



Bar Council response to the House of Commons' Justice Committee Inquiry into the implications of Brexit for the justice system

1. This response, which is submitted by the Bar Council of England and Wales, addresses in turn the three areas of inquiry the Committee wishes to pursue, namely the effect of Brexit on civil justice, criminal justice and legal services.

Civil Justice

2. In a globalised world, it is crucial that the judgments of one state are enforced by the courts of another. The UK is currently in the unique position whereby judgments of its courts are currently enforceable both in EU Member States and also in most Commonwealth states which is very important for the role of the UK as a hub for international litigation. It is critical 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. This is also essential in order to retain our position as the leading dispute resolution centre in the world, with the important economic benefits which this brings.

The current position on enforcement of judgments in the EU

3. 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**).¹ This applies to "*civil and commercial matters*" and provides that:

3.1. 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;

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

3.3. Common rules are applied in the EU for determining the jurisdiction of courts;

3.4. 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 – such clauses are frequently in favour of UK courts;

¹ In force in the UK since January 2015.

3.5. 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.²

4. 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 harmonised within the EU by the Service Regulation.³

5. These mechanisms 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 – For the Legal Sector in England and Wales

6. The reputation of England and Wales as the pre-eminent destination for international dispute resolution will be damaged unless the status quo as outlined above is protected. Much international dispute resolution work comes to English lawyers because the parties to a dispute 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 such 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.

7. 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 much less attractive.

The Position if nothing is done

Jurisdiction and Judgments

8. Commercial parties value continuity and certainty. 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 clauses and judgments in other Member State courts will become more open to question. This may encourage foreign parties to amend their contractual clause in favour of resolving disputes elsewhere.

9. This is demonstrated by a survey conducted by law firm Simmons & Simmons 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. The survey showed that 88%

² The *lis alibi pendens* principle.

³ Council Regulation (EC) No.1393/2007, in force in the UK since 13 November 2008. It creates a 'European judicial area' for the free movement of judicial and extra-judicial documents.

of clients thought the UK Government should make a public and early statement to remove this uncertainty.

10. 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 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 owing to this uncertainty over enforceability. Since large-scale litigation would frequently take longer than two years it is essential that interim measures are put in place.

Service

11. 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.⁴ If the UK does not enter into an agreement akin to the Denmark-EU Service Agreement,⁵ service 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.

Criminal Justice

12. Crime, especially more serious and organised crime, increasingly does not recognise national borders. Even less serious crimes are increasingly 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. Foreign nationals who commit crime in the UK often flee abroad. Some crimes can be committed easily across national boundaries, such as child exploitation, fraud and identity theft. In particular the UK has seen a massive increase in people trafficking offences. Police and the judicial authorities need to cooperate internationally in order to combat crime and bring perpetrators to justice.

13. Doing so on the basis of 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.

14. In particular the EU has been 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

⁴ Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters.

⁵ 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.

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.

15. As we withdraw from the EU, the UK will need to seek, if possible, measures in an agreement with the EU that:

15.1. Secure the speedy arrest of suspects with minimum bureaucracy, via use of the European Arrest Warrant, of those wanted by the British police who have absconded to the Continent. There will need to be some reciprocal measure;

15.2. Provide for the use of Joint Investigation Teams to investigate drug cartels, people trafficking networks and fraud which operate across national borders;

15.3. Secure evidence from overseas, using the mechanisms currently in use in the EU;

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

15.5. Provide for example for the transfer of prisoners to their home countries.

16. The courts and police will continue to want properly to identify those people with whom they deal, so that justice can be done, and the public protected against dangerous people from other countries.

17. 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.

18. In addition, the UK will undoubtedly want to secure some bilateral recognition of systems to protect the large populations of UK nationals living in 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 there may be some transfer of population after Brexit, substantial numbers of foreign nationals are likely to remain. In addition, if Britain is to be open to the world for business, substantial numbers of visitors can be anticipated.

19. 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, and would be even less so in the face of the growth of technology-enabled crime. Moreover, cross-border surveillance is now greatly improved from recent years. 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.

20. The UK has the most developed Criminal Justice System of all the current EU Member States, containing safeguards for the accused, and established rights which are not prevalent in all other Member States. Withdrawal will therefore not immediately affect the way the Crown Court and Court of Appeal conduct their business. Rights to a fair trial, the entitlement of the accused to legal advice, and support, legal aid and advance disclosure of the prosecution case, and disclosure of material undermining the prosecution, routinely take place in UK courts and will be unaffected.

21. British citizens currently have the right to make challenges to the law enforced against them on the basis of the European Convention on Human Rights (ECHR). This is not part of the EU treaty regime, but entirely separate, although frequently treated as part of the EU regime by public commentators. There is some discussion of the substitution of a “British Human Rights Act” for the Human Rights Act 1998. If such a substitution entailed a renunciation of the ECHR, then the UK would have to withdraw from the Council of Europe and other treaties. The developed law relating to Human Rights in the UK is, however, consonant with common law and any changes are unlikely to be significant.

Legal Services

22. The UK legal services market is 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 within the EU and EEA. Equally important, our exporters’ confidence in doing business abroad depends greatly on the ability of their lawyers to establish and provide services in the countries in which they seek to trade and invest.

23. There are numerous aspects of barristers’ work which will no longer be possible if the UK leaves the EEA, unless current cross-border rights are preserved. Such rights include:

23.1. Acquiring the professional title of another EU Member State through three years of practice⁶ or requalification by taking an aptitude test;⁷

23.2. Advising clients in other Member States on a temporary basis with no requirement to register with the local Bar;⁸

23.3. Representing clients in the domestic courts and tribunals of other Member States;⁹

⁶ Currently possible under the Lawyers Establishment Directive 98/5/EC.

⁷ Provided for in Directive 2005/36/EC.

⁸ Currently possible under the Lawyers Services Directive 77/249/EC.

⁹ *Ibid.*

23.4. Advising and representing clients in Commission investigations, including in particular competition proceedings – but EU rules only recognise legal professional privilege in relation to lawyers entitled to practise in a Member State;¹⁰

23.5. 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

23.6. Representing clients in the European Courts – limited to lawyers authorised to practise before a court of a Member State or an EEA State.¹¹

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 negotiates continued free access to the EU legal services market.

24. In addition, at present barristers who are EU/EEA nationals are able to move, without immigration controls, from one Member State to another for the purposes of providing legal services. It is imperative that this free movement right is maintained if barristers are to be able to continue to work in other EU and EEA Member States.

Cross-border rights under Free Trade Agreements – CETA case study: In the case of a “hard Brexit”, the position of UK lawyers would be identical to other third country lawyers. A table can be supplied which shows the current position of third country lawyers such as Canadians in the EU. There are significant restrictions (such as an obligation to satisfy economic needs tests and bans on opening law offices, drafting contracts or appearing 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 market access. It merely offers encouragement to regulatory bodies on both sides to simplify requalification in either direction.

25. 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.

¹⁰ It is for this reason that hundreds of English solicitors are currently registering with the Law Society of Ireland.

¹¹ Article 19 of the Statute of the Court of Justice.

26. 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.¹² 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 in turn help to promote UK financial services and many other sectors of UK business in Europe.

27. Equally important, 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. Major international clients are choosing to bring cases in the UK rather than elsewhere because of the expertise of UK lawyers, as well as litigation advantages of the UK courts (such as the disclosure rules). Much of this work will be lost if UK lawyers lose access to the EU market. This will in turn reduce the attractiveness of London to (for example) top US law firms which currently establish offices in the UK and use these as their passport into the EU legal market by instructing or employing barristers.

28. In conclusion, the medium and long-term uncertainty in established areas and types of practice is high. In formulating its negotiating strategy, the Government should therefore 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 EU law. The enduring international appeal of the UK, not just for its legal standing but also its attractiveness to foreign investors, will depend on the ability of UK lawyers to provide legal services to clients across the EU.

Recommendations

29. The Bar Council recommends that the Government should take action in relation to the matters covered in this response as follows:

Civil Justice

29.1. 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';

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

¹² 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.

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

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

Criminal Justice

29.5. Seek agreements with the EU as outlined in paragraphs 15 and 19 above.

Legal Services

29.6. Preserve the rights of UK lawyers under the Lawyers Services Directive 77/249/EC and the Lawyers Establishment Directive 98/5/EC;

29.7. Ensure that lawyers entitled to practise before UK courts may represent parties before the European Court;

29.8. Ensure that UK lawyers enjoy the same rights to legal privilege under EU law as lawyers of EU Member States; and

29.9. Maintain free movement for immigration purposes for UK lawyers as currently provided for in Articles 45, 49 and 56 TFEU and Directive 2004/38/EC.

Bar Council

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