

## BAR COUNCIL PARLIAMENTARY BRIEFING



### EUROPEAN UNION (WITHDRAWAL) ACT DEBATES – DECEMBER 2018

1. This briefing has been produced by the General Council of the Bar of England and Wales (the Bar Council). The Bar Council is the representative body for over 16,000 barristers in England and Wales.

#### **Summary**

2. The Bar Council is broadly content with the terms of the Withdrawal Agreement, both as to its application to legal services and the continuing application of EU law during the transition / implementation period.
3. Our primary concerns relate to the absence of agreements on judicial co-operation and the provision of cross border legal services after the implementation period or in the event of a no-deal scenario. Our national economic success and the rights of UK citizens will be undermined without such agreements, and we note the lack of ambition articulated for them in the Political Declaration.
4. The Bar therefore urges the Government to prioritise a deal on judicial co-operation and the cross-border provision of legal services during any transition period negotiation on the Future Relationship. These concerns are the focus of this briefing.

#### **Judicial co-operation**

5. The Bar notes with regret that the Political Declaration does not expressly call for judicial cooperation in civil and commercial matters to be provided for in the future relationship, but this is vital if small UK firms are to stand a chance of competing successfully with the EU and if our citizens' rights are not to be undermined.
6. A successful Brexit will see UK and EU businesses and consumers continuing to shop, trade, travel for work and play, and have personal relationships across borders. In any commercial transaction or personal relationship, agreements and arrangements can fail

and when that happens the parties may need recourse to the courts to resolve their difficulties.

7. EU citizens and businesses have for many years benefitted from having at their disposal a range of mechanisms, such as the Brussels I recast Regulation of 2012, which mean that judgments made in the UK are recognised and can be enforced in EU27 countries with a minimum of cost and delay.
8. Such recourse is essential if our businesses are to have confidence that their suppliers and customers will honour their contractual obligations. It is also vital if our citizens are to have ready access to courts and to help from their own lawyers should they buy defective goods from Europe or become injured in one of the Member States. Existing mechanisms deal with judgments and disputes across a range of legal areas including small claims, intellectual property, personal injury, consumer, migration.
9. Post-Brexit, individual UK citizens and small and medium-sized enterprises which cannot afford the cost of cross-border civil litigation (particularly in the absence of civil legal aid) or who do not have large legal teams at their disposal, risk losing their access to judicial remedies – and therefore to justice - if the Future Relationship does not provide for a similar level of civil judicial cooperation.
10. For these reasons, the Bar Council has called for a separate negotiating track to cover judicial co-operation between the UK and the EU post-Brexit so that an agreement on co-operation mechanisms could be entered into whether or not a deal is concluded.
11. The primary benefit of judicial co-operation is that it enables access to justice. The Bar Council therefore very much regrets that EU negotiators have construed justice co-operation as inherent to membership of the single market. This interpretation has had a bearing on the limitations of the Political Declaration we have described and it has meant the EU has been unwilling to put this matter on a separate negotiating track which could have ring-fenced it from the risk of trade-offs which reduce access to justice.
12. Parliamentarians may however recall that co-operation on justice matters preceded the Single Market. Prior to the Treaty of Maastricht, judicial cooperation in both civil and criminal matters between the Member States of the European Community was purely intergovernmental.
13. The Bar Council is therefore calling for existing EU instruments in these areas – Brussels I Regulation in particular - to be extended to cover the UK. Existing international alternatives would not provide the protection needed, particularly to those lacking legal or financial resources. The limitations of relying on terms of the Lugano treaty are illustrated by the examples in Annex 1.

## Legal services

14. If the UK is to fulfil its post-Brexit trade ambitions, legal professionals must be able to deliver their international services effectively and competitively in new markets and in the EU.
15. Based on the very limited provisions for services in the Political Declaration, the most likely route to agreeing a deal on the cross-border provision of legal services is the Free Trade Agreement (FTA) envisaged in the Political Declaration. Under such an agreement, however, the ability of UK and EU lawyers to practise in each other's jurisdictions - and therefore the ability of the legal services sector to contribute to the future wellbeing of the UK economy and access to justice – is likely to be severely limited.
16. Observers may ask why, in our view, an FTA offers less rather than more opportunity for the sector as well as for the wider economy. Part of the answer is that legal services regulation is an EU Member State responsibility. This means that in the event that the UK tries to secure an FTA on legal services, the Government and regulators will have to negotiate with each country individually and navigate 27 different regulatory frameworks with varying restrictions on practice remit and registration requirements.
17. At this point it is worth noting that CETA took five years to negotiate and two years to implement, and merely “encourages” regulators to agree greater legal services market access. Canadian regulators have so far refused to engage with this. Given the lack of EU competency in relation to the EU regulators, it is difficult to foresee a better result for the UK with EU 27 Member States. Additionally, there is plenty of evidence that some EU legal professions will lobby vigorously to reduce the UK's access to their markets.
18. The likely outcomes of an FTA are, therefore, that:
  - UK lawyers will lose the ability to advise on EU, host state, and third country laws, as well as legal professional privilege in relation to matters and cases relating to the EU institutions
  - The recognition of qualifications across borders will become more difficult or impossible to achieve (some Member States having nationality requirements), and
  - The loss of EU law practice rights will be likely to result in much EU-related litigation (worth hundreds of millions of pounds each year) migrating elsewhere.
19. These limitations could be overcome only if a significantly closer agreement is reached than that provided for in the Political Declaration, one which is more closely equivalent to Single Market access.

20. The limitations of an FTA must also be seen in the context of the economic contribution of the sector, and its role in supporting access to justice and the rule of law for businesses and citizens in both the UK and the EU.
21. In 2016 (the latest year for which data is available) the legal services sector contributed £26bn to the UK economy and generated a trade surplus of £4.4bn.<sup>1</sup> It is also worth noting that the cluster of professional services that the legal sector supports, as well as the trade they attract, makes a huge contribution to UK GDP.
22. The ability of lawyers, when necessary in the client's interests, to 'fly in fly out', to form associations with local lawyers and to appear with local lawyers in court, strongly underpins the rule of law agenda pursued by judicial cooperation. In the context of international arbitration, for example, *ad hoc* teams of lawyers come together to argue cases according to different laws. This is not primarily law as business, but law as justice in which high quality lawyers from different systems combine to deliver to their clients a combined level of expertise commensurate with the international nature of the problem.
23. Our courts and lawyers remain powerhouses on the international stage, and the UK is still the world's number one legal centre, but the competition from Singapore and New York, and of course from Europe, cannot be ignored. As well as overseas parties losing their ability to enforce UK judgments in the EU27, there is considerable risk that London may lose its position as the leading international dispute resolution centre.
24. An FTA-style agreement is not likely to either maintain or enhance the UK's current position, nor to enhance access to justice for UK citizens and businesses.

**Bar Council**  
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<sup>1</sup> TheCityUK, *Legal Excellence, Internationally Renowned: UK Legal Services 2018* (2018).

## ANNEX 1

### **A cross-border claim for breach of contract**

An individual or business wishes to sue for breach of contract for non-delivery of goods ordered from an EU Member State. Where does he bring the claim and, if he is awarded judgment, will that be recognised and enforced in the country of the supplier?

Under EU law, those questions would be resolved by applying the Brussels I recast regulation of 2012, which governs issues of jurisdiction and enforcement of judgments between the EU Member States. Judgments delivered by the courts of one Member State are automatically recognised and enforced in the others. Moreover, the EU has developed simplified procedures, such as the Small Claims Procedure, for enforcing low value cross-border claims quickly and cheaply.

Post-Brexit, the Government is saying that it will move to ratify the Lugano Convention 2007, which extended the scope of the Brussels I regulation to three European Free Trade Association (EFTA) countries Iceland, Switzerland and Norway. However, whilst Lugano may be a partial solution for big businesses, with large legal teams or budgets at their disposal, it will not provide the access to justice, particularly for citizens and small businesses, that the EU regime would do. Why not?

### **Limitations of Lugano**

The Lugano Convention extended the 2001 Brussels I regulation, which has been superseded within the EU by a recast version dating from 2012. The Bar was very active in lobbying for two key improvements that were made to the Brussels I text. These are not reflected in the Lugano

Convention:

- The abolition, with safeguards, of the "*exequatur*" procedure, thus removing time-consuming and costly administrative steps previously needed to secure recognition of a judgment in civil and commercial matters in another EU country.
- An exception to the *lis pendens* rule. This rule has the effect that the court first seized in a case proceeds, and any others before which another party to the proceedings brings an action, must stop. Under the 2001 regulation, the *lis pendens* rule meant that even if the parties to a contract had expressly agreed which court would have jurisdiction, if a different court was first seised, the chosen court could not proceed. In practice therefore, parties to a case wishing to avoid judgment would often launch proceedings before a court in a country known for its slow legal system, with the express intent of delaying and possibly frustrating the case. The 2012 recast of the Brussels I regulation created an exception for express choice of court

agreements to prevent these so-called “Italian Torpedo” proceedings from being brought. This has injected much needed legal certainty for businesses, large and small alike.

- It should be noted that the Government is also indicating its plans to sign up to the Hague Choice of Court Convention of 2005, which does honour exclusive choice of court agreements, and would go some way to resolving the lis pendens point for cases within its scope. The difficulties of timing and consent cited elsewhere apply here too however.

Lugano is also limited in scope, excluding for example, rights in property arising out of matrimonial relationships, wills and succession, and bankruptcy. It remains to be seen whether these will be covered elsewhere in the future relationship.

The Lugano Convention could of course, be amended to bring it into line with Brussels I recast or extend its scope. However, such amendments would take time, could open the door to less desirable amendments and would need the agreement of all signatories. Indeed, the other signatories will need to agree once the UK applies to become a signatory in its own right.