The priorities of the legal sector in the UK's negotiating objectives for withdrawal from the EU

UK Law Societies Joint Brussels Office

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The purpose of this report is to inform stakeholders in Brussels of the views and communications held by the Joint Law Societies Brussels Office, together with the Law Societies and solicitors in the UK and Brussels. The Joint Law Societies Brussels Office represents The Law Society of England and Wales, Law Society of Northern Ireland and Law Society of Scotland. This report provides supplementary information to the information communicated by the Law Societies to the UK Government and it does not aim to override those contributions. In particular, the Law Society of England and Wales[1] and the Law Society of Scotland[2] have made their contributions to the UK Government, which set out their individual views.

The key areas of concern explored in this report have been identified by the three Law Societies' members, in co-operation with the Law Societies' staff. This report therefore outlines the key areas of concern for solicitors (and the legal profession more broadly). These are the impact of the UK withdrawal from the EU on mutual access to practise law and establish law firms and maintaining the protection offered by the legal professional privilege to communications between solicitors and their clients.

The Law Societies point out the importance of recognition and enforcement of judgments in civil and commercial matters, family law and consumer law. The Law Societies are particularly concerned about what impact the UK leaving the EU will have on individuals, families and consumers residing in the UK and in the EU. We are also concerned about the impact on the judicial co-operation, in particular on criminal justice.

Accordingly, the report is divided into following sections:

1. Introduction and general issues

2. Practice rights

3. Recognition and enforcement of judgments in civil and commercial cases

4. Family law

5. Criminal justice

6. Consumer protection

[1] The Law Society of England and Wales communications and priorities are available from http://www.lawsociety.org.uk/support-services/brexit-and-the-legal-sector/
[2] The Law Society of Scotland communications and priorities are available from http://www.lawscot.org.uk/members/international/brexit/

Introduction and general issues

Since the June 23 referendum, the UK Law Societies worked with their members to chart out the impact of the UK leaving the EU. EU law covers a wide range of legal regulation, from competition and intellectual property law to judicial co-operation in civil and criminal matters. The impact that EU law has on the national legal orders and methods of integration used by EU law varies. In some areas, EU law has harmonised parts of substantive law, e.g. competition or IP law. In others, EU law simply creates forms of co-operation, where national law still determines the main substance, e.g. recognition and enforcement of judgments. This report represents the current understanding of the potential impact that the UK leaving the EU could have in areas of particular concern for the Law Societies. The findings will be supplemented by further analysis of the areas largely governed by EU laws and regulations, such as competition law, IP law or data protection law, which the UK Law Societies will be looking to provide in due course.

Our findings to date show a number of systemic issues, which will pervade throughout the different areas of law. Solicitors are particularly concerned that awareness should be raised about the loss of reciprocity, and the consequences of an increased divergence between the UK and EU regimes. Analysis of a possible "fall back" into other international regimes which may go on to dictate the EU - UK relationship is particularly important.

Impact in case of loss of reciprocity: SMEs, consumers and individuals

One of the largest overarching issues is what impact the UK's withdrawal from the EU will have on the reciprocal rights and obligations. At present, a large amount of EU internal market legislation creates rights and obligations to ensure that all states subject to the EU legal framework grant those rights and obligations onto businesses or individuals. The core principle here is mutual recognition. For example, Member States agree to recognise qualifications granted by other Member States, or agree to recognise judgments reached by the courts of other Member States automatically.

The Law Societies find that the EU frameworks have benefited the businesses and individuals both in the UK and in other EU Member States. This is evidenced by the fact that the number of cross-border trade transactions and families is larger than ever. Our concern is that suddenly losing these reciprocal legal frameworks would have consequences for businesses and individuals. Furthermore, the impact will be felt both in the UK and the other EU Member States as the individuals and businesses with those links will continue to exist on both sides of the border.

For example, losing the legal framework on recognition and enforcement of judgments means that it becomes more difficult and costly for individuals or businesses to recover the payments due for breaches of obligations, or there is no automatic right to recover assets anymore. It may also mean that the consumer protection regime is not automatically available. As the recognition and enforcement is granted on a bilateral basis, losing it will mean consequences both for businesses and consumers in the EU who are trading in the UK, as well as those operating in the EU27 from the UK.

There are some areas where there are multilaterally agreed international alternatives for reciprocity. For example, in family law there are alternative international frameworks, which would ensure that child abduction cases can be dealt with by the national courts. However, our members have identified that these alternatives are often less effective, more costly and time consuming.

This legislation has a direct impact on the lives of millions of citizens: a return to mechanisms which were suitable at a time when mobility was not as common, and when it was a privilege for the more affluent in society, seems an unfair burden on citizens of all States concerned. Furthermore, the likely outcome is that weakest in society would be the ones to suffer, particularly children, poorer families and vulnerable adults, as the processes become more costly.

Legal certainty

Another overarching issue is how the negotiation process and its outcome may impact the principle of legal certainty. It is recognised that it is unavoidable that the EU - UK relationship will change. However, the Law Societies would rather see a change that is staged so that businesses and individuals are able to plan for the changing circumstances. The Law Societies support negotiation solutions that enhance legal certainty in a future EU - UK environment.

Other areas where areas of legal certainty could be raised include where EU Member States have granted equivalence e.g. for product standards. Without a specific agreement on reciprocally accepting the standards, there could be no reason to accept UK goods in the EU 27 and EU goods in the UK.

Equivalence can be granted in more or less certain ways. Legal certainty may be at risk if the UK and EU arrive at an agreement where equivalence, with regard to each particular area, is granted only after the Commission assessment and the Parliament and the Council approval. This would mean that any change from the EU or UK side could jeopardise the equivalence decision and lead to re-consideration. The Law Societies are concerned that this would not create legal certainty for the businesses and individuals concerned.

It would be preferable to reach a more stable recognition of equivalence to allow the EU and UK to be able to recognise each other's standards in a more permanent arrangement. The impact of the unstable regime is felt by the SMEs in the UK and EU who would be less well equipped to deal with the changes in the equivalence status.

A good illustration of how the equivalence regime is developed and applied by the EU towards third countries are the adequacy decisions adopted by the Commission with regard to the third country data protection regimes (under the 1995 Data Protection Directive).[3] The adequacy decisions are the basis for personal data transfers to third countries without the need for any further safeguards. To determine the equivalent protection of personal data as the one

[3] So far, the Commission has adopted adequacy decisions for Andorra, Argentina, Canada (commercial organisations), Faeroe Islands, Guernsey, Israel, Isle of Man, Jersey, New Zealand, Switzerland, Uruguay and US. More on adequacy decisions: http://ec.europa.eu/justice/data-protection/international-transfers/adequacy/index_en.htm

provided by the EU law, the Commission examines the legislation of a third country in detail. This process takes time and the most recent legal challenges to the EU-US Safe Harbour agreement and the difficulties in reaching the new one, EU-US Privacy Shield agreement, show the scale of the challenges in recognising the equivalence between two well-developed data protection regimes.[4]

Impact on legal services

The evidence we have used in analysing the impact on our members, solicitors, is available through the analysis of, and comparison with, the current regulatory regimes, specifically the World Trade Organisation (WTO) or the European Economic Area (EEA). As this is the only evidence available, the impact of regulatory change that is likely to result from the UK's withdrawal from the EU is limited to an estimation at this point.

For example, in relation to legal services, the abolition of the non-tariff barriers by being a member of the EU means that the legal qualifications are recognised and it is possible to practice in another EU State without the need to re-qualify. Furthermore, the elimination of non-tariff barriers also applies to immigration where there is no need to get a work permit or residence permit to be able to work and live in another Member State. The abolition of non-tariff barriers also helps firms wanting to set up subsidiaries by granting them the same treatment and benefits as companies established in that country, for example they cannot be discriminated against using tax. There is no statistical evidence or information as to how many benefits have been gained as a result of the barriers being removed and so it is impossible to quantify in numbers what, and how extensive, the impact of losing this regime could be. However, there is a general consensus amongst our members that raising these barriers will inevitably impact the number of UK qualified solicitors working in Europe, in particular in the major law firms.

Priorities for the negotiations

As all matters that are covered by a reciprocal system of rights and obligations have an impact both on the remaining EU Member States and the UK, they need to be carefully examined before the withdrawal negotiations end. Such an examination will have to include a detailed impact assessment of the consequences of replacing the current system with another. Without a detailed impact assessment, or ensuring that the co-operation continues until it is clear what will succeed it, there may be severe consequences if the co-operation is suddenly suspended.

Court of Justice of the European Union

We are aware that an agreement will need to be reached on institutional issues, such as the Court of Justice's authority. This may be particularly important where the new EU – UK agreement provides rights for individuals or where the States have a power over individuals, e.g. the European Arrest Warrant. Without advocating one option over another, one possible solution could be a provision framed along the lines of the Lugano Convention Protocol No 2

[4] The 2016 report by Sidley Austin shows the analysis of 'essential equivalence' of the EU and US data protection regimes: http://www.sidley.com/publications/essentially-equivalent

on interpretation of the judgments reached under the Convention. This Protocol provides that the national courts are to take due account of the judgments reached by other courts under the Convention. This type of mechanism, combined with the notion of precedence as applied by the UK courts, would give the judgments of the Court of Justice a persuasive authority and could ensure that the EU – UK agreement is interpreted uniformly.

Transitional arrangements

A transitional period would need to reach a resolution for cases pending before the Court of Justice, or cases pending before national courts, which have an EU cross-border dimension. Such a transitional period would need to establish what would happen to the recognition of a judgment reached in an English court, if the recognition and enforcement agreement is no longer available after the UK's withdrawal and what happens where parties have agreed to grant jurisdiction to a court in Scotland, but when the dispute arises the legal framework that would compel an EU court to surrender the jurisdiction in favour of the Scottish court no longer exists. This uncertainty will jeopardise the attainment of the rights of the parties both in the UK and in the EU. Generally, the UK Law Societies recommend that co-operation is continued through a transitional period, during which it will be possible for businesses to prepare for a different regime.

The general principles of ensuring workable agreements in cross-border cases and clear transitional arrangements where changes are introduced is particularly acute when considering the position of Northern Ireland. In the event of the UK leaving the Customs Union and arriving at a separate customs arrangement, considerations will need to be taken on the Irish border and the free travel area. Alternatively, a bilateral agreement may be struck between the UK and the Republic of Ireland in the event that the UK and the EU do not reach a general customs arrangement. All of these issues are relevant to practitioners within Northern Ireland, who are seeking to plan ahead in representing their clients.

2. Practice rights granted to UK lawyers in the EU/EEA/Switzerland and to EU/EEA/Swiss nationals in the UK

Background

At present, the single market allows the European and the UK lawyers to benefit from a simple, predictable and uniform system of commercial and personal presence in EU Member States, and there is little scope for EU Member States to introduce national variations.

Under the Lawyers' Services Directive 1977 ("**LSD**"), the Lawyers' Establishment Directive 1998 ("**LED**"), the Professional Qualifications Directive 2005 ("**PQD**") and the Framework Services Directive 2006 ("**FSD**"), individual solicitors and law firms have extensive rights. These rights include the right to establish permanently in another Member State under their home title, the right to requalify without an equivalence examination after three years of regular and effective practice of host state law, and the right to set up a branch of a home state law firm.

The current system is considered a success as it allows all European law firms and individual qualified lawyers to be treated on a par with domestically established law firms across the EU.

The UK has an excellent reputation as being an open market for legal services. Some of the largest law firms in the world have their main base of operations in the UK, and there are more than 200 foreign law firms in London alone (including 100 US firms, and firms from over 40 jurisdictions).

Furthermore, thirty-six of the top 50 UK law firms have at least one office in another EU Member State, and UK law firms have a presence in 25 of the 27 Member States. The loss of rights equivalent to those granted under the LSD, the LED and the PQD could clearly have a negative impact on UK law firms.

Ability to practise outside of the EU/EEA/Switzerland

Outside the internal market for legal services, lawyers and law firms would lose these automatic rights to practise and establish and would need to rely on the World Trade Organisation ("**WTO**") framework and the General Agreement on Trade in Services ("**GATS**"). The EU framework for legal services offers far better market access than the GATS. Furthermore, each Member State is able to list its own limitations on the market access and national treatment of foreign lawyers as part of the EU schedule of commitment under the GATS.

Access to the EU courts and Legal Professional Privilege

EU membership currently allows lawyers to represent their clients before the EU courts, and specialised bodies, for example the EU Intellectual Property Office, and allows the clients to benefit from Legal Professional Privilege (LPP).[5] The loss of these rights would be of serious

[5] LPP is a privilege against disclosure, ensuring clients know that certain documents and information provided to lawyers cannot be disclosed at all. It recognises the client's fundamental human right to be candid with his legal adviser, without fear or later disclosure to his prejudice. It is an absolute right and cannot be overridden by any other interest. LPP does not extend to everything lawyers have a duty to keep confidential. LPP protects only those confidential communications falling under either of

concern to both lawyers and their clients. It is crucial that a firm operating internationally is able to represent their clients in different courts, and retaining rights of audience and LPP is essential for law firms to continue to provide the best possible service to their clients.

Mutual recognition of professional qualifications

Requalification as a full member of the host state legal profession is governed by the PQD. The basic rules are that a lawyer seeking to requalify in the EU/EEA/Switzerland must show that he or she has the professional qualifications required for taking up or pursuit of the profession of lawyer in one Member State and is in good standing with his or her home Bar or Law Society.

The PQD is particularly beneficial as it allows UK lawyers to requalify in any Member State and vice versa which is an attractive prospect for foreign law firms who operate on an international basis.

Once the UK leaves the EU, if it is not able to maintain access to the PQD, then there should be scope for the UK to conclude one or more mutual recognition agreements.

Law Societies' Key Asks for the New Relationship

Our first priority in the field of practice rights of solicitors is to maintain the status quo and for UK lawyers to be able to continue to practise law and base themselves in EU Member States. We are also keen to maintain the possibility for EU, EEA and Swiss lawyers to come to the UK and establish and / or re-qualify. This could be achieved by maintaining, or introducing arrangements equivalent to:

- Lawyers' Services and Lawyers' Establishment Directives;
- Professional Qualifications Directive; and
- Rights of audience before the European Court of Justice and legal professional privilege for communications in EU cases.

Our second priority is to maintain access for international talent to the UK legal services market post-Brexit. We would like the UK to remain an open jurisdiction for international lawyers regardless of the form of any new agreement with the EU.

Our third priority is to reassure our European partners that UK solicitors remain committed to continuing co-operation in the field of judicial co-operation, criminal justice, professional rules and other important areas of law.

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the two heads of privilege: advice privilege or litigation privilege. For the purposes of LPP, a lawyer includes solicitors and their employees, barristers and in-house lawyers.

3. The recognition and enforcement of judgments in civil and commercial matters

Introduction

The purpose of this section is to set out the consequences that the UK's withdrawal from the EU membership on the system of recognition and enforcement of judgments and choice of law. This section also aims to explore what alternatives may be available for the UK.

Within the EU there is an almost complete legal framework for the choice of law, jurisdiction and recognition and enforcement of judgments in civil and commercial matters. This framework facilitates two goals:

- The primary goal of the EU legal framework is the facilitation of the recognition and enforcement of judgments reached by Member States' courts, to achieve the so-called free movement of judgments. This is achieved by the Brussels I Regulation[6] (Brussels I), which provides for almost automatic recognition and enforcement of judgments. In addition to this, Brussels I also creates rules that determine which courts have jurisdiction to hear a case. If a court has seized jurisdiction under these rules, Brussels I provides for effortless and speedy recognition and enforcement of the judgment in all other Member States.
- The second goal of the rules is to facilitate the national courts in reaching their decisions. For example, the jurisdiction rules adopted under Brussels I aim to point to the most appropriate court to hear the case. The choice of law rules, which are set out in the Rome I Regulation[7] (Rome I) on contractual relations and the Rome II Regulation[8] on non-contractual relations, also connect with this second aim to facilitate the courts in hearing the case and reaching a decision. These rules on choice of law assist national courts in reaching decisions by setting out the rule regarding which law the court needs to apply in a given case before it. Rome I, for example, allows the parties to a contractual relationship to choose the law applicable to the contract, and Rome II creates criteria for choice of law where the facts point to several legal systems in non-contractual cases. It is desirable, even though not always achievable, that the jurisdiction rules point to a court in the same state as the applicable law rules.

Finally, the EU provides a framework for the rules regarding the service of documents and taking of evidence, which facilitates the operation of courts. It is very difficult for courts to operate in cross-border cases where there is no formal agreement on the service of documents or taking of evidence, or where the procedures are very cumbersome. To facilitate this, the EU has established the Service of Documents and Taking of Evidence Regulations, which currently apply in cross border cases.

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[6] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

[7] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008

on the law applicable to contractual obligations

[8] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations

Negotiation priorities

The primary goal here should be to ensure the continued reciprocal recognition and enforcement of judgments. This would be in the interest of citizens and businesses both in UK and the EU.

The inclusion of the recognition and enforcement of judgments is desirable where there is a continued trade agreement between the UK and the EU, regardless of the form of the new UK-EU relationship. This is because the recognition and enforcement of judgments supports cross-border trade as it provides a mechanism for trade partners to enforce certain obligations in cases of dispute. Trade partners will therefore have access to courts and they will also be able to enforce judgments between states without the need to start proceedings again, where for example assets are in different jurisdictions.[9] The current EU framework covers a wide variety of judgments, from where there is a choice of court agreement between the parties to consumer and employment cases. Furthermore, the current EU framework also includes provisional orders, such as decisions to freeze the assets, and mediation awards, which are particularly important in relation to disputes involving consumers.

When the UK withdraws from the EU, the recognition and enforcement of judgments in civil and commercial matters is not automatically available. This means that it is necessary for the UK to negotiate and obtain access to a framework that can continue to guarantee the recognition and enforcement of judgments.

Ensuring recognition and enforcement after the EU membership

There are alternative approaches that could provide for continued recognition and enforcement of judgments in civil and commercial matters. These are:

- maintaining the Brussels I framework as part of the EU-UK agreement on the new relationship;
- accession to the Lugano Convention on civil and commercial matters; and
- the various conventions agreed at the Hague Conference on Private International Law.

Practitioners would prefer to maintain the application of Brussels I as part of the new EU - UK relationship. Compared with the alternatives, the Regulation covers the widest variety of judgments and orders, includes modernised rules on jurisdiction and gives speediest and most efficient enforcement of judgments.

[9] The Lugano Convention, which allows the recognition and enforcement of judgments in civil and commercial matters between the EU and EFTA states was considered as a pre-requisite for a deeper single market access via EEA Agreement.

Lugano Convention

The Lugano Convention [10] provides for an almost parallel system of recognition and enforcement of judgments in civil and commercial matters to Brussels I. The Convention is open to the EU and EFTA States, and any other States that are invited by the participating states to join. This could provide an alternative route to guarantee recognition and enforcement of judgments to Brussels I. However, there are two specific issues that arise in this context: Brussels I was revised as to *lis alibi pendens* and recognition and enforcement; and the Lugano Convention will need to be ratified by all the parties to it.

Modernisation of the Lugano Convention Regime

Brussels I was reviewed from 2011 to 2012, however, the Lugano Convention has not yet been amended to include the revisions. There are two amendments that practitioners involved in Brussels I cases consider to be particularly important. This is because they empower the parties' chosen court to ignore other courts first seized of proceedings, and provide rules for streamlining the recognition and enforcement of judgments for more expeditious administration of justice.

1. The first amendment is the revised *lis alibi pendens* rule, which deals with a situation where proceedings have been opened simultaneously in several Member States. Under the Lugano Convention, if there are parallel proceedings opened in courts of different Member States, priority is given to the court first seized to initially decide whether it has jurisdiction to hear the case. The courts that have opened their proceedings at a later stage must stay their proceedings and wait for the first court to act. Brussels I was revised to allow the court chosen by the parties to continue with its proceedings without having to wait to hear from the court first seized. This strengthens the party autonomy and empowers the court chosen by the parties to ignore proceedings started in other courts in violation of the agreement by the parties.

    - There is some evidence, in particular from financial services (e.g. the application of the ISDA [11] model contracts), that in some instances parties have tried to frustrate a case by racing to open proceedings in Member States that have courts which are slow in making a determination of jurisdiction, instead of bringing the case in the English courts, which have been chosen under the agreement. This is called an "Italian torpedo" and the new Brussels I *lis alibi pendens* rules allow the English courts to continue with cases where the parties have made such a choice of court agreement. Conversely, under the Lugano Convention rules, the English court would have to wait until the court first seized has denied jurisdiction.

2. Almost automatic recognition and enforcement of judgments - Brussels I helps to make the recognition and enforcement of judgments almost automatic, as if they were judgments

[10] Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters

[11] International Swaps and Derivatives Association

from the courts of that same Member State. This increases the speed and certainty of judgments. Under the Lugano Convention, an exequatur is required whereby there is a need to open first recognition process at the courts of the Member State seeking recognition and enforcement.

The view of practitioners is that, if access to the Brussels I recast Regulation is not possible and instead the Lugano Convention framework is chosen, the UK and the other parties should aim to include the Brussels I amendments in the Lugano Convention.

Ratification of the Lugano Convention and Transitional Period

It should be noted that the Lugano Convention will need to be ratified by all parties concerned in order to become an effective alternative to Brussels I. This process of ratification may delay the entry into force of the Lugano Convention. If this delay is realised, a gap could be created between the operation of the EU law and the Lugano Convention, which would be highly detrimental because of the uncertainty it creates. This uncertainty will be detrimental both to parties in the EU and in the UK. Therefore, in this case, the UK Law Societies strongly recommend the inclusion of the recognition and enforcement of judgments and access to Brussels I in any transitional arrangement between the UK's withdrawal from the UK and the new agreement.

The Conventions agreed at the Hague Conference on Private International Law

The Hague Conference on Private International Law is a global organisation for cross-border co-operation in civil and commercial matters. The Conference has negotiated several agreements on the recognition and enforcement of judgments, including a few that will be crucial to ratify as the UK withdraws from the EU.

There is a Convention on the Recognition and Enforcement of Civil and Commercial Judgments from 1971, however, this Convention has only been ratified by four states: Albania, Cyprus, the Netherlands and Portugal. Therefore ratification of this Convention does not provide for a satisfactory solution for a new UK – EU relationship on recognition and enforcement of judgments.

Choice of Court Agreements Convention

An important convention that we would recommend ratifying is the 2005 Choice of Court Agreements Convention on Civil and Commercial Matters. This Convention has been ratified by the EU (2015), Mexico (2007) and Singapore (2016). The UK is therefore already a party to this Convention as a Member State.

As a point of priority, it should be ensured that the UK will accede to the Convention, as seamlessly as possible, as the UK withdraws from the EU membership. Usually it takes three months for the ratification to enter into force. If the UK were to deposit the ratification document only at the withdrawal, it could lead to a three-month period when the Convention is not applied, which again would create a wealth of uncertainty as explained below. This should be avoided and we will be discussing this with the UK Government as well as with the Hague Conference and the Netherlands authorities who are the depositaries of the Convention.

Limits of the Choice of Court Agreements Convention

The Convention provides that it applies only to those choice of jurisdiction agreements which have been concluded after its entry into force. Without a transitional arrangement with EU, there may appear a gap whereby judgments reached by UK courts on the basis of agreements concluded before the entry into force of the Convention cannot be enforced. The transitional agreement would therefore be needed to fill this gap. It could provide, for example, that agreements concluded prior to the entry into force of the Convention fall to be decided under Brussels I rules.

It should also be noted that while this Convention is very important to commercial adjudication, as it provides for a recognition and enforcement of judgments where there is an exclusive choice of court agreement between the parties to the dispute, it does not fully replace Brussels I framework. Both Brussels I and the Lugano Convention apply to all judgments in civil and commercial matters, including for example where there is a consumer, employment or insurance dispute.

Furthermore, the Hague Choice of Court Agreements Convention applies only where there is an exclusive choice of court agreement between the parties. Therefore, the Convention does not apply where there is an asymmetrical or a hybrid choice of court contract, i.e. where the parties have chosen different jurisdictions or courts to solve different areas of disputes. These kinds of clauses are often included in the financial services contracts. Legal practitioners have pointed out that the judgments following from disputes where there is such an asymmetrical or hybrid choice of court clause would not get recognised and enforced.

The Hague Judgments Project

The Hague Conference is currently working on a new global judgments convention. In 2016, the Council on General Affairs and Policy of the Hague Conference welcomed the work completed by the Hague Judgments Project Working Group on this, and they decided to set up a Special Commission to prepare a draft Convention. The new agreement is almost ready and it is likely to be presented for political approval during 2018. We are aware how the EU has been one of the negotiators of Convention, supporting its conclusion.

The proposed judgments convention aims to provide recognition and enforcement of judgments in civil and commercial matters. However, unlike Brussels I and the Lugano Convention, it does not aim to provide for recognition and enforcement of judgments in consumer and employment contracts. The impact of this is further discussed below.

Service of Documents and Taking of Evidence: Differences between EU Regulations and the Hague Conventions

Additionally, it is important to ensure that courts can continue to obtain documents and evidence from other EU jurisdictions. The agreement on the new EU-UK relationship on civil justice co-operation could also include the Service of Documents and Taking of Evidence

Regulations as they support the aims of the recognition and enforcement of judgments and speedy and efficient dispute settlement mechanisms.

The Hague Conference has previously adopted Conventions on the service of documents and the taking of evidence and the UK is already a party to them. Generally these Conventions have been widely ratified within the EU: the Service of Documents Convention has been ratified by all Member States apart from Austria, and the Taking of Evidence Convention has been ratified by all apart from Austria, Belgium and Ireland. Furthermore, they are currently being applied where non-EU states have ratified them. The Conventions also provide a global setting for the service of documents and the taking of evidence in civil and commercial matters.

Practitioners involved in the processes of serving documents and taking evidence have however highlighted that the procedures under the Conventions are more cumbersome and slower than those under the EU Regulations. This means that the proceedings are less expeditious and more costly for the parties involved.

Case study: Crucial differences between the EU and the Hague Conventions' mechanisms

A small business from Manchester buys some glass from a factory in Athens. The contractual documents do not contain a choice of court clause. A dispute transpires: the Greek manufacturer says payments have been missed while the UK company claims the glass is defective. The Greek company threatens to bring proceedings against the Manchester company in the courts of Thessaloniki.

Under Brussels I, the starting point would be that a claimant should sue the defendant in their place of domicile. So, in this scenario, the English company could be fairly confident that the general rule would be followed and it would be sued in England. It could also be fairly confident that if the Greek company initiated proceedings in Thessaloniki, the Greek courts would stay those proceedings (as per Brussels regime). There are of course alternative grounds that the Greek company could rely on, such as place of performance or place of harmful event, which is analysed in the context of the English applicant below.

If Brussels I did not apply, the English company would need to investigate what the relevant rules were in Greece and whether it had any basis on which to challenge any subsequent proceedings brought in Greece. The English company may as a result face increased legal costs investigating the position, as well as the costs and uncertainties involved in litigating in a foreign jurisdiction and in a foreign language, if proceedings do progress in Greece.

Also, if the English company wanted to bring a claim against the Greek company in the courts in Manchester, it might be able to rely on an alternative ground of jurisdiction contained at Article 7(1) of the Brussels Recast Regulation - the place of performance of the contract. For a sale of goods, the place of performance is where goods are delivered (or should have been delivered), ie Manchester. The UK would therefore not need permission to serve those proceedings outside the jurisdiction on the glass company in Greece.

If the UK is not a party to the Brussels I or the Service of Documents Regulation, the English company will presumably have to seek the English court's permission to serve proceedings

out of the jurisdiction (adding to costs and time) and they will also have to persuade the court that the claim falls within one of the 'jurisdictional gateways' (for example it may have to persuade the court that the breach of contract took place in England). The English company may also have to seek local law advice as to how to serve the proceedings in Greece because it could not rely on the Service of Documents Regulation.

All the above will also be creating obstacles for the companies from other EU countries if the UK is not participating in the judicial co-operation measures. Equally, obstacles and extra costs are also faced by the Greek company in this scenario.

Recognition and Enforcement of Judgments in Special Cases

As made clear above, the Hague Conference Conventions do not cover as wide a scope as Brussels I and the Lugano Convention. In particular, the latter applies also to protect the weaker parties in insurance, employment or consumer contracts, ensuring that defendants can only be sued only in their place of residence or domicile. Therefore, the Hague Conventions would not protect weaker parties domiciled or located in the UK, even if the Hague judgments project comes to fruition in the not too distant future. Accordingly, the loss of these frameworks needs to be carefully analysed.

Furthermore, Brussels I forms a basic pillar on which other special frameworks for recognition and enforcement have been created. Consumer contracts are an obvious example, but they are analysed in a separate section. Another example is the Insolvency Regulation, which provides for the recognition of insolvency proceedings in one jurisdiction, that of the main place of business, which is further explained here below. Brussels I also provides for the possibility of recognition and enforcement of judgments on broader issues, such as asset recovery. Together these Regulations ensure a suitable framework for insolvency practitioners to open insolvency proceedings and recover assets for the creditors. Furthermore, effectiveness of the EU frameworks means that there is more to share for the creditors.

Insurance contracts

Brussels I includes specific provisions aimed at protecting the weaker party in insurance contracts. The relevant provisions provide that the weaker party should be protected by rules of jurisdiction more favourable to its interests than the general rules. Additional protection is also provided by Article 26(2) of Brussels I, which states that, in cases falling within the special jurisdiction rules relating to the insured, the court seized must ensure that the defendant is informed of his right to contest the jurisdiction of the court and the defendant must also be informed of the consequences of entering or not entering an appearance before the court proceeds to assume jurisdiction. These provisions are clearly favourable to policyholders and such protections may be lost both by the insured parties in the UK, as well as those insurance holders in the remaining EU countries, if Brussels I is not retained.

Employment contracts

The Brussels I Regulation specifically provides that an employee is to be treated as the weaker party in any contractual negotiations and it therefore gives such employees additional rights, which in some cases can trump the otherwise clear provisions of the contract of employment.

In essence therefore, a choice of court clause in a contract of employment will not bind the employee if it is entered into before a dispute has arisen –obviously, by definition, a clause in the contract of employment is going to predate any such dispute.

Choice of court clauses are however more usually drafted in transnational contracts, in an effort to remove any potential uncertainty. Under Brussels I an employer seeking to sue an employee in the "wrong" Member State must be met with a refusal by the courts of that Member State to accept jurisdiction. This protection will be lost from the EU employees in the UK and UK employees in the EU if the Brussels I is not retained.

Insolvency Regulation

The Insolvency Regulation provides for the recognition of opening insolvency proceedings in one Member State, as briefly mentioned above. Brussels I also provides for the possibility of recognition and enforcement of judgments on broader issues, such as asset recovery. Together these Regulations ensure a suitable framework for insolvency practitioners to open insolvency proceedings and recover assets for the creditors. Furthermore, effectiveness of the EU frameworks means that there is more to share for the creditors.

The Insolvency Regulation provides for a speedy and efficient procedure if a business is to be sold as a consequence of insolvency. It also allows "safe harbours", which allow parties confidently to assess the risk of transactions being set aside upon insolvency, and thus contribute to business certainty.

If the UK is no longer a member of the EU, this automatic recognition would cease to apply, making it more difficult for a UK insolvency officeholder to secure recognition in the EU or EU insolvency holder to secure recognition in the UK, as the question of whether the opening of insolvency proceedings are recognised would be governed by the local law; in some cases such recognition may not even be available. Additionally, without the "safe harbours", there would be no bar on transactions governed by UK laws being set aside under the laws of Member States.

4. Family law

Overview

The EU has a limited role in family law matters. Each individual Member State has its own rules about separation, divorce, maintenance of spouses and children, custody and guardianship and other family law matters.

It is important to note that EU rules in the family law area generally build upon the international conventions which already exist. For example the Brussels II Regulation, the EU's most comprehensive legislation on recognition and enforcement of family law judgments, builds upon the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations.

If the UK were to leave the EU, the applicable regime in cases would be the one provided for by the International Convention which regulates the matter concerned. If, for example, the matter concerned a divorce or legal separation then the Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations would apply to allow the recognition of divorces and legal separations, which follow judicial or other proceedings, to be officially recognised in a contracting state and ensure its legal effect.

Although the substantive family law remains under the sole competence of Member States, the EU can take measures concerning family law with cross-border implications on the basis of a special legislative procedure. All EU countries must unanimously agree and the European Parliament must be consulted. If unanimity cannot be reached, a number of Member States (minimum 9) can decide to agree to establish integration or co-operation in an area within EU structures through a procedure called "enhanced co-operation".

The 28 Member States had previously failed to reach the required unanimity in the Council to adopt initial proposals from 2011 for regulations dealing with the property regimes of international couples, one for married couples and the other for registered partnerships. 17 EU states have now however adopted these proposals, due to enhanced co-operation, in the form of the Rome III Regulation and the Regulation on enhanced co-operation regarding matrimonial and partnership property regimes. The UK does not participate in these two enhanced co-operation pieces of legislation and so would not need to disentangle itself from them.

On the whole, the aim of EU co-operation is to offer residents of the Member States legal certainty in cross border family law situations by:

- ensuring that decisions made in one country can be implemented in another
- trying to establish which country has jurisdiction to hear a particular case.

Continued co-operation

The UK Law Societies believe that co-operation is fundamental in the area of family law to ensure the continuing existence of mechanisms which have made the life of citizens, often at a trying and delicate time, easier and less stressful.

In this spirit, the continued participation of the UK in the EU Maintenance Regulation should be encouraged.[12] This is particularly important as the UK is not bound by the 2007 Hague protocol on the law applicable to maintenance obligations. The mechanisms provided by the EU Maintenance Regulation make the recovery of maintenance easier, quicker and cheaper.

It is of particular importance that the preservation of the close collaboration between courts and national welfare authorities afforded by the Brussels II bis Regulation in matters of children and jurisdiction; recognition and enforcement of children orders with the abolition of the exequatur; child protection and child abduction is maintained. EU legislation is based on mutual trust, and nowhere is that more evident than in family law. The building of this trust between national courts and welfare authorities has been beneficial to the everyday life of citizens, and so a weakening of collaboration should be avoided in the mutual interest of all parties concerned.

More specifically, the Brussels II Regulation has been successful in:

- Fixing the principle and the structure of a hierarchy of jurisdiction
- Giving opportunity to transfer cases if best for the child and best for the case.
- Providing a much improved automatic system of recognition of contact orders.
- Providing easier enforcement of children orders.
- Building on Hague on child abduction and strengthening the basic principles.

It is encouraging that the Government has decided to opt-in in the proposed revision of the Regulation and the Law Society Brussels Office proposes to engage fully in the process of revision, including on the matter of the matrimonial *lis pendens* rule, which can create an unhelpful "rush to court" in divorce proceedings. The problem of the ‘race to court’ in divorce proceedings could be addressed by including in the text of the Brussels II recast proposal one or both of two alternatives:

- A power be given to authorities/ courts to transfer divorce proceedings to a more suitable authority / court – as is already possible under Article 15 in respect of proceedings concerning parental responsibility; and /or
- An express hierarchy can be introduced into the jurisdictional bases found in the present Article 3(a) and (b)

The Law Society Brussels Office would also like to see a continuing participation of the UK in the Regulation (EU) 606/2013 on mutual recognition of protection measures in civil matters, referring specifically to any protection measure aimed at protecting victims of violence. In this context, we advocate the ratification by the UK of the Council of Europe Convention on preventing and combating violence against women and domestic violence.

[12] Regulation (EC) n. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and co-operation in matters relating to maintenance obligation

5. Criminal justice co-operation

Overview

The UK is considered by many to have been one of the leading states in shaping early EU policy in the area of criminal justice and policing. The UK Law Societies have historically supported the EU's efforts to improve access to justice in a criminal context, particularly in relation to measures aimed at improving the rights of accused persons. For example, the Law Society of Scotland provided a submission to the House of Lords Committee on policing and security issues.[13] Similarly, many of the EU mechanisms for co-operation in policing have provided benefits in terms of facilitating investigations, sharing information, and ensuring that processes - for example in terms of extradition - function more efficiently.

Continued co-operation

The Brussels Office has identified some priorities for effective continued co-operation with other Member States to help protect UK and EU citizens and ensure effective law enforcement on cross border issues.

Any reduction in the level of access and co-operation between the UK and EU in the criminal justice field would impair and delay effective law enforcement for both sides. Information needs to be exchanged swiftly and cross-border investigatory teams need to be established in order to have effective cross-border action. The relationships between European police forces have developed over time to achieve mutual trust and co-operation, which has been assisted by joint initiatives introduced by the EU. This level of trust towards the UK will be difficult to maintain if the UK does not co-operate with cross border mechanisms and agencies, and will jeopardise the security of EU and UK citizens

Involvement in all of these measures will mean the UK will also have to consider safeguards for personal data which will need to be negotiated.

<u>Co-operation of courts</u>

The UK's membership of Eurojust allows us to benefit from the co-ordinated work of joint investigation teams across Member States which facilitate the prosecution of serious cross-border criminal offences, such as terrorism and child trafficking offences.

There is precedent for non-Member States to have a relationship with Eurojust. Whilst Norway is not an associate member of Eurojust, it signed a co-operation agreement with the organisation in 2005 and has liaison prosecutors based at Eurojust. The USA has also signed a co-operation agreement. If the UK moves from national college members to liaison officers it is likely to lose influence on the work of the organisation.

<u>Co-operation through the sharing of information</u>

[13] http://www.lawscot.org.uk/media/970316/crim-written-submission-home-affairs-commitee-eu-policing-and-security-issues-submitted.pdf

The UK currently participates in the Schengen Information System II (SISII)[14], the European-wide IT system to facilitate co-operation for law enforcement including persons wanted for extradition, missing persons and witnesses. The UK has not opted in for immigration and border control purposes.

Co-operation of joint security operations

Europol focuses on intelligence analysis to support the operations of national law enforcement agencies in Member States. This allows EU Member States to continue to work together to combat serious crime including unlawful drug trafficking, illegal immigrant smuggling, trade in human beings, money laundering and terrorist activities.[15] Norway has a co-operation agreement with the EU which centres on exchange of operational information but can also include Europol activities such as exchange of strategic intelligence and specialist knowledge of participation in training.

The Law Societies welcome the recent Government commitment to adopt the Europol opt-in in May 2017, and recommend that the UK continues its involvement in Europol as a member or through a co-operation agreement.

European Arrest Warrant (EAW)

The EAW sets out a court-led process whereby the surrender request (in the EU surrender replaces extradition) from one Member State's courts or prosecutors is almost automatically recognised and enforced. The EAW is more efficient than traditional extradition requests which are usually dealt with by the diplomatic services.

The EAW is particularly important as the UK may not be able to fall back on previous extradition arrangements, namely the 1957 Council of Europe Convention on Extradition (ECE). Some Member States would be unable to apply the ECE due to superseding legislation and others never brought it into force (e.g. Ireland in relation to the UK,) so bilateral arrangements would be required which are likely to be less efficient.[16] Our members have noted that this could lead to extraditions taking years rather than months, as under the current system.

The Law Societies believe the UK should look to retain the EAW which safeguards UK citizens and helps ensure that the interests of justice are served.

European Investigation Order (EIO)

[14] http://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system_en

[15] SISII enables participating countries to share and extradition purposes for whom a warrant has been issued; missing persons who need to be placed under police protection or in a place of safety; witnesses, absconders or others to appear before the judicial authorities; people or vehicles requiring specific checks or surveillance; items that are lost or stolen, and which are sought for seizure, or for use as evidence (eg. firearms, passports).

[16] As the House of Lords Committee on Extradition Law acknowledged in 2014, even if we were able to fall back on the ECE it would be slower than under the EAW and many witnesses (including the Law Society) criticised the Convention system as being inefficient, cumbersome, slow (which resulted in long periods of pre-trial detention for suspects), expensive, technical, political, restrictive, containing a series of loopholes and subject to less judicial oversight.

As from 22 May 2017, the EIO will replace most of the existing laws in the area of judicial co-operation.[17] The new mechanism will cover almost all investigative measures, such as interviewing witnesses, obtaining information or evidence already in the possession of the executing authority, and (with additional safeguards) interception of telecommunications, and information on, and monitoring of, bank accounts.

The UK should seek to remain a party to this instrument, or negotiate equivalent mechanisms. Experience shows that extending such co-operation to non-EU states can take years to negotiate and can result in more limited forms of co-operation.

[17] The Council of Europe Convention on Mutual Assistance in Criminal Matters of 20 April, 1959 (and its two additiona protocols), Parts of the Schengen Convention, The 2000 EU Convention on Mutual assistance in criminal matters (and its Protocol), The 2008 Framework Decision on the European evidence warrant, The 2003 Framework Decision on the execution in the EU of orders freezing property or evidence (as regards freezing of evidence).

6. Consumer Protection

Overview

EU consumer law provides a framework for a wide range of consumer rights, covering food and product safety, unfair commercial practices, consumer information, such as product labelling and packaging, and consumer redress.

The majority of UK consumer legislation derives from the EU and is implemented into the UK regulatory framework through either primary or secondary legislation, like other EU legislation. For instance, the Consumer Rights Act 2015 is the main piece of UK legislation providing consumer protection rights. The Act is primary legislation and implements the EU Sales Directive on Consumer Goods and Guarantees 1999/44/EC. On the other hand, the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 is a secondary piece of legislation, which implements the EU Consumer Rights Directive 2011/83/EC. In addition, there are also some EU rules contained in EU regulations and/or EU case law, which have a direct application in the UK: for example, compensation for flight delays.

The bulk of consumer protection legislation is therefore already UK legislation, so it is likely that it will be incorporated into UK law through the Great Repeal Bill.

Due to the nature of the single market and an increase in e-commerce, consumers in Europe are now accustomed to buying products from across the EU and to travel for business and pleasure. The main uncertainties deriving from the UK's proposed withdrawal from the EU for consumers are therefore situations surrounding travel abroad and EU cross-border transactions.

Cross-border consumer transactions

Contracts governed by the consumer's home country law

Rome I establishes that a contract between a business and a consumer is to be governed by the law of the country where the consumer lives on the condition that the business operates or undertakes marketing (including online marketing) in the consumer's country. This allows the consumer to be protected by the rights of their home state, which they are likely to be more familiar with.

Ideally, the UK would continue to take part in Rome I in the event of a withdrawal from the EU. If this is not possible, we believe that the UK should maintain the rules established by Rome I, in which case the UK government should immediately make it clear that they will apply the rules set out in Rome I by converting them into domestic law.

Recognition and enforcement in consumer issues

The Brussels I Regulation[18] (Brussels I) sets out a uniform system under which civil and commercial judgments are recognised and enforced throughout the EU area.

As noted in Chapter 3, Brussels I normally allocates jurisdiction for the courts of the state where the defendant is domiciled. It provides for an exception for consumers, where they are able sue others or defend themselves in their home court and have any judgment enforced almost automatically across the EU. This reversal of the normal jurisdiction rule allows the consumer under certain circumstances to have the case brought in their home court, which makes it easier for them to bring a case and feel familiar with the process. The same weaker party protection applies to insurance contracts, which is another advantage for consumers.

The UK should negotiate continued participation in the Brussels I framework as there is a need for reciprocity between the UK and EU Member States as, where the framework does not apply, consumers face the challenge of jurisdiction of choice clauses within standard terms and conditions, which mean that they are unable to have their case heard in the court that is familiar to them. UK consumers who buy goods or services in the EU and EU consumers who buy goods or services in the UK would therefore find themselves at a disadvantage if the framework were not to apply.

Recognition and enforcement in motor traffic accidents

The combination of Brussels I and the Motor Insurance Directive allows residents who are victims of car accidents to use their home courts to pursue insurance claims after accidents occurring in another Member States. This right is particularly important where the accidents involve personal injuries or fatalities.

Passenger Rights

EU legislation on passenger rights sets a harmonised minimum level of protection irrespective of the mode of transport used. For example, under EU law, passengers can claim compensation for certain flight, train and coach delays that occur within the EU and are between EU and non-EU airports and terminals.

Package Travel

The EU package travel rules protect consumers who buy a package holiday consisting of two or more elements, for example a flight and a hotel, or a hotel and a car hire. The law establishes requirements for clear information, in particular for the liable party to be identified. Under these rules, the business that organises the package holiday is responsible for all the elements of the package, even if it is not directly providing each element.

Roaming

[18] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

The EU roaming rules have reduced the cost of making and receiving calls abroad within the EU and roaming charges are due to be phased out after June 2017. The advantages for consumers of remaining part of this system is therefore evident and we would recommend that the UK negotiates continued participation in these mechanisms.

Cross-border enforcement

At present, the enforcement of EU consumer law is monitored through market surveillance and enforcement mechanisms carried out on a domestic and cross-border level. For example, in enforcement in the UK is carried out by authorities such as Trading Standards, the Competition and Market Authority (CMA) and/or sector-specific regulators.

Currently, the UK is also a member of a number of agencies which help to protect consumers including:

- **Consumer Protection Co-operation (CPC) -** A network of the EU national enforcement authorities, which aims to detect and prevent cross-border illegal commercial practices.
- **RAPEX** - A Rapid Alert System for dangerous non-food products, which allows dangerous products to be quickly withdrawn from the market, preventing further risks to consumers.

A future mutual recognition agreement

Depending on the UK's future relationship with the EU on the trade of goods, there will likely be a need for the UK and the EU to have a mutual recognition agreement (MRA) which provides for mutual recognition of product standards.

Even if the UK will still be applying European standards to its products, it will not have the automatic recognition of these standards, particularly where the UK has imported goods from outside the EU with the aim of exporting them to the EU.

There will likely need to be bilateral agreements laying down the conditions under which the UK will accept conformity assessment results (e.g. testing or certification) from the EU and vice-versa.

An MRA would include relevant lists of designated laboratories, inspection bodies and conformity assessment bodies in both the EU and the UK. Such an agreement would help to promote trade in goods between the EU and UK, ensure that consumers are getting safe products and benefit industry by providing easier access to conformity assessment.