The Brexpert witness

Chris Pamplin takes a broad view of the possible implications for expert witnesses of Britain's exit from the EU

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IN BRIEF

- What approach will be taken in relation to the taking of evidence, including expert evidence, in cross-border litigation?
- EU legislation such as the EU Taking of Evidence Regulation has simplified and assisted procedures.
- Steps will be required to ensure that clauses giving exclusive jurisdiction to English courts continue to be effective.

Over the many years of Britain's EU membership there have been numerous EU Directives, regulations and conventions, all of which have impacted on cross-border litigation in member states, eg the recognition and enforcement of judgments across borders, the determination of jurisdiction, the obtaining and taking of evidence, the investigation of civil and criminal cases and the availability of sanctions.

Alongside these wider issues there are also regulations in place governing such matters as legal assistance, money laundering, legal professional privilege and the European Arrest Warrant. New provisions must be put in place to cover all of these, but what exactly is likely to change, and when, is currently unclear.

Of course, as matters stand, nothing at all has been changed by the referendum result. The terms of the UK's withdrawal have yet to be negotiated and, until this takes place, the status quo is maintained. However, while some measures already incorporated into national legislation might not pose too many difficulties, there are others that will require some careful thought and negotiation.

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Existing EU law

Britain's membership of the EU has created a situation where a vast mass of EU legislation has been incorporated into UK law over a long period. This law will remain in place unless expressly repealed. Experts whose fields are affected by EU Directives and regulations (and these extend to almost every facet of our manufacturing, commercial and working lives) will need to monitor any amendments closely. Assuming there is a political will to do so, the task facing civil servants and parliamentary draftsmen in making such changes is colossal, and the speed of change is likely to be ponderous.

Given that some EU law (such as the Data Protection Act 1998) forms part of UK primary and secondary legislation, it is very unlikely that the UK government will rush to repeal any part of English law emanating from the EU without giving long and serious consideration to what would replace it.

Other EU regulations that apply directly to member states will probably cease to be applicable unless the UK agrees to preserve them, but it is not unlikely that most of these regulations will simply be adopted so that they continue to apply, unless changed specifically by UK domestic legislation. This would be like the model used by a number of former British colonies on gaining independence.

New EU law post-Brexit

The extent to which new EU laws will have effect in a post-Brexit UK will depend on which exit model the UK adopts. If it negotiates the Norwegian model, which now seems unlikely, it would become part of the European Economic Area (EEA), the terms of the EEA Agreement would mean that EU legislation would continue to be incorporated into English law with regard to those matters covered by the Agreement. However, if no bespoke deal can be agreed, the UK would fall back on the World Trade Organisation (WTO) model. In that case it would be free to negotiate its own agreements, relying solely on rights and obligations under WTO rules, and not be obliged to adopt EU laws and regulations unless it wished to do so.

The retention or adoption of EU law would pose its own interesting issues because the Court of Justice of the European Union (CJEU) currently has sovereignty over UK courts on points of European law. Whether the decisions of the CJEU will continue to carry any weight or authority with UK courts is uncertain but appears doubtful. Almost certainly, however, parties will no longer be able to appeal the decisions of a UK court to the CJEU, and the Supreme Court will revert to being the court of final decision. While some litigants and lawyers may bemoan this, many will welcome the saving in time and expense this will represent.

Jurisdiction & enforceability of judgments

The European regime applies, with certain exceptions, to civil and commercial cases, and aims to provide legal certainty and predictability. Its purpose is to address the

issue of jurisdiction and to simplify the reciprocal recognition and enforcement of judgments between EU member states.

The main provisions of the European regime are contained in the Recast Brussels Regulation (Regulation (EU) 1215/2012), and the EU Service Regulation (Regulation (EC) 1393/2007). Under the regime, it is generally accepted that court proceedings should take place in the member state in which the defendant resides. Reciprocal arrangements mean that service may be made, without leave, on parties domiciled in other member states and, generally, the decisions of one court may be enforced in the jurisdiction of all others. Outside the regime it's likely that service will be slower, issues of forum and law less certain, and enforcement more complicated. The UK will therefore have to negotiate agreements that will preserve, at least in the main, reciprocal arrangements.

That said, there are already conventions and treaties in existence that are broadly similar to the Recast Brussels Regulation and apply between EU member states and some non-member states. These include the 2007 Lugano Convention (currently in force between the EU, Switzerland, Norway and Iceland). It is similar to the current EU regime and, if the UK accedes to it, it is possible that there may be little significant change in the existing arrangements. Alternatively, the UK might attempt to negotiate separate bilateral or multilateral agreements with member states, although these are likely to be harder to negotiate and less certain in application. Brussels will, no doubt, lean on member states to prohibit the negotiation of separate agreements, at least in the short term, while Art 50 negotiations are under way.

It remains to be seen what approach will be taken in relation to the taking of evidence, including expert evidence, in cross-border litigation. There is no doubting that the EU Taking of Evidence Regulation (Regulation (EC) 1206/2001) has greatly simplified and assisted in the taking of such evidence, and it is to be hoped that some similar arrangement will be adopted post-Brexit.

Contractual choice of law & jurisdiction

Although the European regime provides the general rule that the court where the defendant is domiciled should have jurisdiction, it is subject to exceptions, eg cases involving employment, consumer or insurance contracts, where public policy curtails the choice of jurisdiction to protect the "weaker" party. Consequently the European regime gives autonomy to the parties to make contractual agreements regulating the forum for the settlement of disputes and the applicable national law.

Currently, UK courts are a favourite choice of jurisdiction, particularly the London commercial courts. This is due largely to their reputation for impartiality, the quality of the lawyers and judiciary, and their wide experience of international commerce cases. This preference represents a substantial benefit to all those who make their living from work in the commercial courts, including, of course, many expert witnesses who deal with cross-border disputes in such fields as: energy; patents; construction; shipping; and international freight. If the UK is to retain its leading role as a venue for the determination of commercial disputes, steps will be required to ensure that clauses giving exclusive jurisdiction to English courts continue to be effective.

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The UK, particularly London, is such a large centre for commercial litigation that most observers agree nothing is likely to change, at least in the medium term. As with everything else, it is simply a matter of negotiating some effective mechanism to ensure that commercial agreements to submit disputes to the exclusive jurisdiction of the English courts will become no less effective. This could be by negotiating a separate membership of the existing Recast Brussels Regulation, or, perhaps more likely, reverting to the Brussels Convention or unilaterally signing up to either the Lugano Convention or the Hague Convention on Choice of Court Agreements. However, the uncertainty in the interim may lead other European legal centres, jealous of London's position, to attempt to steal work while they can. While this is a slight concern for advocates and experts who work in this field, I suspect that the UK's position is robust enough to withstand such opportunistic poaching.

English contract law is largely unaffected by Brexit and likely to continue to be widely used as the law of choice in many commercial contracts. The courts of EU member states will, in any event, still be bound to decide choice of law in accordance with the Rome I and Rome II Regulations, which apply to laws of jurisdictions outside the EU as much as those within. Post-Brexit, the UK can pass legislation that will reflect the current EU regulations or, by default, fall back on the existing Rome Convention which contains similar provisions for contractual choice of law agreements.

An unholy mess?

Nothing perhaps is insurmountable, but there are myriad anomalies that Brexit will create in our legal system. For example, EU Regulation 600/2014 currently requires disputes relating to financial market transactions between EU and non-EU parties to be submitted to a court in an EU member state. Where both parties wish the case to be heard in the UK, UK courts will presumably consider that they are not bound by this and will disregard the Regulation. How this will sit with other EU courts, and how it will affect enforceability of judgments, is debatable. Regard must also be had to the EU Directives with direct application to how our courts and legal institutions function. These include Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings and the Right to Information Directive 2012/13/EU. The latter applies to all suspects and defendants in criminal proceedings and confers:

- the right to know your rights (Arts 3, 4 & 5);
- the right to know the case against you (Art 6); and
- the right of access to the evidence against you (Art 7).

Brexit will also cast some uncertainty over the UK's relationship with institutions such as the CJEU and the European Court of Human Rights, and its adherence to the European Convention on Human Rights, incorporated into domestic legislation by the Human Rights Act 1998. Strictly speaking, these are Council of Europe rather than EU institutions, but how, if at all, they will be affected by Brexit is another uncertainty. Directives and conventions such as these have been absorbed into our own justice system and relied upon over many years, and may have no direct equivalent in our own constitution or domestic court rules. Consequently, there will be many issues to be assessed and holes to be filled. Those to whom the task falls are not to be envied.

However it pans out, it seems likely that there will be plenty of extra work to go around. **NLJ**

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