

Select Committee on the European Union

Justice Sub-Committee

Corrected oral evidence: Brexit: civil justice co-operation and the CJEU

Tuesday 13 December 2016

11.30 am

[Watch the meeting](#)

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

Evidence Session No. 3

Heard in Public

Questions 13 - 20

Witnesses

I: Professor Jonathan Harris QC, Serle Court Chambers; Mr Richard Lord QC, Brick Court Chambers; Mr Oliver Jones, Brick Court Chambers.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.
2. Any public use of, or reference to, the contents should make clear that neither Members nor witnesses have had the opportunity to correct the record. If in doubt as to the propriety of using the transcript, please contact the Clerk of the Committee.

Examination of witnesses

Professor Jonathan Harris QC, Mr Richard Lord QC and Mr Oliver Jones.

Q13 The Chairman: Welcome. It is really nice to see you. I am incredibly grateful to you for giving up your time; your expertise is going to be invaluable to us. I will explain a number of things to you before we start and then I will invite each of you to introduce yourselves for the record and for those who will be listening. Just say who you are and what your area of expertise is.

As you probably know, the session is open to the public, although we are not exactly crowded out. A webcast of the session goes out live and is subsequently accessible on the parliamentary website. A verbatim transcript will be taken of the evidence, and this will also be put on the parliamentary website. A few days after this evidence session you will be sent a copy of that transcript with an opportunity to check it for accuracy. Please do that as soon as possible so that any corrections can be made. If, after the session, you decide there are matters that you would have liked more time to reflect on and you would like to add to the evidence you have given, please send us anything supplementary in writing and it will be included in our report.

Please now introduce yourselves for the record.

Richard Lord QC: I am Richard Lord. I am a barrister and Queen's Counsel at Brick Court Chambers and my speciality over the last 30 years has been commercial litigation, particularly in the shipping and insurance sector, which has involved a great deal of conflict of law and jurisdictional issues.

Oliver Jones: I am Oliver Jones, also a barrister of Brick Court Chambers, specialising in commercial law, administrative and public law, and public international law.

Professor Jonathan Harris QC: I am Jonathan Harris. I am a barrister at Serle Court specialising in commercial and chancery law. I am also Professor of International Commercial Law at King's College London.

Q14 The Chairman: Thank you very much. This Committee normally scrutinises matters concerned with our engagement with the European Union, and because of the vote on 23 June we are looking at a number of issues so that we can assist government, alerting it to areas where the law might be impacted upon due to our withdrawal from the European Union so that it can be part of any negotiation, identifying any gaps and so forth. We want your assistance in doing that in the fields in which you are particularly expert.

How important to the operation of UK European Union law—of the legal system that we have constructed and that we share—is the Brussels I recast Regulation? Mr Lord?

Richard Lord QC: I think it is very important. One has to look at it not in isolation and comparing it necessarily with what the position might be

under the common law or different Regulations but because of the reciprocal nature of it. If we did not have it, any alternative runs the risk of a lack of ability to enforce judgments, and the degree of confusion and uncertainty goes much wider than that. I can expand on that later, if that would be helpful, but I think it is important and its loss would lead to a risk to businesses and the country generally.

The Chairman: I just want to make it clear to those who are listening and who are very concerned to know more and to become informed by these evidence sessions what the Brussels I recast Regulation does. Can you give us examples of how it operates and what the benefits are?

Richard Lord QC: It comes back to the idea of reciprocity and what would happen if no provision were made to replace it. To expand on that, picking up on some of last week's evidence, which I have looked at, there is perhaps a technical issue as to what would happen on withdrawal without provision for replacement. It has been suggested that we revert to the common law position. In fact, many people think that that would not be the case and that we would revert back to the original Brussels Regulation, but that is not the main point, because that could be corrected simply by repealing the relevant section of the 1982 Act. The point is that businesses, and indeed individuals, like certainty and predictability, and if you do not have a reciprocal arrangement with Europe, those who trade with Europe risk all sorts of problems.

I can list a number of examples that might come out of a simple contract between a British business and a French or Italian company just on the sale of goods or services. At present, if an English jurisdiction clause is inserted, that will be recognised. I do not want to get into the details, but jurisdiction clauses come in different shapes and sizes. It might not be recognised if we lose the Regulation. Similarly, even if there is no jurisdiction clause, currently with this reciprocal system you are not likely to have two courts both saying, "I have jurisdiction". If we lose that, you might have all sorts of problems with courts losing jurisdiction.

The single most fundamental problem is that if you have a judgment you want to be able to enforce it. The ready enforcement of judgments is key. Again, I heard evidence last week to the contrary and I would not entirely agree with it.

The Chairman: I want to press you on this. A British business person is involved in a contract with somebody in Europe. Can we not just set up arrangements with Germany, and separately with Spain and other European countries with which we do business, to replace this unifying Regulation? That is what people who are involved in arguing for leaving would say.

Richard Lord QC: You could, in theory. I cannot of course comment on the political aspect. I think it would be extremely difficult. It would take a long time and you could end up with a multiplicity of different regimes, quite apart from whether the different member states would negotiate separately. You risk the prospect of the common law applying when we

look at it from our perspective but being unable to apply it from a European perspective. I just do not see that as a realistic or practical option. Of course, if we managed to negotiate a whole set of 27 deals, or if Europe were happy to accept some English common-law way of doing that, that might work, but I do not see that as viable.

The Chairman: I will come to our other witnesses, who might have a different view or something they would like to expand upon from the answer given by Mr Lord. Mr Jones?

Oliver Jones: One thing that is potentially overlooked in this context, when we look at London as a centre for providing legal services and the impact that leaving the EU might have on the viability of London in that sense, is that one of the fundamental rationales of the current EU system is that it is there to protect people. It protects UK individuals and UK companies from being sued in Germany, Italy or Spain by requiring that they be sued here, subject to limited exceptions. It protects them from parallel proceedings being launched against them in different member states. With things like insurance contracts, consumer contracts, employment contracts, it ensures that people who are sometimes in a vulnerable position, a position of disadvantage, can be sued in the courts of their home member state. It does that by providing a clear, codified set of rules that people can understand and it has been proven to work, albeit that people have different criticisms of it. Although the choice of courts is a very important issue, this is not just about the London commercial market but about a wider system that is there to protect all individuals who use the courts.

The Chairman: I am happy to hear you say that, because I am rather concerned that the impression is given to those who are listening that this is about looking after the legal community and that you are a crowd of lawyers coming in here to say that everybody comes to Britain, a lot of business comes here, and so on, and we do not want to be losing that. A sense of that came through in some of the evidence that we heard last week, and I am rather anxious to hear about people who are trying to do business—sometimes small business persons, not necessarily big corporates—and how this benefits or does not benefit them. I want it to be clear how it affects us as British citizens. It is very helpful to have some flesh put on the bones of that.

Oliver Jones: That bleeds into enforcement issues, too. We talk about enforcement in terms of people having an English choice of court agreement, obtaining a judgment and being able to enforce that, and we think very much of big corporates, large commercial claims, which of course we all act in. But it applies equally to very small claims, individual claims and small company claims, where someone brings an action in this country and obtains a judgment, which could be for a very small amount of money. The question is: how will that judgment be enforced if the counterparty, or the person who is subject to the judgment, is not in this country? In fact, anything that reduces uniformity and decreases efficiency will impact on those people the most.

The Chairman: I want to make this issue more accessible. If someone has made a contract with an Italian design company to work with a small wool manufacturer able to create garments but wanting to do them in a stylish way—it is a cashmere company; I am a Scot, so I will ask about that—and wins their case here in the courts, how do they get the order against the people who owe them money and have not paid up for the creation of the items?

Oliver Jones: Under the recast Regulation, which is the unexciting title for the most recent iteration of these rules—

The Chairman: The titles are a block to understanding, as we said.

Oliver Jones: —in effect it is automatic. That was one of the changes that came in in the latest iteration of the Regulation. It means that you just take your order to the foreign state and enforce it there as if it was a judgment of that state. That has been the product of an evolution of the rules over time. That is a procedural aspect that increases efficiency. Of course, there are also the substantive aspects in that, under the existing rules, the grounds on which the foreign court may refuse to recognise something are very narrow. Once it has been produced in the court of a member state, in effect there is automatic enforcement. If we lose a system like the current regime, we are very much at the mercy of whatever national rules other member states may choose to adopt in relation to us.

The Chairman: Mr [Professor?] Harris, can you assist us? Do you have a different view, or is there some other element you would like to add to this description?

Professor Jonathan Harris QC: I do not have a different view on the general thrust and tone of what is being said. The recast Regulation is highly advantageous to us in allowing parties to choose the English courts and in terms of enforcement. One has to look at this as two sides of the same coin. I personally doubt, whatever regime we end up with, that English courts will not respect English jurisdiction clauses. I do not think that is the problem. The regime at the moment gives you both sides of the picture. The other side is that all the other member states also have to respect an English jurisdiction clause and decline jurisdiction. We know what they are going to do in all areas, as well as what we are going to do, and it is the same thing. That, as Mr Jones says, also means that there is a mechanism to prevent parallel proceedings.

It is perhaps worth going back to why this instrument exists at all. It may not be a very exciting point, but it is Article 81 of the European treaty that has enabled this Regulation to be enacted. It says that Regulations may be put forward particularly where necessary for the promotion of the internal market. The only reason this exists is because it was considered to be complementary to free trade—you would not have a barrier to going out to provide your goods or services across Europe because you knew you would be able to recover debts, or it would be a lot easier to recover debts.

The only point on which I respectfully slightly disagree with Mr Lord is on the possibility of individual deals with member states. I think that is highly unlikely, because under Article 81 of the treaty the European Union claims exclusive competence in those areas, which is why a number of more recent instruments have been ratified by the EU en bloc rather than by the UK and individual countries. I think it will preclude other member states individually doing deals with the UK; either you deal with the bloc or you do not have a deal at all.

The Chairman: I think Mr Lord agrees.

Richard Lord QC: Yes, I think it was put that there might be a possibility, but certainly I agree with Professor Harris on that.

The Chairman: It is likely to be insisted upon that the deal is done with the European Union rather than individual members?

Richard Lord QC: Yes.

The Chairman: So in any negotiation you think that is likely to be the argument from the other side. Lord Oates.

Q15 **Lord Oates:** Mr Lord referred to evidence that we heard last week. Professor Fentiman told us that the common law provides widely used rules that are considered around the world as state of the art. He went on to say that these rules, "would simply occupy the space vacated by the EU regime", and that, "there would be no loss of performance post-Brexit". Do any of you agree with that assessment?

The Chairman: Or disagree?

Richard Lord QC: In my case, it is a question of degree, but I do disagree, first, on whether it would occupy the space. In isolation, we could adopt the same approach to the EU states as we do to other states, such as the US or China. I was trying to think of an analogy that might illustrate my concern. It made me think of the 19th century, when Brunel's Great Western Railway had the broad gauge and everyone else had the standard gauge. Although it is not an exact analogy, if we went back to the broad gauge there might be nothing wrong with it but everyone, as they did in the 19th century, would have to change trains when they travelled to or from the west.

The imposition of two different sets of rules and the clash between them would be a recipe for confusion, expense and uncertainty. It is for that reason that I do not agree that we can take a relaxed view. I am not suggesting that it is an absolute disaster, but it seems that it would be a retrograde step and cause difficulty. I should emphasise what Oliver said—that of course we are here as members of the legal services industry—but I also fundamentally believe that it is in the interests of British citizens, businesses and consumers, as well as those who practise in cases where parties from, say, China and Argentina have chosen to come here. I am not talking about that.

Oliver Jones: On the suggestion that the common law is good enough, with respect I could not disagree more. The suggestion that we could or should be relaxed about simply leaving the current regime and putting nothing else in place and allowing the common law to return to a judicial space from which it has been on hiatus for the past 30 years does not tally with the views of anyone I have spoken to in the London legal market. We are cool and calm, obviously, but Brexit is seen as a clear and present threat to the ability of our jurisdictional rules to protect people and—the commercial side of it—London as a legal market.

The Chairman: And losing the way?

Oliver Jones: Yes. I think something was said in the previous session about common-law principles washing over into European principles. We saw that very clearly when the recast Regulation was negotiated. Many of the benefits that we obtained from that were a result of good negotiations by this country. They are clear and sophisticated rules that people can benefit from.

The Chairman: Professor Harris, do you take a different view?

Professor Jonathan Harris QC: Not really, no. The common-law rules are very respected. They are a model for many legal systems around the world, although if one was starting with a blank piece of paper I do not think one would create them today. Questions on whether you can serve a claim form and whether you have jurisdiction are largely equated. There is a significant difference in the rules of jurisdiction depending on whether you happen to be able to serve the claim form on the defendant when they are in this country, however briefly. They are highly discretionary, so all the things that Mr Jones listed—that you can look at the Regulation and say, “In these circumstances, you will be able to choose the English courts and it will work”—would be lost.

More obviously, one would lose the whole other side of the coin that I talked about before. One would not have the same rules in the rest of the European Union, and one would have the attendant risk of parallel proceedings in other courts that could lead to inconsistent results. Most obviously of all, we are not talking about one thing here but two: jurisdiction and the enforcement of judgments. To me, the advantage of the recast Regulation is that it has both, and it remains the case that, whatever rules we might apply, if we do not have a reciprocal system we do not have the advantages of the free enforcement of judgments for individuals around the European Union.

Q16 **Lord Cromwell:** Just on this question of the London legal services market, I think the mood of everybody is that the real issue here is what happens to businesses. Nevertheless, this is a significant market and you are obviously players in it. It has been suggested to us that the current uncertainty about which rules are actually going to apply, or which rules are going to regulate cross-border disputes, will damage that market. I have two questions: one short, the other a bit longer. The short one is: who is going to benefit if we lose out? The one that might take longer is:

what might the Government do to assist in that process—or rather, to assist in that process not happening?

The Chairman: To address that uncertainty.

Oliver Jones: My personal view of who will win out is that the various arbitration centres will likely win out. In circumstances in which a party is choosing an English court, English law or whatever, they always have a choice: do I go for something like English courts, or do I go for something like arbitration and have my dispute determined by a panel of arbitrators that the parties select?

One great advantage of arbitration is essentially universal enforceability under another excitingly named Convention, the New York Convention, and that will obviously be undermined in the English context through the damage to enforcement that we talked about. So I think that arbitration is the one that wins out. We have to remember that the people making these decisions—do I have arbitration, do I have the English courts?—are lawyers sitting in a room, and we know that lawyers, some of us at least, are risk averse. If they are asked whether there is a risk to the enforceability of English judgments, they will say, yes, there is.

The Chairman: So go for arbitration.

Oliver Jones: So go for arbitration. The final point I will make about arbitration is that this is not just a commercial question. Arbitration takes place in private—it is not an open, public hearing—and the more we push towards an arbitration-centred model, the more we lose open justice and the rule of law.

Lord Cromwell: Before you move off this issue, where is that arbitration likely to take place geographically? Are there markets around the world where, if you are going for arbitration, you really ought to go to Frankfurt, Paris or London?

Richard Lord QC: There are a whole lot. There was a survey and I think the top ones after us—we are still the leaders in volume—are Paris, Geneva, Stockholm and New York. Those are the sorts of places.

Professor Jonathan Harris QC: And Singapore.

Richard Lord QC: Yes. If it is helpful, I could just add a gloss to what Oliver said. You have to look at two situations. One is the position between people trading within the EU as it now is. They are saying, “Shall we have a jurisdiction clause in favour of London or Paris, or neither?” Increased uncertainty might favour places such as Paris, Hamburg or Rotterdam. I have given expert evidence in the commercial court in Rotterdam, for example, where everything was done in English. They were set up to do that. I will not give you details, but there are places like that.

Then you have people choosing them because they are neutral third parties, so you get a Chinese importer and a Chilean ship owner, for

example. Although they are perhaps less likely to be influenced by uncertainty here, I believe it is a factor, because you get lots of very aggressive—in the best possible way—alternative dispute resolutions saying, “Come to us. Don’t go all the way to London. Come to Dubai”, “Come to Singapore”. “Come to Hong Kong”. “Come to New York”. Any uncertainty will also impact on that choice.

Lord Cromwell: Do any of the others have a dissenting view?

Professor Jonathan Harris QC: On the first part of the question, no, not really. I have seen and heard what amount to pitches, essentially, for our business from lawyers from jurisdictions including France, Germany, the Netherlands, but also certainly Ireland, where there is a view that you can have a court and a system that is broadly similar. Of course, rules of jurisdiction and enforcement are not the only reasons, by any means, why people have traditionally favoured the English courts. There may also be some move towards arbitration.

On the second question, what can be done now, obviously a lot is unknown at the moment. One thing could be done now, and I know it came up last week. There is an instrument, The Hague Convention on Choice of Court Agreements, to which the UK is already bound by virtue of the EU’s ratification and which the UK could ratify in its own right once it leaves the European Union.

It seems to me that there would be some advantage to reassuring the public and business if there was an early announcement of an intention to ratify that Convention as soon as the United Kingdom can. There are some wrinkles about when it can, because the European Union has exclusive competence until the day we leave, unless we can get them to waive that exclusive competence so that there is no time gap. That is one thing, and although it perhaps does not go directly to what we are talking about today there are hugely important areas of international commercial litigation that are not dependent on reciprocity: in other words, they do not require someone else to enforce our judgments.

The entire regime on choosing the governing law and the ability to choose English law in a contract does not depend on enforcement. The Government could announce that if no other deal is forthcoming, the rules in what are currently called the Rome I and Rome II Regulations on choice of law for contractual and non-contractual obligations will be enacted into domestic statute, so at least we would have certainty that choices of English law will continue to operate on broadly the same basis.

Earl of Kinnoull: I want to take us a bit further into the uncertainty. I want to imagine a situation in which we write a contract today, a cause of action arises in a month’s time and the case begins shortly after that. We then leave the EU. Where is that case left? Does it go over the cliff? Can you give us a bit more uncertainty certainty?

Oliver Jones: It is a known unknown, I suppose.

The Chairman: To quote someone.

Oliver Jones: The current systems of Brussels Regulations will usually apply based upon when a case is commenced. So if my case is commenced under a particular regime of rules, that regime of rules will apply to a judgment that arises from that case. That is certainly a sensible approach to take to transitional arrangements. In your example, if a case is commenced under a particular set of rules—the current rules—jurisdiction would be taken in accordance with those rules and one would hope the judgment is enforceable in accordance with those rules. But it all depends, ultimately, on what the deal is.

Earl of Kinnoull: Right, so in the absence of an expressed deal in fact there would be chaos?

Oliver Jones: Well, yes. One has to think about whose courts the judgments we are talking about have come from. If it were a judgment from the English courts, under the existing Regulation, one would hope that following the UK leaving the EU, other member states, which would continue to be bound by those rules, would consider that they were obliged to enforce that judgment under the existing rules. I would hope that it would not be chaos in that sense, but of course we will have no control over how they wish to change their rules and what those rules may be.

The Chairman: It goes back to the myth that has been created that all this law comes at us from Europe, when in fact Britain has played a very large role in the development of law and actually in perfecting these rules to make them as good as they are. Law is one of the things that we are good at. Baroness Shackleton has some questions for you.

Q17 **Baroness Shackleton of Belgravia:** I think this question has largely been answered, but you unanimously disagree with Professor Fentiman about the common law being sufficient to buttress through. I am very concerned by Mr Jones' response that if everything goes to arbitration, which I can see being a very attractive alternative, people will not put English law clauses in. No one will know what English law is, because it will remain secret. Therefore, the law that is evolving might not evolve. Do you consider that anything can be done post-Brexit for the EU member states to make it better, and does the Lugano Convention offer a precedent?

Professor Jonathan Harris QC: The one good thing is that there are various alternative options. I personally think that one needs to be realistic about the recast Judgments Regulation. It is a European Regulation. One is going into uncertain territory as a third country—a non-member state—in asking to keep it, especially if one says that one wants to keep it but not be subject to the European Court of Justice. I happen to think that the Lugano Convention—the Convention that exists between the member states, Norway, Iceland and Switzerland, containing harmonised rules of jurisdiction and enforcement—is extremely important. It is not quite as good as the recast Regulation. It does not

have quite as streamlined a procedure for enforcement. The protection against proceedings brought in breach of an English exclusive jurisdiction clause in another member state is not as good. But it is an awful lot better than nothing at all. Politically, it looks neater for a third country to be bound by a Convention with the member states, Norway, Iceland and Switzerland rather than keeping a Regulation.

The existing Lugano Convention also has something that may be politically more acceptable because Norway, Iceland and Switzerland are not directly subject to the European Court of Justice's jurisdiction. Their national courts are bound to have regard to ECJ case law. Their Governments are entitled to submit observations on cases brought from courts of member states. There is a mechanism for the exchange of information. All this seems to be a more plausible, more politically acceptable option. There is a mechanism in the Lugano Convention for third countries, including non-EFTA countries, to join the Lugano Convention. The articles are right near the back and slightly self-contradictory, but they appear to say that you can accede as a third country but for the Lugano Convention to operate between you and another contracting state, that other contracting state has to agree. So if you are talking about the European Union, you would still need to get agreement from the European Union to apply it vis-à-vis the United Kingdom, but I think that is more likely. The advantage of The Hague Choice of Court Convention—which is another option that should be pursued—is that we do not have to ask anyone's permission. Therefore, it seems to be a starting block. Lugano alongside it is a more likely option.

The Chairman: So Lugano-plus.

Professor Jonathan Harris QC: Yes.

The Chairman: Lady Newlove, you are teetering into this same area.

Q18 **Baroness Newlove:** The Government appear to reject any post-Brexit role for the European Court of Justice. What are the implications of their stance for civil justice co-operation by the UK with the remaining EU member states?

The Chairman: That question picks up on what you have just been discussing. You have just dealt with a possible alternative. You are suggesting that it could be Lugano-plus. For those outside listening, Lugano provides a way for countries at the one-remove position of Norway and so on to be part of the legal world of Europe without being full members. That is my understanding.

Professor Jonathan Harris QC: I think that is right. The broader implications in the area of cross-border litigation are enormous. Trying to keep the very broad range of litigation instruments, which are Regulations—for example, on insolvency, the service of documents and taking evidence—while not being willing to be subject to the European Court of Justice's jurisdiction will, I suspect, be very difficult indeed to negotiate. It is only really in the area of civil jurisdiction and enforcement

of judgments where there is this happy fall-back option of a Convention. But there is not, unfortunately, the same fall-back option in a number of other areas.

The Chairman: I am keen to hear from Mr Lord and Mr Jones on this issue. So that people who are listening might understand, if a company that you have been doing business with goes bust, as a creditor sitting here in Britain you are going to want to make sure that you get the money that is owed to you. There are these Regulations that make that possible for you to be on the list of creditors and to make sure that you do not get forgotten and put to the bottom of the list because you do not belong to the European Union. Perhaps you can help us with this.

Richard Lord QC: This is perhaps the most important thing in this discussion. I have been critical, both in private and in public, of various aspects of EU Regulations and the CJEU, but we have now got to a much more advanced state. The problem, even for those who are very keen to disengage, is not with the substance of the current Regulations—whether it be Brussels I recast, Rome I or Rome II—but with the prospect of the involvement of the CJEU.

The Chairman: The court?

Richard Lord QC: Yes, and for reasons that I will not go into that has been the subject of various criticisms—some political, some legal. What people might be looking for in a solution is two tiers. What many see as the optimum solution is simply to enact the current Regulations as a matter of English law and then try to address politically the involvement of the court. The alternative, which may be easier, is to go back to Lugano with this idea of just paying due regard to what the court does, but then you would lose some of the additional advantages that you get in Brussels I recast as opposed to Lugano.

The Chairman: So you lose some of the benefits but you are not bound by the European Court of Justice. It becomes a bit like the European Court of Human Rights; you have to take account of the decisions and so on, but your own sovereignty and autonomy are maintained.

Richard Lord QC: Indeed. There are risks in that, but there may be benefits that outweigh them.

The Chairman: People might find that quite appealing, but there will be some losses and we need to evaluate the extent of the losses by going down that road. Mr Jones, do you have anything to add on that?

Oliver Jones: Yes. Jonathan has referred to two competing options for us. One is the Lugano Convention or Lugano-plus. The other is the Denmark model. This is the idea that Denmark, which had opted out of certain home affairs and other restrictions in Maastricht, could come in and join the recast Brussels I Regulation, and many people have said that the UK can do that as well.

The Chairman: Does that bind you to the court?

Oliver Jones: That binds you to the court. Of course, the gold standard for those looking at this issue and negotiating it is to say, "We'll have that, thanks, but we don't want to be bound by the court". Jonathan has alluded to something that any sensible person would recognise: that that gold standard may not be achievable. The general view is that if we can move to a model that is very much based upon the European Convention on Human Rights, where a dialogue is created and regard is had to European decisions, that would be a very good outcome. Whether that is possible in the current political environment, of course, is a different question.

Professor Jonathan Harris QC: It is true that the Lugano Convention is not state of the art. It lags behind the recast Regulation. But I do not think we should be too gloomy about that. It is not impossible to try to produce a new version of the Lugano Convention that includes pretty much all the main jurisdiction and enforcement rules in the recast Regulation and to try to negotiate that with the member states, Norway, Iceland and Switzerland. There may well be a shared enthusiasm for catching up with those rules, but obviously it would not be one that subjected the UK to European Court of Justice jurisdiction.

The Chairman: I am mindful of time, so I will bring in Lord Kinnoull.

Q19 **Earl of Kinnoull:** You have covered some of this area already. I really want to focus in on the approach that the Government might take to this area in their negotiations. Two things occur to me. The first is the priority the Government might accord this area. The second is whether transitional arrangements might be appropriate.

The Chairman: Who would like to come in on that? We have received evidence that we do not want to fall off a cliff edge if the negotiations do not go very well, so what would you say about transitional agreements?

Oliver Jones: I suppose one thing that we picked up in our discussion earlier is for there to be a clear announcement from the Government that the approach that I outlined earlier as being the right one—i.e. that proceedings commenced under the current regime, the old regime, will apply until it changes—will be the approach that we sign up to and that we would hope our partners in Europe also sign up to. That should certainly be a priority for the transitional arrangements.

On the question of how important these rules are generally and how we approach the negotiation process—Jonathan has already picked up on this to an extent—it is the extent to which we see, or wish to present, rules on jurisdiction and rules on enforcement as aspects of the internal market. Obviously in any negotiating strategy, whatever one might say about the substance of that argument it is advantageous, and it can be presented in this way, to say that rules of jurisdiction and rules of enforcement are there to protect individuals and are separate from wider questions about tariffs, various people's products the free movement of those products throughout the European Union. We can separate this issue off and say, "Keep the old system, subject to the tweaks we have

referred to, and don't wrap it in to a wider, more complex and more difficult debate about free movement".

The Chairman: That is very interesting. Would you like to say anything, Mr Lord?

Richard Lord QC: Very briefly, only that, as we discussed before, a regime in future that is inherently uncertain is on the whole bad for business and for Britain. Uncertainty about how uncertain it will be compounds that, and although one has to take these surveys with a pinch of salt there is reference in some of the submissions to a survey of clients, 88% of whom say they want a clear and early statement from the Government as to their position. I would certainly agree with that.

The Chairman: Yes. There is competition as to who is to be at the top of the list with their priorities to be dealt with, let me tell you, so it will be hard for the Government to decide.

I want to deal with this business of your assessment of how government might proceed in a negotiation. One of the clear statements made by the Prime Minister and others is that part of this deal has to mean that the European Court of Justice is out of the picture and that there has to be a repatriation of the powers of our own courts. With that in mind I would like you to revisit the Earl of Kinnoull's question to you about some sort of transitional arrangement.

Professor Jonathan Harris QC: I certainly think that a transitional arrangement is in everyone's interest, so I would be more optimistic that everybody will want something laid down that says that proceedings commenced while the recast Regulation was in force in the United Kingdom are enforceable in the European Union. I think that is achievable.

I have already indicated that some certainty can be brought in the meantime by a government announcement of an intention to ratify The Hague Choice of Court Convention and that some, although by no means all, of the Regulations which the Government could announce as a long stop would be enacted into domestic law, if nothing else. Those are principally the ones on choice of law. But it does not work for the recast Regulation, because one has to have mutuality and the mutual enforcement of each other's judgment.

If I may, I will make two quick points. There is the possibility that it is hopelessly ambitious to think that we will have time to get into the detail of negotiating Regulation by Regulation. One possibility is that the European Union will want to take big chunks, perhaps articles of the treaty, pursuant to which a whole group of Regulations were enacted, or perhaps even the wider area, which is in Title V, Part III, of the TFEU; Title V is on the area of freedom, security and justice. There is a significant possibility that all this will be bundled up into larger chunks.

The final important point to make is about the future. If the UK had left the European Union in 2006, we would have been talking about no recast Regulation, no Rome I, no Rome II. The world looks very different now. If there is one thing that one can almost be sure of, it is that there will be new Regulations that we have not even thought of in the years to come, but there will also definitely be amendments to the existing Regulations. To give you one example, Article 79 of the recast Regulation requires the Commission to file a report by 11 January 2022 on the possibility of extending the Regulation to abolish totally all national grounds of jurisdiction, even against non-EU domiciled defendants. Something that is terribly important is how, if at all, the United Kingdom can ensure a stake in the future content of these Regulations; as you have said, we have been very influential with regard to their content. The risk is that you do a deal, you are very happy, you keep a Regulation, but then you have no vote on its future direction and you find that you are still stuck with it. That is a difficult but very important issue.

The Chairman: And that would be the position if we went down the Lugano-plus road, would it? We would still be outside the law-making processes?

Professor Jonathan Harris QC: I do not think it would be the position under the Lugano-plus version, because we would be an independent ratifying country and we would have to agree to any future iteration, but I do think it would be quite likely to be the case, absent any other special arrangement, if there were a deal to keep any of the European Regulations. It would be much more difficult to ensure a stake in their content in the future.

The Chairman: I see. Would anyone else like to come in on that? No. Baroness Ludford will ask her question.

Q20 **Baroness Ludford:** My apologies for not being here right at the beginning.

This leads into the question about the ECJ and keeping up with evolutions of the Regulation. As a former MEP but one who did not work on civil justice, I can be pretty sure that that review clause was probably stuck in by the European Parliament to review whether there is the potential to get rid of national divergences, and I suspect that these clauses are scattered throughout other civil justice Regulations. First, if the Regulations were incorporated into domestic law, given that they are interpreted by the Court of Justice, how will the UK courts cope with ECJ judgments as the years roll on? Even under the Lugano Convention, EEA national courts have to take account of the ECJ.

The Chairman: They have to have regard.

Baroness Ludford: They have to have regard. Presumably if they do not have regard, there are consequences. Have any of them not had regard? I am trying to establish how free one would really be of the ECJ. If you follow the ECJ you have political problems in some quarters, because we are not really free, but if you do not follow the ECJ you have legal

problems, including not only the lack of mutuality but enforceability. So are we not damned if we do and damned if we do not?

Richard Lord QC: In practice, that might not be such a problem, because, as Professor Harris has pointed out elsewhere—I think it was him—our courts are quite internationalist in outlook anyway and they are bound to look at decisions just to see what is said, even if they disagree with them. So there is plenty of scope for a divergence of jurisprudence if the court does not want to follow a particular line of authority without being held to be in breach of an obligation to give due regard, which is a fairly wide and flexible phrase.

Oliver Jones: On the question of how we would cope, I think we would cope very well in terms of our English courts interpreting instruments from Europe. They do it all the time when they do not refer matters to Luxembourg and, some would say, do it better than the courts in Luxembourg do.

As to whether we would truly be free, one can contrast the situation with what happens under the European Convention on Human Rights, where we are obliged to have regard only to decisions of Strasbourg. Of course, if the English courts get it wrong, the person can go off to Strasbourg and say, “The English courts have breached my rights, and I’d like damages, please”. Under the Lugano model, that would not exist.

Professor Jonathan Harris QC: I agree to an extent, but I also agree with Mr Lord and Mr Jones that one can overstate the problem. There are other analogies. In the case law of the European Court of Human Rights, there is no absolute obligation to follow all those decisions.

I personally think it is quite likely that the English courts would say fairly early on that they would be inclined to follow European Court of Justice jurisprudence unless they think it is clearly incorrect. I think there will be some sort of statement fairly early on in the jurisprudence to that effect. But of course many cases simply will not need to be referred to the European Court of Justice. There will be no clear precedent and the English courts will make up their own mind. At the moment an English court of last resort is bound to refer to the European Court of Justice but it will be able to make up its own mind.

Baroness Ludford: But what are the consequences? I see the analogy with Strasbourg, but the Strasbourg system does not have the crucial mutual recognition and enforceability. The English courts do their own thing—they either do or do not say the same as Luxembourg, either in real time or as the Regulations evolve in the way that we agree is predictable. If there is then a gap between the interpretation of EU law in the UK and in the EU, what effect does that have on the operation of whatever relationship we have with the single market?

Richard Lord QC: If I may respectfully say so, that is a very good point. Obviously, one could theoretically foresee that if there was a divergence between the English and EU interpretations of an instrument, that could

affect the ability to enforce, but that would depend on whatever was agreed, for the reasons we have expressed. In practice, I think that is less likely, but it could theoretically happen.

Professor Jonathan Harris QC: Against that, the Lugano Convention has a pretty clear provision that says when enforcing you are not allowed to review the substance of the foreign judgment. The way it works is that you have to accept the judgment of a fellow contracting state, even if you think it is obviously wrong. That gives you some leeway. On the question of how a divergence might affect the market for UK services, I do not think there will be a great divergence between the approach in the UK and elsewhere, but if there is one it depends whether the solution that is being offered in the UK is considered to be more or less pragmatic and helpful. It could turn out to be an advantage as much as a disadvantage.

The Chairman: That has always been the great strength of our tradition, that sort of pragmatism and flexibility, which has made capitalism and markets thrive in Britain and other common-law jurisdictions in ways that perhaps have not happened in other places. Are we not likely to see the UK courts being mindful of what is happening over there because of wanting to keep that playing field fairly even for the purposes of business? Is that right?

Oliver Jones: I think the English courts would recognise, as they have in the past, that this thing works only if there is reciprocity and uniformity. I might not go so far as to say that they will say, "We will follow Luxembourg unless it is clearly wrong", but certainly that would be one of the motivating principles in how they approach the question.

Baroness Ludford: But then the people who said, "We're getting out in order to be free of the ECJ", will find that the emperor has no clothes, will they not?

The Chairman: They might continue to complain.

Oliver Jones: That might be the perception, but I do not think it would be right. A situation where the English court is looking at the reasoning that has been undertaken by the ECJ, critiquing that reasoning and then saying whether or not it disagrees with it, but recognising that the decision has been made, is quite different from what we have now, which is, "What the ECJ says goes".

The Chairman: Thank you very much. It was incredibly helpful having you here. I hope you felt it was a good use of your morning. It was really useful to us. I am grateful to all three of you. Thank you very much. Lucid, clear and the best legal advice—no wonder we lead the world.