University of Maastricht/ EC, DG JLS, 2005); Tilburg, Griefswald, *An Analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU, Draft Introductory Summary*, EC DG JLS/D3/2007/01, (2009); T. Spronken et al, *Effective Criminal Defence in Europe* (Intersentia, 2010); T. Spronken, *EU-wide Letter of Rights in Criminal Proceedings: Towards Best Practice* (University of Maastricht/Bundesministerium der Justiz, 2010); E. Cape and Z. Namoradze, Legal Aid Reformers Network, *Effective Criminal Defence in Eastern Europe* (Soros Foundation-Moldova, 2012); S. Schumann et al, *Pre-trial Emergency Defence* (Intersentia/NWV, 2012); J. Blackstock, *European arrest warrants: Ensuring an effective defence* (JUSTICE, 2012); Fair Trials International, *Advancing defence rights in the EU* (2012); J. Blackstock et. al, *Inside Police Custody: An Empirical Account of Suspect's Rights in Four Jurisdictions* (Intersentia, 2012).

<sup>27</sup> Resolution of the Council of 30 November 2009, *on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*, OJ C 295/1 (4.12.2009).

<sup>28</sup> Directive 2012/13/EU on the right to information in criminal proceedings; Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings; Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty; Directive 2016/800/EU on procedural safeguards for children who are suspects or accused persons in criminal proceedings; **Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings; Directive 2016/1919/EU on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings**

<sup>29</sup> With some exceptions due to Protocols 21 and 22 to the Treaty on the Functioning of the European Union enabling the UK, Ireland and Denmark to opt out of laws relating to the Area of freedom, security and justice.

enforceable through domestic courts and, if a reference is made to it, the Court of Justice of the European Union.

13. Such measures provide people living in and moving between EU countries with the protection of certain minimum standards throughout the EU. For the UK, which already has extensive, though not all-encompassing, procedural safeguards, this means that British citizens and residents will be able to avail of similar protections to those at home should they become embroiled in the criminal justice system in another Member State. Promotion of fair trial rights can also alleviate some of the concerns about the swift and cursory operation of mutual recognition decisions.

### **The Challenge post-BREXIT**

14. Part of the challenge in negotiating law enforcement measures post Brexit will be to ensure that these procedural standards continue to be available for British nationals and British residents accused before EU courts. Agreements must also provide mechanisms for affected persons to make representations and invoke postponement or refusal grounds where it is appropriate to do so. Improved procedural safeguards will have minimal effect unless there is the opportunity for the affected person to be heard by a judicial authority on the application against them, and with the commensurate fair trial principles that should attach to that process.

### **Brexit Working Group**

### **Bar Council**



## PAPER 9

### Brexit and competition law

#### Summary

Competition enforcement and current levels of consumer protection will be severely weakened unless post-Brexit arrangements allow UK consumers to rely on decisions of the European Commission.

Preserving the powers under the Competition Act 1998 to enable UK courts and consumers to continue to enforce the decisions of the European Commission will be very important.

There is also a powerful public interest in ensuring that the European Commission can continue to include the UK in its EEA-wide investigations into competition distortions.

A key driver of competition enforcement in both the UK and EU is the use of leniency arrangements, under which participants in cartels may obtain immunity or reduction in fines in exchange for cooperation. At present an application in the UK is sufficient to trigger leniency across the EU and in respect of the Commission. If that “one stop” approach were lost, there would be diminished incentive to apply for leniency. Following Brexit, coordinating measures would be highly desirable.

- We therefore urge Government to preserve the powers contained in the Competition Act 1998 to render Commission infringement decisions binding and enable UK consumers and businesses to seek injunctive relief on that basis.
- We also urge Government to preserve the immunity protection for leniency applicants and ensure mutual recognition and protection for immunity statements from disclosure.

## PAPER 9

### Brexit and competition law

1. Competition law is an important driver of the UK's economy, estimated by the CMA to produce annual average direct consumer benefits of £745 million between 2012-13 and 2014-15<sup>30</sup>.

2. Over the last 20 years, successive Governments have implemented a series of reforms which have strengthened that regime and the remedies which it offers. As the Government said in 2013, launching its most recent reforms:<sup>31</sup>

*Competition creates growth and is one of the pillars of a vibrant economy. A strong competition regime ensures the most efficient and innovative businesses can thrive, allowing the best to grow and enter new markets, and gives confidence to businesses wanting to set up in the UK. It drives investment in new and better products and pushes prices down and quality up. This is good for growth and good for consumers.*

3. At present, businesses and consumers in the UK enjoy the protection of two parallel, and closely linked regimes. The principal provisions of UK competition law are contained in the Competition Act 1998 (CA 98). It contains prohibitions on cartels and other forms of collusive agreements, as well as abuse of dominant position.<sup>32</sup> Its provisions are closely mirrored on the requirements of EU law.<sup>33</sup>

---

<sup>30</sup> National Audit Office Report, February 2016.

<sup>31</sup> Private actions in competition law: a consultation on options for reform, Government Response, BIS January 2013 p 5.

<sup>32</sup> Chapters I and II of the Competition Act 1998.

<sup>33</sup> Treaty on the Functioning of the European Union, Articles 101 and 102. S. 60 of the CA98 ensures consistency of approach with the EU by requiring that questions arising under the Act in relation to competition within the United Kingdom are dealt with in

## The current position

4. Enforcement of competition law takes place in two ways, “public” or “private”. Public enforcement is by the competition authorities: the CMA in the UK and other sectoral regulators<sup>34</sup> and the European Commission at EU level. Decisions of those authorities are binding on the English Courts and give rise to substantial penalties.

5. Decisions of the UK authorities are confined to anti-competitive conduct within the UK; the European Commission considers distortions of competition in cases with an effect on trade within the EU.

6. The European Commission, which tends to focus its enforcement activity on large international cartels, levied fines between 2012 and 2016 in the sum of €8.6bn.<sup>35</sup> By contrast, the UK competition authorities issued £65 million of competition enforcement fines between 2012 and 2014. The Commission's enforcement activity extends to cartels which distort competition in the United Kingdom and worldwide and in practice serves to expand the reach of enforcement action within the UK, beyond that of the CMA, and enhance greatly the protection which consumers and businesses receive even within the UK.

7. Private enforcement consists of claims for injunctive relief and damages brought by companies or individuals (acting alone, or as part of a class action under reforms introduced in 2015). It is at least as important as public enforcement in practice. It enables those harmed by infringements of competition law to obtain

---

a manner which is consistent with the treatment of corresponding questions arising in EU law in relation to competition within the European Union.

<sup>34</sup> Covering communications and post, water, road and rail, gas and electricity, air traffic and airport operations, financial and payment services and healthcare.

<sup>35</sup> <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>

direct redress, and provides an important constraint on anti-competitive behaviour. As the Government has said:<sup>36</sup>

*Private actions are a very important limb of an effective competition regime. Where behaviour is illegal under competition laws, parties who are harmed should be able to bring action against the perpetrators – getting the compensation they deserve.*

8. Under the CA 98, a decision of either a UK regulator or the European Commission that there has been a breach of competition law is binding upon national courts for the purpose of a competition damages action.<sup>37</sup>

9. This is a hugely beneficial regime for consumers: claimants do not need to prove a breach of competition law – just the damages they have suffered as a result. They can instead take advantage of the enforcement activity of both national regulators and the Commission. In practice most competition law damages actions at least partly rely upon such decisions. There are huge impediments to claimants seeking to prove the existence of cartel arrangements for themselves, not least the secret and frequently international nature of such cartels with consequent asymmetry of information and difficulties in obtaining evidence.

10. The London courts have become a leading international centre for private competition litigation of this kind, and in recent years have seen claims for damages brought in respect of international infringements concerning LCD screens, air cargo, credit card fees, vitamins, rubber and many others. By way of example a class action against MasterCard was recently launched on behalf of consumers, seeking £14bn in damages. The English Courts, have seen the highest proportion of follow-on damages

---

<sup>36</sup> A World Class Competition Regime White Paper 2001.

<sup>37</sup> s58A (read with s47A) of the Competition Act 1998

between 2006-2012 within the EU.<sup>38</sup> This is a reflection upon the confidence placed in our system of courts and tribunals the efficacy of the remedies provided by English law and the calibre of legal services.

### **The implications of Brexit**

11. Whilst Brexit will not affect the ability of UK authorities to enforce UK competition law in the UK, those authorities in fact take very few competition enforcement decisions.<sup>39</sup> In practice, the system of competition law protection in the UK would be substantially weakened, constrained by the far more limited resources and territorial reach of the national regulators.

12. If our current system of efficacious remedies and consumer protection is to remain in place it is critical that consumers in the UK are able to rely upon decisions of the European Commission. Otherwise, competition enforcement (both public and private) will be severely weakened.

13. The starting point is that the CA98 gives effect both to our domestic competition law and also permits decisions of the European Commission to be relied upon in order to found follow on actions. The formal position is that those provisions would not be affected by repeal of the European Communities Act 1972 as they are contained in primary legislation.<sup>40</sup>

---

<sup>38</sup> [http://ec.europa.eu/competition/publications/cpb/2015/001\\_en.pdf](http://ec.europa.eu/competition/publications/cpb/2015/001_en.pdf)

<sup>39</sup> The CMA took three enforcement decisions in 2015/16:  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/539987/cma-annual-report-and-accounts-2015-16-web-accessible-version.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/539987/cma-annual-report-and-accounts-2015-16-web-accessible-version.pdf)

<sup>40</sup> See ss 47A and 58A of the CA 98.

14. It is likely that preserving those powers would therefore enable UK courts and consumers to continue to enforce the decisions of the European Commission.<sup>41</sup> The Commission will however continue to make decisions which impact upon UK business which trade in the EU. At present, its investigations encompass distortions of competition within the whole EEA, including the UK. Depending on the terms of Brexit, that may well come to an end, unless steps are taken to ensure that UK markets and consumers stay within its remit for competition law purposes. There is a powerful public interest in arrangements which enable it to continue to do so.

15. One model of such arrangements is provided by the EEA Agreement. Its competition provisions are materially identical to the EU regime.<sup>42</sup> As a consequence, competition enforcement decisions of the Commission expressly apply the provisions of the EEA Agreement and frequently consider cartel activity throughout the EEA, so as to encompass markets in Iceland, Norway and Liechtenstein as well as the EU. If the UK entered into comparable arrangements, then there would be no detrimental impact to the efficacy of the competition regime arising from Brexit.<sup>43</sup>

16. There are two further more technical matters of practical significance.

17. First, a key driver of competition enforcement in both the UK and EU is the use of leniency arrangements, under which participants in cartels may obtain immunity or reduction in fines in exchange for cooperation. At present an application in the UK is sufficient to trigger leniency across the EU and in respect of the Commission. Use and

---

<sup>41</sup> We understand there is some difference of opinion as to whether these provisions of the CA98 would be sufficient, on the basis that this would amount to the application of foreign rules of public policy.

<sup>42</sup> See Arts 53 and 54 of the EEA Agreement and Protocol Z1 and Annex XIV to the EEA Agreement.

<sup>43</sup> Consequential changes would be required to the Competition Act 1998, but not in respect of matters of substance.



disclosure of that material is carefully controlled. If that “one stop” approach were lost, there would be diminished incentive to apply for leniency, and a need for multiple filings. Thus, following Brexit, coordinating measures would be highly desirable.

18. Secondly, there would be a need for protection for UK enterprises from the risk of double jeopardy in the form of fines for the same conduct in the UK and by the Commission or other regulatory authorities in the EEA.

### **Recommendations**

19. Any post-Brexit arrangement with the EU should:

- (1) preserve the powers contained in the Competition Act 1998 which render Commission infringement decisions binding and enable UK consumers and business to seek damages and injunctive relief on the basis of those decisions.
- (2) preserve the immunity protection for leniency applicants and ensure mutual recognition and protection for immunity statements from disclosure in administrative or judicial proceedings;
- (3) protect against double jeopardy of competition fines in respect of the same conduct.

There is in addition a powerful public interest in arrangements which would extend future infringement decisions by the Commission to UK markets.

### **Brexit Working Group**

### **Bar Council**