



Select Committee on the European Union

Justice Sub-Committee

Corrected oral evidence: Brexit: civil justice cooperation and the CJEU

Tuesday 6 December 2016

10.45 am

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Members present: Baroness Kennedy of The Shaws (Chairman); Lord Cromwell; Lord Judd; Baroness Ludford; Baroness Newlove; Lord Oates; Lord Polak; Baroness Shackleton of Belgravia.

Evidence Session No. 1

Heard in Public

Questions 1 - 5

Witnesses

I: Dr Louise Merrett, Reader in International Commercial Law, Cambridge University; Professor Richard Fentiman, Professor of Private International Law, University of Cambridge; Professor Steve Peers, Professor of European Union Law and Human Rights Law School of Law, University of Essex.

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Examination of witnesses

Dr Louise Merrett, Professor Richard Fentiman and Professor Steve Peers.

Q1 **The Chairman:** Welcome. I know that one of your number is still not here but I thought we might get under way and Professor Steve Peers from Essex University can join us eventually. Welcome, Professor Richard Fentiman and Dr Louise Merrett.

Let me just run through the procedure that starts these sessions. The session is open to the public. I think you know that, but there is also a live webcast of the session that is subsequently accessible via the parliamentary website. A verbatim transcript will be taken of the evidence and will be put on the parliamentary website. A few days after this evidence session, you will be sent a copy of the transcript and it will be an opportunity for you to check it for accuracy. If you could get it back to us with any corrections as quickly as possible, that would be invaluable. If, after this session, you decide that there are matters that you could have elucidated or additional points you could have given us, you are welcome to submit supplementary written evidence, and please do so.

If you could introduce yourselves for the record, that would be wonderful. Then I would like you to give a short presentation on the matters you would like to help the Committee with today. Professor Fentiman, would you go first?

Professor Richard Fentiman: Thank you. I am Richard Fentiman, professor of private international law at the University of Cambridge.

Dr Louise Merrett: I am Dr Louise Merrett, reader in international commercial law at the University of Cambridge.

The Chairman: Thank you both. Professor Fentiman, perhaps you could start off and give us an outline. Many of us are novices in the intricacies of this area of law, despite being lawyers ourselves, so we would be grateful for your assistance.

Professor Richard Fentiman: Thank you very much, Chair, and thank you for asking us to give evidence today on this important question.

The Chairman: Could you pause for a moment, Professor? We have our third witness, Professor Steve Peers. It is lovely to see you, Professor Peers. I know it is quite hard to get into this building nowadays because of security so please do not worry about being a minute or two late. It is good to see you. Could you introduce yourself?

Professor Steve Peers: I am Professor Steve Peers from the University of Essex. I write about EU justice and home affairs law as well as Brexit and other EU law issues.

The Chairman: Thank you. Professor Fentiman was just telling us about the area of law in which he specialises and how he might assist us today.

Professor Richard Fentiman: Thank you. I should say that I considered these matters with my colleague Dr Merrett and I think I can fairly say that we agree on all the essentials. So it might be helpful if I said a few words that encapsulate the bullet points that might anchor our discussion of the questions you have very helpfully asked.

I should begin by saying that we are primarily concerned with the impact of Brexit on civil and commercial litigation. I am aware that your questions ranged more widely than that but the areas of matrimonial law and maintenance are outside our expertise. So we wish, if we may, to focus on those issues, particularly with reference to the importance of commercial litigation in London and the way in which that important sector of our economy might be impacted by Brexit.

Perhaps I may summarise as follows. Underlying the answers to the questions you posed are a number of key points. We thought it was important at the very beginning to distinguish between three distinct issues as we see them. First, we feel that there is a need for certainty now to preserve the aspect of our legal services market that centres on cross-border litigation in London. That is an immediate concern. Secondly, of course, there is a distinct issue about securing an optimal immediate post-Brexit solution. That is, what should the legal landscape look like at one minute past midnight on the day we exit the EU? That may be distinct from our third question: what should the mid or long-term solution be in this area? We are conscious that there may be an interval between the moment of Brexit and putting into place a longer-term solution.

It seems to us that whatever the answer to the question, "What is the long-term solution?", it is necessary to have at least in view a solution immediately post-Brexit to provide the certainty that is so necessary now to ensure the continuation of the legal services market as it relates to the commercial court.

Our particular conclusions that go to your questions are as follows. First, we consider that maintenance of the current regime—that is, a regime based on the current EU rules in this area—is not essential post-Brexit. I should explain—we can perhaps come back to this later in more detail—that this is an area of law in which the EU regime has not replaced the common-law rules. The common-law rules still exist and are widely used—indeed, in a large number of cases. The point is that even at the moment, when EU legislation in this area falls away, there will not be a vacuum; it will simply be the case that the widely used rules, which are considered around the world as state of the art rules for dealing with cross-border matters, would simply occupy the space vacated by the EU regime. A related point is that there would be no loss of performance post-Brexit. The courts and litigants will be able to continue and the rules that would be used are very satisfactory.

As we will explain, this solution, which is immediately post-Brexit simply to allow common law to do the work, is associated with a more technical matter that I shall mention now and to which we will perhaps come back.

We consider that, side by side with allowing common-law rules to operate, it would be necessary for the UK to ratify an important international instrument that currently exists: the 2005 Hague convention on choice of court agreements. Perhaps I can come back to the significance of that later.

So our first point is that we do not need, at least immediately post-Brexit, to do anything other than allow the common-law rules to fill the space. However, we also consider that, in the mid to longer term, having a solution that reflects or is based on the existing European regime would be optimal. There are important reasons for that. To fall back on the common law is a unilateral and not a reciprocal solution. By that I mean that it provides certainty as to the rules that our courts would apply but involves no reciprocal obligations as between us and member states of the EU. So in the mid to longer term, we think a solution at least based on the current EU rules would be optimal because an element of reciprocity would be desirable.

The next, and perhaps related, point is that in the interval—if there is an interval—between the moment of Brexit and the putting in place of some longer-term solution, it follows from what I have said already that we do not consider that the optimal solution in this area would be simply to include aspects of the existing EU regime in a Brexit statute. That is, we do not think it would be appropriate to implement aspects of the current EU regime in this area as domestic legislation. The reason for that is very simple: those rules are rules that in their nature operate in a reciprocal way, but there would be no reciprocity post-Brexit if we were simply to include these rules in national legislation.

Our next general conclusion is that in relation to the role of the Court of Justice of the European Union, clearly if we simply resort to the common-law rules, that court has no role in this area at all. If, however—perhaps in the mid to longer term—we were to introduce a regime that reflects the current EU rules, our feeling is that although a degree of uniformity in the operation of that regime is desirable, it would not be necessary for the Court of Justice to have any mandatory jurisdiction. That is to say that its decisions might very well have persuasive effect, but we see no reason why they should have a decisive effect.

Our next conclusion, which we can come back to in the questioning, is that the threat to the legal regulation of cross-border disputes and to the market for legal services at the moment lies in the current degree of uncertainty. We therefore regard it as being of first importance that some decision should be made and some clarity offered now as to what the position would be post-Brexit. I can come back to that later, but essentially the risk is that those who currently use the market for legal services in the City of London, those who use the commercial court in London, would simply take their business elsewhere, which they are likely to do if there is uncertainty.

Our final point is simply this, and it relates to a question that you asked us about the UK's negotiating position. Our view, following from what I

have said, is that it is important to remember that we would not be negotiating from a position of weakness. That is to say that we need not be worried about the absence of the EU rules, because if indeed the common-law rules were, post-Brexit, to occupy the space, we would have a well-known and certain body of rules regarded throughout the world as the world-leading rules in that area. There is no need for urgency; we are not talking about an operation to salvage the operation of existing EU rules.

That leads to the final point that in so far as the optimal solution might be in the mid to longer term, our view is that proper time can be taken to achieve the best solution in that area.

Q2 The Chairman: Professor Fentiman, that was really interesting. For those of us who are lawyers, it will not be unfamiliar to us that the common law has provided, as you said, state-of-the-art rules when it comes to commercial litigation and has led the way and been adopted in many places, even places that do not have common-law jurisdictions. But how important are the Brussels Regulations, such as the Brussels IIa Regulation—I know you are not a family lawyer—and the Maintenance Regulation, particularly in your field of commercial law, just in maintaining the confidence of our commercial relationships with the rest of Europe?

Professor Richard Fentiman: I think my answer would be that in terms of people bringing business to the City of London and to the commercial court, they do that, and they do so in large numbers, even in areas where the EU rules do not apply. In other words, I think there is a high degree of confidence in the operation of the common-law rules that we have now, and I would not have thought that maintaining the rules and the Regulation would particularly make a difference to that.

The Chairman: Okay. There will be people watching who are not lawyers and who are interested to know what the impact of Brexit might mean for them, so they follow the debates in Parliament or sessions such as this on the implications. Could you help those who are not knowledgeable about Britain's position with regard to law? One thing that has become very clear to me is that Britain has played a very high-level role in the making of European law. Britain is good at law. Would you agree?

Professor Richard Fentiman: Yes.

The Chairman: I am sure you would. Therefore, in the making of law there has been this myth that somehow it is all washing at us from Europe, when in fact we have been doing an awful lot of the washing in the opposite direction. Would you agree?

Professor Richard Fentiman: I certainly would. There are some very specific examples, but perhaps I can just generalise and say that some of the key instruments in this area—the Brussels I Regulation on jurisdiction and the enforcement of judgments; the Rome I Regulation on the choice of law in contract; the Rome II Regulation, which operates—

The Chairman: I wish the titles were more exciting. They are so desperately dull that one's brain switches off hearing Regulation I, Brussels II and so on. These are important Regulations about the way in which cross-border law operates.

Professor Richard Fentiman: They are extremely important, but the point is that in relation to each of them the United Kingdom has had very considerable influence in shaping their form. There is a very good reason for that, as you indicated, which is that in the area of cross-border litigation we are regarded as a market leader. Our European colleagues look to us to supply the expertise.

The Chairman: As a result, a great deal of business comes into the City of London and our commercial courts here. Indeed, our commercial lawyers do very well as a result of the expertise that we have here and the leading role that we have played in the creation of commercial law. That is true around the world, not just in relation to Europe.

Professor Richard Fentiman: Yes. It might be worth emphasising—just to add to that and to put this into perspective for those who are unfamiliar with this—that our commercial court in London is the world centre for the resolution of commercial disputes. There are some very striking statistics that bear that out. Something close to 60% of the cases before the commercial court involve at least one party that is not English, but over 50% of the cases in the commercial court involve disputes neither party to which is English.

The Chairman: I was going to ask you that. Quite often it is the court of choice because of the wish for independence. A public authority might have a Swedish pension plan or a pension with a financial outfit in the United States and will actually set down in its contract of arrangement that it wants the British courts to be the place where any dispute is resolved.

Baroness Shackleton of Belgravia: Chairman, might I add to that? It would be unfair not to give credit to the judges. It is one of the jurisdiction choices when I am operating, because the judges in England cannot be bought and it is a system of true justice, whatever law they are applying.

The Chairman: There is a high quality of judicial determination.

Baroness Shackleton of Belgravia: And independence.

The Chairman: Would you like to give any examples to the present of how the European Regulations impact on the way we do business?

Professor Richard Fentiman: There are two parts to an answer to that question. First, in purely practical legal terms, many important questions are regulated by the EU Regulation concerning, for example, the stability of English jurisdiction agreements. That is certainly true. The enforcement of judgments across borders in Europe is a very significant matter that is governed by the EU Regulations.

The second part of my answer is that what underlies the question is whether or not the current rules, which derive only in part from the EU regime, are of such importance that they bring business to the commercial court such that if we lost them that would not be the case.

The Chairman: That is the question I am asking: how serious is the loss likely to be?

Professor Richard Fentiman: Perhaps I could give a brief answer, and I am sure that my colleague, Dr Merrett, who has been thinking about this, would then like to expand on it. I do not think that the loss will be as significant as some people, including some of my colleagues in the rest of Europe, imagine. Let me focus on a particular point as an illustration. It is often held up as a potential disadvantage, if we were to leave this regime, that English judgments would no longer be passported, so to speak, automatically into the rest of Europe. This is often held up as a significant disadvantage of Brexit which we have to do everything to cure by trying to retain, in so far as we can, a mechanism for the automatic enforcement of judgments across borders. Our feeling is that that is not the risk that it is perceived to be, and there are a number of reasons for that. First, a study a couple of years ago by the British Institute of International Comparative Law into the reasons why people litigate in England made no reference at any point to the fact that people wish to litigate in England because they wanted the passporting of their judgments into the rest of Europe. This does not appear to be a significant factor.

Secondly, certainly in the realm of commercial law—I am very conscious that this is not the case in the matrimonial area, for example—as any litigator knows, these disputes never go to judgment. In fact, it is very unlikely that they will go to a trial on the merits at all. In other words, you simply will not reach the point at which you have a judgment which needs to be enforced.

The Chairman: Can you explain something for people who are listening? In most commercial disputes, a resolution is sought outside the courtroom, sometimes by mediation, sometimes by arbitration, and so on. When you say that therefore you do not need to go for enforcement, what mechanisms exist? Is it done by mutual agreement?

Professor Richard Fentiman: The kind of disputes that we are talking about a very complex, high-grade, high-value disputes. Very large sums of money are involved. The parties view litigation essentially as an extension of their commercial practice, so to speak, they will always arrive at a commercial result in the event that there is a dispute. The best commercial result is invariably to have a negotiated settlement, so that is what happens.

The Chairman: Thank you, Professor Fentiman. I will ask you, Dr Merrett, to say briefly where you agree and where you do not agree with your colleague from Cambridge.

Dr Louise Merrett: I can do that very briefly, because I agree with everything he said.

The Chairman: That makes that very quick, but I will bring you in when we come to other matters. Professor Peers, do you take a different view?

Professor Steve Peers: Yes. I wonder whether the enforcement issue has been studied completely. One risk of not being part of the EU system is that it might be changed or member states' application of it, or the way in which they promote themselves as alternative legal centres might be changed to take account of the UK not being part of it any more. That means that the system would develop in such a way that you no longer have the British influence, as has already been discussed, and that it would develop in such a way as to attract business away from London. One way to do that is to make enforcement more difficult than it is at the moment—and more difficult than it would be by simply going back to the position in 1973—by raising additional barriers to enforcement. Already, the more recent version of the Brussels regime includes barriers to enforcement.

One specific point is that the UK Government have just said that they want to participate in the unified patent court. One of the revised rules under the Brussels Regulation, as further amended, includes specific rules on the recognition of patent court judgments. One purpose of that system in the unified patent court is to avoid multiple litigation that slows down the enforcement process for patents. Clearly, there is the possibility that if we are not part at least of some kind of enforcement regime that it will complicate our participation in the unified patent court.

The Chairman: So you see a problem around the whole enforcement issue?

Professor Steve Peers: Yes, I think it would be useful to have an enforcement system in place.

The Chairman: It was very helpful to have that overview, and it means that when it comes to our questions, your answers can be shorter.

Q3 **Lord Judd:** Really, you have covered the ground that I wanted to ask about, but perhaps I may put it like this. All three of you are fairly relaxed about what the Prime Minister said in September: "We are not leaving the EU only to return to the jurisdiction of the European Court of Justice". In the sphere you have been talking about—cross-border litigation—you are pretty relaxed. Is that right?

Professor Richard Fentiman: Yes, I think that is true. I should perhaps elaborate. As I indicated earlier, some longer-term solution might involve, for example, membership of something called the Lugano Convention, which is a treaty which replicates to some extent the terms of the Regulation. But such a solution would necessarily involve us having regard to the decisions of the Court of Justice. That, it seems to me, would be sufficient. In terms of introducing a degree of uniformity into the process, all the evidence surrounding the Lugano Convention, which

currently operates in other countries, and here, is that having that, if I dare use the expression, soft approach to the CJEU is perfectly workable, and you do not have to submit to its compulsory, mandatory judgments.

Lord Judd: You do not feel that it is a bit airy fairy to say that there is value in the concept of developing international law as an end in itself, so that we have as much agreed practice and understanding in law as we can across the globe, starting with Europe?

Professor Richard Fentiman: That is very important, but I would answer it by saying that there is a long-standing tradition, which is often articulated by our courts, that in matters of private international law, the courts adopt an internationalist approach. That is the case anyway, and I would not see that being affected.

Lord Cromwell: Lord Judd described your joint view as perhaps relaxed. Are you outliers in that or is that the general view of the industry?

The Chairman: That would seem to be the Cambridge position. I am not sure that Edinburgh is quite as relaxed.

Professor Steve Peers: In a way, the question does not arise, because in any field where the European Union signs treaties with non-EU countries, it is very rare that you would find jurisdiction of the Court of Justice covering the non-EU side. Of course you will have jurisdiction of the Court of Justice over the treaty that the European Union has signed. There have been one or two cases interpreting the Lugano Convention for the EU side, which will inevitably have an indirect impact on the non-EU parties such as the Swiss and the Norwegians. That would be the same with a trade agreement, data protection or anything that we might happen to agree on. It would be the same unilaterally as well, although with at least the likelihood of some questions about whether the choice of English law is a problem, because the EU rules on conflicts of law refer also to the selection of non-EU jurisdictions as the applicable law.

Inevitably, there will be an indirect effect of the Court of Justice, and we could not influence it by appearing in court, normally, or having a British judge, a British advocate-general, and so on, as part of the system. So there is that. But on the other side, I cannot see the Court of Justice issuing rulings that will be directly binding on us. It is not then under the Lugano Convention, where that is common; it is not common in treaties with non-EU countries. Whatever relationship we might wish to seek with the European Union, the Lugano Convention is clearly there as a precedent. They were perfectly fine about the Court of Justice not having jurisdiction over non-EU countries: instead, there is a discussion. I imagine that if you looked into what happened in Switzerland, there is a persuasive effect of the Court of Justice judgments; I imagine there is quite some litigation there.

Lord Cromwell: A second part to my question, which is obvious, is that if our influence wanes to some degree, who will pick that up, who will benefit, who will step into our shoes, if you will, as advising in the

European system?

Dr Louise Merrett: Do you mean in terms of the substantive development of the law, or which court is involved?

Lord Cromwell: Yes. If we have been so helpful and productive in our influence and are so looked to to provide it, if that tap is turned off, whose opportunity is it to turn theirs on?

Professor Richard Fentiman: Well—

The Chairman: Hard to say, is basically the answer.

Professor Richard Fentiman: There are two ways to take your question. I think our influence is through the work of scholars and academics and the fact that our approach to these questions is so highly regarded and looked to in other jurisdictions, and I cannot see that changing in any way.

There is perhaps an underlying issue, which is the more practical one: if we are for some reason no longer regarded as the market leader in this area, does this mean, to put it crudely, that the business currently done in London migrates to Frankfurt or Paris? My answer would be that there are many reasons, other than those relating to the operation of these Regulations, why people would wish to litigate in London. These are partly to do with the legal infrastructure, the expertise of the lawyers and the expertise and impartiality of the judges, as we have heard. Those factors will not change.

Importantly, we should also remember that we have been talking here about procedural rules—rules concerning jurisdiction—and the enforcement of judgments. However, a key aspect in any cross-border dispute is what law governs the substance of the dispute. It is still the case—and I cannot see rationally that this would be affected by Brexit—that people want and will want English substantive law to govern their disputes. If that is the case, the best place to have English law applied is in the English courts.

Dr Louise Merrett: It is a competitive market. Singapore is actively competing for business, for example, and within Europe the Dutch courts are developing a specialty in collective action and redress. However, we are such a long way ahead at the moment that it is not much of a threat.

The other thing to remember is that there is a disadvantage in Europe because their judgments will not be automatically enforceable in England. That will be a disadvantage for the other European jurisdictions trying to compete with us.

The Chairman: I know our Cambridge consensus has been on commercial law, but there are important questions here relating to family law, where enforcement really does matter; in the commercial field there are fewer enforcement issues. Lord Oates has a question.

Q4 Lord Oates: My question does not directly relate to that, but perhaps you can comment on that issue in the context of Lord Judd's question in particular. In the context of the Regulations aimed at facilitating civil justice co-operation, which we have just been discussing and which, as Professor Fentiman stated, were significantly shaped by English influence, do you see Brexit as a setback or an opportunity for the UK's legal system, particularly the English legal system?

Professor Richard Fentiman: I would not see it—

The Chairman: I am sorry, but I will ask Dr Merrett.

Professor Richard Fentiman: Indeed.

The Chairman: So far you have been the spokesperson for the Cambridge consensus, but I should like to hear from Dr Merrett.

Dr Louise Merrett: I see it as a challenge, so neither one thing nor the other. It is a challenge because the legal system is so successful at the moment. You would not break a status quo that is currently working so well. For that reason, it is a challenge, but there is a short-term solution in the common-law rules that would work well if we did nothing. The longer-term optimal solution may well be to try to negotiate a reciprocal regime. In the meantime, however, there are the common-law rules—

The Chairman: As a backstop?

Dr Louise Merrett: Yes, as a backstop.

Lord Oates: But ideally, as you say, because the status quo operates effectively you would prefer not to change it until there is a workable solution.

Dr Louise Merrett: Negotiating a treaty that could give us reciprocity is the long-term aim, but in the short-term the common-law rules would—

The Chairman: I see Professor Fentiman nodding, so I take it the consensus of Cambridge still stands. Can we move to Essex, please? Is this a setback or an opportunity?

Professor Steve Peers: I think I agree that it is a challenge, but there is an immediate challenge over transitional issues, which Professor Fentiman mentioned at the beginning. What about every case that is pending on Brexit day? Do they continue under the rules of the EU regime? The same would apply to anything pending on the continent with British involvement or potential relevance for enforcement. What happens to a judgment that was given two years ago that you might be trying to enforce in 2019? Can that still be enforced under a Brussels regime? You have to think about that.

Obviously there are people who go to court and get judgments. Not everything gets settled. There are cases that come to the EU court and our judges are kept busy; not everything is settled before it reaches them. Questions will inevitably arise. There is a risk, as I said, that

people in the European Union will think that this is an opportunity to divert or prevent business. For instance, you can amend the choice of law and rules to rule out certain laws being applicable on certain grounds. You can amend the jurisdiction rules. Already, the latest version in Brussels has more in it on non-EU jurisdiction and when it might not apply. If someone wants to be protectionist about their legal system, they can choose to do that; it is an option. It would be useful, at the very least, to keep channels of communication open between us and the European Union, as well as to have at least a system of enforcement of judgments that tries to address those concerns.

The Chairman: So you are suggesting that there would need to be some transitional arrangements for cases already in the pipeline.

Professor Steve Peers: Yes.

The Chairman: I shall go to Baroness Ludford, but it seems to me that the question you were going to ask has been largely answered. Is there any supplementary that you would like to put to the witnesses?

Baroness Ludford: Yes.

The Chairman: I am mindful of the time because we have other witnesses coming.

Q5 **Baroness Ludford:** I do have questions, thank you. I am slightly confused. Professor Fentiman, you said that if, immediately post-Brexit, we rely on common-law rules, there would be no loss of performance. Why, then, do you want a regime in the long term? I think you conceded that common law is unilateral with no reciprocity, so I do not really understand either why there is no loss of performance if you need reciprocity or why you would bother to seek reciprocity if there is no loss of performance.

Secondly, we have talked about the legal system and the legal market, but I fear the loss of individuals—litigants and potential litigants—from these issues. We have had a good laugh about the titles—Brussels I and Rome or whatever—but individuals are at the core of this, as is whether they will be able to get their cases settled and their rights enforced. I am rather concerned that they are getting lost in this concern for legal business in London, important though that is.

Professor Richard Fentiman: As to the first point, our feeling is that there is a gain in having reciprocal rules, not least because everyone knows what they are. You do not have to establish in the French courts what English law is on a particular point if that becomes relevant, because their law is the same. That is an advantage. It is not such a significant advantage that the lack of those rules poses a threat to the legal services market that I was describing.

In the same way, there is an advantage in the more or less automatic enforcement of judgments across borders. If you do not have that, you have to rely on the local rules being enforced in particular states to

enforce that judgment. So there is an advantage, but the point is that it is not an existential threat. We are better off having those rules, but their loss is not a calamity. That is the point that I would make.

As to the second point, of course you are absolutely right: our focus has been very much on high-grade commercial litigation, where the interests of the parties are very different. If I may generalise, there is a degree of cross-border litigation involving private individuals, and it is very important that their position should be respected. However, there is not as large a volume of that as people might suppose. For example, a recent study showed that although the European Regulations concern specific rules for consumers, in fact it is very unlikely that a consumer in Germany would seek to sue a supplier of goods in England because of a breach of contract. In other words, of course private individuals must be taken into account, but the volume of cross-border individual litigation is quite small.

Lord Judd: I am interested in your position, because you have just argued that there is value in reciprocity and that building up a sort of international understanding and culture between those practising law is not a bad thing. If you think back over the evidence that you have given us this morning, is there not a case that it could be taken out of context and used inadvertently as a case for demolishing the position of those who argue that the whole point of the European Union is that in all realms of life we were trying to build an international understanding and culture. Your saying that it does not really matter in this area is not altogether helpful for those people.

Professor Richard Fentiman: If I may, I do not think that we are saying that it does not matter. Indeed, the fact that we take the view that the optimal solution would be to return to some sort of reciprocal arrangement rather suggests that we think that is ideally how things should be.

Our point, as I indicated just now, is not that it does not matter but that the absence of the European rules is not calamitous. It is not an existential threat. There is a ready, workable solution.

I certainly take your point about it being taken out of context, but I do not think either of us would wish our commitment to a global, internationalist view of these questions to be misunderstood.

The Chairman: I am mindful of time. It was helpful having that statement at the beginning, but I am anxious that we have the opportunity to hear whether there is any difference of opinion. I address this to you in particular, Professor Peers, because it seems to me that you may have a different view on some of this. Your position seems to be much more that departing from the rules that have been elaborated on will create some sort of deficit for us in Britain.

Professor Steve Peers: It is difficult to quantify, but you can do so in a sense by looking at the number of cases that reach the EU courts. In any

area, only the tip of the iceberg of national cases reach the EU courts. In this area, there are about 20 to 30 cases a year. They mostly look at the facts of the cases; they are mostly about small values of litigation. There are lots of people suing airlines or hotels; small businesses have a dispute between each other which they cannot settle, and they are arguing about €10,000, or something like that.

Then there are private individuals. There have been terrible cases. In a well-known case, *Owusu v Jackson*, someone had been paralysed and was suing for liability. For that individual, enforcement of the claim was crucial. It may not be much compared to high-value commercial litigation, but to tell someone suing in any of those cases that they could face another year or two to get enforcement of their ruling and significant extra costs is a burden and a potential deterrent to doing cross-border business.

The Commission has made a series of proposals on enforcement. The last two amendments to the Brussels rules improved enforcement. The amendment to the insolvency rules improved enforcement. The latest proposal on Brussels II, which the Government opted into since the referendum, improved enforcement. We also have a series of special measures, such as the legislation on small claims and payment orders, which have been adopted, and the UK has opted into two versions of the small claims legislation. All that suggests that there are practical problems to which member states were willing to adopt solutions. The UK had a choice to opt out, but it ultimately every time because it felt that there was a problem that needed addressing.

I do not think the question is: are we going to collapse if we do not participate? The question is: is this a useful thing to have? I would ask the question the other way round: if it is, why should we leave? Obviously, we are leaving the European Union, but why should we leave participation in these rules if we think there is a net advantage to us? Why not seek to continue? What are the reasons against it? That is the way I would phrase the question.

Dr Louise Merrett: Very briefly, I do not disagree with any of that. I think the optimum solution is to carry on in a regime that is very similar to the one that operates now. The very specific question is that, given that there will be a delay, whether we are better with the common-law rules or with some domestic version of the Brussels Regulation. It is that specific thing that we do not think is helpful. There is no point in implementing the Brussels Regulation in the meantime as a national law, because it is a reciprocal arrangement. Yes, we should move forward and keep negotiating to try to remain within a reciprocal regime, but in the interim the common-law rules are the only solution. You could not have a national Brussels Regulation; it would not make sense.

The Chairman: I am mindful of the time. I have three witnesses who have given of their morning and will come in to deal with family law. Are any of my panel keen to press with a question?

Lord Cromwell: I have a very quick technical question for clarity. Forgive me if this is obvious to everyone else. On Brexit day plus one, no alternative arrangements are in place for cross-border enforcement and dealing with conflicts of laws. Are you saying that we can fall back on the common law and that will reach out and deal with that, or is that area a bit fluffy?

Dr Louise Merrett: If we did nothing, those are the rules that are currently operating in non-EU cases by default, and they would become the rules in all cases.

The Chairman: So when you talk about the common-law rules that you say are there as the backstop and come out of our traditions, those are the rules that we use in any event when we are not dealing with the European Union.

Dr Louise Merrett: Yes, US or Russian or—

The Chairman: So when you talk about the common law, you are talking about the rules that we deal with when we are doing business with the Far East or with any other part, and those are the rules that would basically fall into place if we were no longer part of the European Union regime?

Dr Louise Merrett: That is correct.

The Chairman: Okay. Unless Baroness Shackleton or Baroness Newlove have any questions, I would like to thank all three of you for coming and giving your time. It was really helpful and quite illuminating for us. As I said, if you would like to add anything in writing, please do so, and please correct anything in the transcript that will be sent to you that you would like to correct. I am very grateful for your attendance this morning.