

Select Committee on the European Union

Justice Sub-Committee

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

Tuesday 10 January 2017

10.45 am

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

Evidence Session No. 4

Heard in Public

Questions 21 - 28

Witnesses

I: Mr David Greene, Edwin Coe LLP, Chair of the Law Society's Legal Affairs and Policy Board; Dr Helena Raulus, Policy Adviser on the EU Internal Market, the Law Society; Mr Tim Scott QC, 29 Bedford Row, the Bar Council; Mr Hugh Mercer QC, Essex Court Chambers, the Bar Council.

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Examination of witnesses

Mr David Greene, Dr Helena Raulus, Mr Tim Scott QC and Mr Hugh Mercer QC.

Q21 The Chairman: Hello and welcome. It is very nice to see you all. Happy new year, and thank you for giving your time to come and assist us by giving us your expertise. This is the fourth evidence session of our current inquiry into the consequences for civil justice co-operation post-Brexit and what the loss of the jurisdiction of the European Court of Justice will mean for us. You probably know that the purpose of the inquiry is eventually to create a report, which we hope will not just inform the public but will be informative and helpful to government in looking at what should be included in negotiations, in order perhaps to fill gaps and so on that we identify as existing as a result of this process. It should be known that the reports of the European Union Select Committee are read across Europe; they are very influential, and we like to think that they have an impact. Your evidence is really important to us, and I really am grateful to you for coming along.

I remind you that this session is open to the public. A webcast of the session goes out live and is subsequently accessible via the parliamentary website. A verbatim transcript will be created of the evidence, which will also be put on to the parliamentary website. A few days after this evidence session we will send you a copy of the transcript before it goes online so that you may check it for accuracy. If you want to make any corrections, please get in touch with us as quickly as possible so that we can amend it. If, after this session, you want to clarify or amplify points, you felt that you did not have the opportunity to push an issue, or you want to make any additional points, please put them into supplementary written form and send them to us, and we will include them in our ultimate considerations.

First, would you please introduce yourselves for the record?

Tim Scott QC: I am Tim Scott. I am a family law practitioner. I am the Family Law Bar Association representative on the Bar Council EU law committee, and a lot of my practice is concerned with the two EU Regulations that affect family law, principally Brussels IIa and the Maintenance Regulation.

Hugh Mercer QC: I am Hugh Mercer QC. I chair the Bar's Brexit working group, and my practice has tended to involve a lot of EU law and conflict of laws.

Dr Helena Raulus: I am Helena Raulus. I am the internal market adviser at the UK Law Societies' joint Brussels office. I also sit on the Law Society's Brexit task force.

David Greene: I am David Greene. I am senior partner at Edwin Coe. I am chair of the Law Society's legal affairs and policy board and its international committee. I specialise if anything in group litigation, in collective actions, cross-border. Otherwise, I am a civil litigator.

Q22 **The Chairman:** Thank you. I start by asking how important to the operation of the UK-EU legal system that we have combined are the Brussels I recast Regulation, the Brussels IIa Regulation and the Maintenance Regulation and to the rights of citizens here, and how important they are into the future. Are there aspects of them that you would want to preserve?

Hugh Mercer QC: The uniformity and certainty given to general civil litigation by the Brussels Regulation—I will let Tim answer for family litigation—are very important. You may buy a computer online from a vendor in France, it arrives but does not work, and you were not on the guarantee. The Brussels Regulation gives certainty to consumers, to employees, and to victims of car accidents at the moment; if you are knocked down in the street in Nicosia, you can bring your claim against the Cypriot insurer in English courts. It is certainty for the little guy. The oligarchs can always afford the common law, but the little guy is given certainty and uniformity. It is very useful for judgments; you get your judgment against the Cypriot insurer, you can take it to Cyprus and it will be recognised automatically. You know that there is a uniform procedure for that. So when you start the litigation back in your home country, you are pretty certain that you will get the money at the end of the day.

The Chairman: Thank you. It was suggested, Mr Scott, that you might have something to say on family law.

Tim Scott QC: Yes. I echo in the family context very much what Hugh has said. For family law you have to think about the very large numbers of people involved. The conventional statistics are that there are 3 million citizens of other member states living in the UK and 1.2 million UK citizens living in other member states. In addition, there are a number of families where somebody has come from another member state, has lived in England for a few years, has had a child here and has then gone back to their home country, so you have a transnational family that is not even caught up in the 3 million and 1.2 million statistics. A certain proportion of this very large number will experience contentious family breakdown. The certainty that is provided by the two Regulations that concern family law is vital, and I would be very concerned indeed if those were to be lost.

There is also the question of enforcement under both Brussels IIa and the Maintenance Regulation. There are provisions for ready enforcement, and again it would be a big loss if we were to lose them.

The Chairman: One question in the course of discussions about what leaving Europe might mean is very much how this affects the ordinary citizen, to use Mr Mercer's words. You are right that oligarchs, the rich, can find legal systems that work for them wherever they are. What about regular citizens? Is this really valuable for them? That is the particular question that I would like answered, because the public will want to know.

Tim Scott QC: In family law it is the ordinary citizens for whom this level of certainty is the most valuable. If you take my hypothetical example of somebody who has come from, let us say, Lithuania to England, has had a family here and has gone back to Lithuania or possibly gone on to another member state, what is needed above all if there is, say, an issue about contact in relation to a child in England is certainty about where that issue should be decided, because the last problem that that person needs is uncertainty about where issues about contact with his children should be decided.

Dr Helena Raulus: These Regulations also provide cost-effectiveness. When we in the Law Society have analysed these Regulations and the impact of potentially losing them, we have become aware of the near-automatic procedures whereby the courts actually help the parties in question and the decisions are nearly automatically recognised in other countries. SMEs, for example, get great benefit out of this. They do not have to put so many resources into litigation fees.

Another issue is the mirroring for individuals, which is a cost-effectiveness issue. As has been pointed out, the oligarchs and the big companies have the resources to ensure that they have the legal teams in place who can litigate perhaps in different jurisdictions. The Brussels Regulations remove this.

The Chairman: I am glad that you mentioned the small and medium-sized enterprises, because we know that big corporates can rule the world and have batteries of lawyers at their disposal. I want to ask about the small trading company that does business with Italy. We know that Italy has quite slow processes for dealing with litigation and so on. It is one of the things that Italy has been criticised for: that processes are so slow. Supposing a business man or a business woman in Britain—a small Scottish company creating cashmere goods, say—is working with an design company in Italy that owes money and does not seem very ready to pay. What can be done?

David Greene: If a client comes to us—they might be an SME or a consumer—we will consider the facts and think about four issues in pursuit of the claim: jurisdiction, where we talk about Brussels; the law that applies, Rome I and II; service, under the service Regulation; and enforcement—how am I going to enforce this, and can you come back to Brussels? You might also talk about cross-border mediation under the mediation Directive. You will take the facts and start applying them to those categories. The thing that we want to advise a client on is certainty on how they will pursue the claim in a cost-effective way. That is the most important point for us: pursuing it in a cost-effective way. If you take the Italian case, it might depend on the contract, but it is likely to be dealt with by Rome I. We will look at Rome I, the facts and the contract and seek to pursue it in so far as we can in this jurisdiction rather than pursuing it in Italy.

The Chairman: What about judgment? What about enforcement?

David Greene: On enforcement, the certainty that we have with Brussels is that we can enforce the judgment that we secure in another jurisdiction. The example has been given of Cyprus. You might have holiday claims or road traffic claims. With any claims that are cross-border, you have the certainty under Brussels of enforcement. However, we should not take Brussels as a simple picture. Brussels is only one aspect of the process. For instance, when we look at a road traffic accident, we also look at the motor insurance Directive, which is what gives you your firm rights of pursuit of a claim in this jurisdiction. When we talk about Brussels, it is a bit simplistic to say, "Let's keep Brussels", "Let's have Lugano", or one of those treaties. You have to look at the deeper policies lying behind the motor insurance Directive, for instance, or the package holidays Directive, if you have a holiday claim. All those things add up to giving you jurisdiction and allowing you enforcement. In a way, we should be looking at the complexity that lies behind Brussels—the Regulations and the other Directives that are relevant to it. That is important when one looks at consumer claims, so that we can ensure that that simplicity is retained. The common law might provide answers to you as a consumer, but the world has moved on a bit in 40 years. We have moved to a much more international and more European-focused United Kingdom. People are taking holidays or buying goods. If I buy something on Amazon, I may be buying it from Luxembourg. There are all those issues. I would say, as a lawyer for claimants, that we are looking for some degree of certainty. At the moment, that is what we are lacking. The same is true for SMEs—the need to get a degree of certainty on what the position will be post-Brexit.

Q23 Baroness Shackleton of Belgravia: Mr Greene has come some way to answering the question that I am going to pose, which is: if we do away with the Brussels regime, would the vacuum that is created be adequately filled by the common law? We have heard evidence pro and against. We would like to know whether you agree or disagree.

David Greene: From our point of view, the common law can and will provide answers in a vacuum. I go back to the point that, with the common law, there is a degree of uncertainty. The world has moved on; how is the common law going to be applied? If I may say this—it is a rather anti-common law point—the development of common law is a very expensive process. It requires the parties to litigate, to come to a conclusion and to have a decision setting up precedent. We would be going back all those years and trying to develop the common law quite quickly to meet modern conditions. That is the problem with going back: it has that uncertainty. If someone comes to me and I talk about jurisdiction, I will look at the circumstances but I may not have the certainty to say to them, "Actually, 40 years ago the common law provided this and this is how it developed". It would be fair to say that, while Brussels deals with the European Union, the common law has developed in relation to other jurisdictions, but there would be that uncertainty.

Baroness Shackleton of Belgravia: On family law, do you see any

problem that we are back to the old days of not first past the post but jurisdictional arguments as to forum non conveniens, uncertainty and enforcement problems? Will the common law be adequate to stop the gap that Brussels will leave if we depart?

Tim Scott QC: There are strong structural and practical reasons why the answer is no. You have to consider the position of the family court. We now have a unified family court. A lot of the work is done by lay magistrates and district judges, who are not aware on a day-to-day basis that they are operating EU Regulations, although, in fact, every case that comes before them is based on EU Regulations. The first point is that, if we lose the EU Regulations, there will be a massive retraining exercise, which will be much more difficult in the family court than, I would guess, for intellectual property, which is largely done by specialist judges in the Chancery Division, who can be expected to retrain on the hoof. For the family court, it will be a much bigger exercise. Also, the family court is under immense pressure. The virtual abolition of legal aid in family cases has put the courts under great pressure and the family courts are, frankly, fairly demoralised. They have a very difficult time. I could give an example, because I sit part-time in a family court and I see it from that side as well. If we were to go back to forum conveniens in intra-EU cases, again we go back to the numbers of people concerned. A potentially very large number of cases will be imposed on an already fully stretched family court that is having to relearn the law.

The Chairman: Mr Scott, for those who are listening and who will watch this recording, what does the first past the post system mean with regard to the way in which cases are brought?

Tim Scott QC: Let us take a simple example. Suppose you have an Anglo-French couple. They live in England but they are both French nationals. It is possible for either of them to start divorce proceedings in either England or France. The first past the post system means that whichever proceeding is filed first will prevail. Under the common law rules of forum conveniens, the English court would decide whether France or England was the appropriate court—the forum conveniens—for the matter to proceed. That is a wonderfully fair proceeding and is great for oligarchs who can afford it, but it is very time-consuming both for the parties and for the courts, and it is very expensive because it involves technical legal argument. For ordinary people who are confronted with that, there will be a great loss of certainty—I echo what has been said about the importance of certainty. It will be very difficult for the courts, because it could impose a huge additional burden.

The Chairman: Mr Mercer, I notice that you want to come in.

Hugh Mercer QC: I just want to add that in general civil litigation there is also the problem of discretion. The rules in Brussels proceed on the basis of saying, "In circumstances A, B and C, you go to Italy. In circumstances D, E and F, you go to England". The common law system will always decide on a discretionary basis which is the appropriate court. That means that a defendant who wants to string things out always has

the possibility of an argument; he cannot be struck out on that basis and he can always argue the point.

The other important point is that the common law rules help with the import of judgments, because we can use the common law system to deal with judgments coming from overseas, but they do not help with the export of judgments: what happens to English judgments when they arrive in Italy, Spain, Portugal or France? There you would have to look to their old national rules as to how they deal with an American judgment, a Russian judgment or a Chinese judgment. Those rules tend to be much more protectionist. There are many more hoops that you have to jump through to get your judgment recognised, not least because the American judgments, for example, tend to have rather quaint things like triple damages, and countries generally do not like to apply those sorts of penal judgments. So you have to jump through many more hoops.

Baroness Shackleton of Belgravia: Enforcement problems.

Hugh Mercer QC: Enforcement problems, exactly.

Tim Scott QC: I did not touch on enforcement, but much the same applies in family law.

Q24 **Lord Cromwell:** I think you have all more than touched on the importance of certainty of jurisdiction, enforcement and process. We are all sitting here because we are about to take a well-established system and throw it into complete uncertainty. My question to you focuses on where business will be done if that happens. London is clearly a very active centre, but which jurisdictions are likely to soak up that business, and how, or should, the Government be doing anything to address that?

Dr Helena Raulus: We have already seen a bit of movement. This happened before the EU referendum. The German and Dutch jurisdictions are building up the commercial litigation side in particular. We have heard anecdotal evidence that post the EU referendum result there is a lot of discussion on the continent. They look at the UK's and the English courts' jurisdiction as only one of the options at this point, not as an automatic option as previously. We have seen a move to grab—if you want to use that word—commercial litigation for the continental courts. The Dutch, for example, are building a commercial court that also operates in English.

The Chairman: Yes, we have had testimony that an English-language court is going to operate.

David Greene: As a practitioner, we are seeing a degree of arbitrage about the jurisdiction you choose to pursue a claim. If you take the Netherlands system and the UK system as examples, there is a degree of arbitrage about the system you would use for, for instance, a cartel claim. If you were bringing a cartel claim for consumers, it goes cross-border into Europe, and we would be thinking about whether we should bring it in this jurisdiction—England and Wales—or under the Netherlands scheme. The Netherlands in particular has established an English-

language court, as have the Germans. They have developed their court system to be beneficial to consumers and are undoubtedly trying to attract business into the jurisdiction. The Scots talked about having a consumer collective action process, so we are seeing that developing within Europe with jurisdictions becoming attractive.

Lord Cromwell: Is that healthy competition or a race to the bottom?

David Greene: I do not think it is a race to the bottom; I think it is about the attractiveness of the ability to enforce my rights. If I am a consumer and I have been subject to a cartel—we can think of many examples of that—where do I bring my claim? What is my ability to bring a claim? My ability to bring a claim derives partly from all the points I was making about jurisdiction and enforcement but partly from my ability to get a speedy conclusion, the efficiency, the cost process and how much it is going to cost. All those things are relevant to our choice of jurisdiction. We in London would think about which jurisdiction we are going to use.

Lord Cromwell: One last point on this. You are in a sense describing healthy competition, but it is also a reversion to the first past the post system in effect, or something very akin to it, to say, “Which jurisdiction will be the best for us? We’ll go for that one”. Does that discomfort any of the other members of the group giving evidence?

Hugh Mercer QC: It does not give discomfort. There has always been arbitrage within Europe; it is just that we have generally been the winner to date. English courts are good-quality courts. They tend to be rather expensive, but you will get a certain result that is respected. Our courts will suffer if we go with the common law, because you have to ask yourself the inevitable questions: you want to know where you can sue with certainty and where you can enforce the judgment. Those are the first and last questions, and if there is any uncertainty over them, that is important. The art of litigation is about reducing the hurdles, so if you have two extra risks, you might steer clear of them. For intra-EU cases, you may well go to the Netherlands or possibly Germany, although there the English-language courts have had rather modest success. I was told last September that only four cases, or maybe five, had been successfully run in English, but it is trying. France has just rejigged its contract code in order to attract more litigation. That is healthy competition.

The other problem is that the more global litigation, the big litigation, which gives a lot of income to the legal sector in London, will tend not to go to an EU court, in my view. It may go to arbitration; there is quite a strong possibility of that. It could still be London for arbitration, but it could be Paris, Geneva or Stockholm, or New York for litigation—it is big in the banking and financial services sector—or Singapore, which is putting in a big pitch, or Dubai. At that sort of level, our courts have led the way because we have worked to get a system that works. We have the unique advantage at the moment that our judgments can be enforced throughout the Commonwealth under the 1933 Act and throughout the EU. That is unique in the world, and it helps.

On arbitration, the 1958 Convention gives greater enforceability throughout the world for all arbitral rules, but London has a critical mass of competent arbitrators, which still gives an advantage, but it is not an insuperable advantage because you have developing centres such as Singapore, which is making a big pitch.

The Chairman: Baroness Ludford, do you want to supplement that?

Baroness Ludford: I have not fully understood where the scope for arbitrage under EU rules comes, because you were talking about certainty. I confess that I am not familiar with civil law; I am much more familiar with criminal law. Given that I understood that the stress was on the certainty of rules—if A applies, therefore B applies under the Brussels Regulations and the jurisdictional rules—where is the scope for arbitrage in choosing a jurisdiction?

Hugh Mercer QC: I gave the example of the rules: in cases A, B and C, litigate in Italy; in cases D, E and F, litigate in England. There are different rules, but the main rule is that you go to where the defendant is domiciled. In contract cases, you can go for the place of performance of the obligation in question as an additional possible jurisdiction, so it gives you the choice.

Baroness Ludford: So there is a choice?

Hugh Mercer QC: There are often options, but they are clearer than the common law equivalent.

Q25 **Lord Oates:** Could you give us your views on the alternatives, post-Brexit, for UK co-operation in these fields with other EU member states? In particular, what is your view of the Lugano Convention as a precedent? I noted Mr Greene's comment that perhaps we should not rely too much on it. Overall, do you consider that there are adequate replacements for current EU legislation?

David Greene: I think there are. I will go on about certainty. We are looking for certainty, and I would like the Government to say, "This is what we are going to aim for in negotiations". That might be Lugano. We would regard Lugano as the second choice compared with Brussels, but it might be Lugano. We would like the Government to set out some aims that they want to achieve. The difficulty is that quite a lot of these provisions are reciprocal, and while we are talking about the great repeal Bill and bringing into domestic legislation some of the Regulations, for instance Rome I and Rome II, quite a lot of this is reciprocal, and that will need negotiation over the period. Yes, we would like the status quo to some extent. We would like to have Brussels adopted in some fashion, otherwise Lugano, and then we would fall back on international treaties, the Hague Conventions or common law.

Dr Helena Raulus: If I may add the Law Society's view, its preference is to try to ensure access to Brussels and perhaps also to the linked frameworks, as has been explained, for the motor insurance Directive, consumer legislation and insolvency. This is what it considers to be the

priority, because it works. This framework of legislation provides the best, most cost-effective and most certain solution. Of course, as an alternative, it is possible to enter into Lugano, but then some of the consumer issues start to fall out.

We would also encourage amending Lugano. In the last revision of the Brussels I Regulation in 2012, the *lis pendens* rule, which sets out which court takes priority when two cases are pending in different countries, was amended such that if the parties have a choice-of-court agreement and one of the parties tries to take the case to another court in another member state, if the case is brought in the court of state appointed by the agreement, litigation can still go ahead. The case does not have to wait for the court first seized, which is usually the priority rule: that the court first seized decides that it does not have jurisdiction. This refers back to the Italian courts, and the so-called Italian torpedo, where proceedings are very slow and are a way for parties to try to frustrate the proceedings. The rule was advocated by the UK Government at the time, so we would like to see this. It is also very important commercially, because again we have some evidence from the financial services world that these kinds of manoeuvring tactics have been used.

Moving on to the international sphere, the problem there is that we have even less scope. At the moment we only have the Hague choice-of-court agreements Convention. This applies only where parties have made a choice-of-court agreement. We do not have rules on what to do without these kinds of agreements; we do not have employee protection, consumer protection, insurance clauses or anything like that. We know that the Hague judgments project is coming and will deliver a new worldwide judgments Convention this year, but again it is only for commercial purposes. As far as we have seen, it does not contain the weaker party protection, which is the consumer protection and employee protection, which are part of Brussels I. These are our reasons for backing Brussels I as the priority, but if Brussels I is not achieved there are alternatives coming up.

Tim Scott QC: If we were to join the Lugano Convention, that would to a very significant extent pick up the slack of what would be lost by losing the Maintenance Regulation.

So far as Brussels IIa is concerned, looking first at the children side, I know that in December David Williams QC gave evidence to this Committee about the extent to which the Hague 1996 Convention would and would not pick up the slack if we lost Brussels IIa, and I cannot improve on what he said.

That said, none of these would resolve the problem of reintroducing forum conveniens for divorce, which I spoke about earlier and which is one of my main fears about how our courts would be able to deal with that.

Q26 Earl of Kinnoull: The Government appear to reject strongly any role for the European Court of Justice post-Brexit. What do you think the

implications might be for that in civil justice co-operation?

Hugh Mercer QC: We must remember that when the Brussels Convention applied, from 1982 until 2001, it was only the supreme courts that could send questions to Luxembourg in this area. So from 1982 to 2001 we developed a system whereby most of these cases were dealt with nationally.

The Court of Justice keeps a database of national court decisions. I have cited decisions of the Swiss supreme court, the French supreme court and the Italian supreme court to English judges on issues where there is no Court of Justice authority. So I find it quite difficult to see that rejecting the jurisdiction of the Court of Justice is an insuperable bar. It might make it more difficult to achieve an agreement with the EU to apply the Brussels Regulation, which is basically the state of the art—it is the 2012 version.

Lugano is 2007 and does not have some of the improvements which the UK lobbied hard for. Under Lugano, there is no access to the Court of Justice for Lugano states; there is an agreement whereby the courts of the Lugano states take due account of the decisions of the Court of Justice, and the Court of Justice itself takes due account of the decisions of the Lugano courts. If it is an issue on which the Swiss supreme court has had a view, and it is obviously very strong on conflict issues, the Court of Justice must take account of that. It is more of a dialogue between courts.

At the moment, Denmark has a treaty with the EU to apply the Brussels Regulation. That treaty includes references to the Court of Justice, but it does not seem to me to be beyond the scope of negotiators to seek to achieve a treaty with the EU to apply the Brussels Regulation without reference to the Court of Justice but on the basis of due account—to apply the Lugano interpretation rules to a treaty applying the Brussels Regulation.

David Greene: I think we are bound to get to a position where due account is taken, because it is quite likely that the—

The Chairman: Can we make it clear that due account is your drawing on decisions even if you are not under the jurisdiction of the European Court of Justice; that you will take account of the way in which law is developing across Europe, even here in Britain?

David Greene: There are two forms of due account. There is the formal form of due account: i.e. some legislation that says that the English and Welsh courts will take European decisions into account. There is also the informal basis. We are likely to get an informal basis at least, with the English and Welsh courts taking into account what the Court of Justice has been saying. That is bound to come out of it, because we will be interpreting very similar laws, if not the same laws, and just as a matter of practice we will get that.

Dr Helena Raulus: Also, it would be desirable, because uniformity in interpretation, especially when it comes to jurisdiction rules, is needed. If there is no uniformity in the interpretation of the jurisdiction rules, two courts in different member states, or even in different participating states at this point, might consider that they have jurisdiction under the same clause. This opens up forum shopping for the parties, but it also opens up the possibility of this judgment not being recognised and enforced in the other courts. Too much divergence might jeopardise the full aim of co-operation.

I will add a small point on the Lugano protocol. Interestingly, it says that the courts take due account of the decisions of other courts. It does not mention the Court of Justice specifically, because this was a bit of a touchy subject at the time for the EFTA states joining in. However, it opens up the possibility of looking, as Hugh Mercer said, at the Munich court and other courts, not only what happens at the Court of Justice. Of course, for the EU area the Court of Justice will have the most say because it has the ultimate authority to interpret Brussels I. However, it is still one court among the courts, and it holds a database on interpretation of Lugano.

The Chairman: So that everyone understands, Lugano covers three countries: Norway—

Dr Helena Raulus: —Iceland and Switzerland.

The Chairman: Yes, I was right about Switzerland. Those three countries are not part of the European Union. They are in a special situation that is distinct, but they are covered by the Lugano protocols, which fall short of Brussels, which you all describe as being the state of the art. Could you invent a Lugano-plus to bring you up to it?

Hugh Mercer QC: In a sense, that is what I am suggesting. The latest Lugano is 2007 and the latest EU Regulation is 2012. In those five years, there was quite a bit of lobbying, particularly by the UK. We got about half a dozen points changed. Four or five of those points were proposed by the UK and heavily pushed by the UK and ultimately prevailed. Lugano-plus would be saying that we will adopt the same approach to interpretation as under Lugano, so the European Court of Justice will not have jurisdiction to consider questions from the UK, but UK courts will take account of the courts of all other member states, including the European Court of Justice, and the courts of other member states and the European Court of Justice will take account of the decisions of the UK and Swiss courts, as they do. The rules that we will apply under that system will be the same jurisdiction and enforcement of judgments rules as under the current 2012 Brussels Regulation.

The Chairman: I am grateful to you for indicating the extent to which Britain has played a very powerful role in the creation of law across Europe. The impression is always given to the public that it all comes at us in a great wash of law, when in fact law is one of the things that the UK is rather good at, and we actually play a very powerful role in creating

this law.

Hugh Mercer QC: The UK Law Societies' joint Brussels office, the Bar Council's Brussels office and British parliamentarians and MEPs have been tremendously influential. That is unsung. People do not believe it on the streets and it does not make *Daily Mirror* headlines, but Britain has punched well above its weight. I was chair of the UK delegation to the CCBE—the parliament of the Bars of Europe. Whenever there is a difficult issue of law, people look to France and the UK for a lead on the position. We have a very strong legal system, and we have been very influential in Brussels. The fact that the public do not acknowledge that is sad, but it does not detract from that fact. It is the strength of our Civil Service, our MPs, particularly our MEPs, our Commissioners and all those people who have invested their careers in going to the European institutions.

David Greene: There is an example of British influence in the mediation Directive in relation to the negotiations on it. When the Directive came in, we had most of the provisions in any event. We set our standards quite high in those terms. When the mediation Directive came in, the main change we had to make was to the Civil Procedure Rules rather than to the law itself.

Q27 **Lord Judd:** My question follows on from your answer to the last question. We are again bouncing up against the post-truth society. Here is a self-evidently positive piece of evidence about our influence and place in Europe that has been totally ignored by the popular media. In fact, it has been denied. It is very difficult for all of us to operate in a society in which the public are being misinformed quite deliberately. It seems to me that the issue gets complicated, because last weekend for example the Prime Minister was at pains to say that lots of people are living in a sort of dream world in which they still want to be part of it all but not to be part of it. You very professionally want to be part of it, even if you are forced to approach it from outside. If the Government were prepared to take advice, what advice would you give them about our whole strategic approach to the issues to which you have alluded this morning?

Hugh Mercer QC: I would try to stress that these are conflict of laws instruments. Conflict of laws arises wherever you get people, businesses, products or goods crossing borders. Even if we go down the hard Brexit route, we still need rules that sort out cross-border situations, such as a Franco-British husband and wife or the sale of goods by Amazon in Luxembourg. You still need rules to sort out what is going to happen. If you do not have these rules, the rules will be made on a case-by-case basis, and that is in nobody's interest, so the first thing is that conflict of laws instruments are necessary.

Secondly, these rules are genuinely protective of the little guy. The consumer wants to sue at home. It is not just our consumers, it is also the German dentist who has too much money and invests it through a bank in London, the bank loses the lot and he wants to sue it. He needs certainty over where to sue. You do not need free movement of

persons—there could still be a visa system and all that, it could be a hard Brexit—but for this area of civil justice co-operation you need a sensible approach whereby the EU says, “We have interests in our citizens having certainty in dealing with the UK”, and the UK says, “Our citizens and our businesses need certainty dealing with the EU”. Regardless of Brexit, this is a side issue. Under the old EU treaty, this was right at the end. It was a very short clause in Article 220 of the original 1957 EEC treaty, which stated that countries would co-operate in order to enforce each other’s judgments. It was a very vague thing along those lines.

This is not something that has been moved closer to the area of free movement as part of the internal market. Obviously it helps the internal market to work, but at origin it is not part of the internal market or of free movement. It can be dealt with separately. Both sides have a really strong mutual interest in making sure that the little guy does not suffer as a result of Brexit when he is involved in cross-border situations.

The Chairman: Thank you. That was very helpful.

Baroness Ludford: You talked about the possibility of some post-Brexit arrangement whereby the UK courts would take due account, like Norway, Iceland, Switzerland and so on, under Lugano, but I put it to you that it is sometimes argued that a deal that has been given to small countries still in theory in a sort of transition towards the EU, although that is more honoured in the breach than in actuality, will not be given to a country like the UK, which has chosen to leave. Iceland, Norway and Switzerland do not upset the centre of gravity, as it were, of the EU, but the UK leaving and saying that it wants special rules and will not obey the ECJ but will take due account will not necessarily have strong weight in negotiations to get what Norway and Switzerland have.

David Greene: We are often referred to as taking either the Danish model or the Norway model. That is not helpful. I think we will have a UK model, which will differ in some ways. As you say, small countries may have particular status or influence in a way, but we have a different influence. We have a lot of consumers who want to take holidays in Europe and who want to buy goods from Europe, and Europe wants to export goods to the UK. We are in a different position from small nations, but we go into those negotiations, as Hugh has been saying, saying that these are sensible solutions. This is a sensible way for consumers to be able to take their holiday in safety and to pursue their rights in relation to road traffic accidents. These are sensible solutions.

From our point of view as lawyers, taking up the point made by Lord Judd, if the Government will say to us that this is the political end that they want, we are in a position to say how we think we can achieve it sensibly. That is a matter of negotiation. The Brussels Convention or whatever we have is a matter of negotiation, but we have strengths and weakness, as you indicate. I think we may be forced into having a transitional position and will have some form of legislation for a transitional provision with a sunset provision, two years or whatever it happens to be, or maybe a sunrise position on Brexit and a sunset

position two years on, so that we have room to advise and say that this is how we can achieve what you want in law, this is the sensible way forward, and we can achieve it in the negotiations. I think the two years after the Article 50 notice will be too short. You are trying to put into that period an extremely complex picture. You cannot look at Brussels in isolation. You have to look at all the legislation that supports it—the motor insurance Directive and the like. As a lawyer, I would advise saying that we ought to be trying to develop a transitional position where we can cite our strengths and make our case out.

The Chairman: I see that Dr Raulus wants to come in on this. You are saying that you endorse the view that this is a longer process than people might imagine. There will be the two-year period of negotiation post Article 50, but then there will have to be transitional arrangements for a number of years. You are talking about possibly two, but whatever; there will be a transitional period post those two years of negotiation, so we are talking about something that will last well into something in the order of five years. Is that what you are saying?

David Greene: The ultimate result, because it is sensible, is that we will have something along the Brussels line. We will have enforcement that, as Hugh says, is consumers able to enforce and to bring proceedings. That is a sensible solution, but to get to it will take more than two years because it needs reciprocation. There are some provisions—for instance, Rome I and Rome II, which we can reproduce in the great repeal Act in due course, but there is quite a lot that is reciprocal and that will need negotiation. You are trying to stuff quite a lot into those two years post the Article 50 notice. There is a lot of complexity. It is not a simple picture.

Lord Judd: You persuade me, and I am sure most of my colleagues around the table, but the trouble is that we are not operating in a rational situation; we are operating in an emotional situation. Emotion is dictating the agenda. There are emotional objectives that counter the whole concept of a rational approach to the management of this.

David Greene: From my point of view, when we talk about emotion we are really talking about the politics of the situation.

Lord Judd: Yes, of course.

David Greene: As lawyers at least, we are trying to meet what the politicians want. We are trying to meet the political agenda. If, for instance—and I think it has been put—you do not want the European Court of Justice—

Lord Judd: But you are saying that you can only meet it by continuing to co-operate, and you do not believe that you can meet it as you are meeting it at the moment if we are somehow floating in mid ocean in a world of our own.

David Greene: If someone comes to me I would certainly tell the Government that this is a sensible solution. If you want to ensure that consumers can pursue their rights in relation to their holiday, the purchase of goods and road traffic accidents, this is a sensible solution and may be how you can achieve it. Whether it is lawyers or the Civil Service advising those dealing with the emotions and the politics, that is our role as lawyers. We can do only that. I cannot do all the politics or the emotional bit.

The Chairman: One problem in all this is what is thrown out by the popular press and perhaps by some unrestrained voices: that this advice is coming from people who have their own political agenda. You are saying that as lawyers dealing with the practicalities of people's lives and the problems that face them, the advice you are giving, based on years of experience, is that we have to provide these protections for consumers.

David Greene: We are saying that politically in the newspapers certain suggestions are put into the Brexit box, or taken out of it, and judgments are made. All we are trying to achieve is something sensible for consumers. I hope we can persuade politicians of that good sense for the future.

Hugh Mercer QC: We are speaking against the interests of individual lawyers in a way, because as lawyers you like to have an efficient system, but if you are talking about financial interests, endless cases where you decide on a discretionary basis—

The Chairman: The more complex, the better.

Hugh Mercer QC: Yes. I always tell a client that if I tell you that your case is interesting, it is good for me and bad for you. We are suggesting something that we think is sensible, because we, particularly the Law Society and the Bar Council, focus on trying to achieve a better level of justice. That is where we are speaking from.

The Chairman: We are talking about what is in the interests of citizens, the problems that are presented to them as they lead their lives and the best rules that there could be to bring just outcomes for them.

Hugh Mercer QC: That is it. On transitional measures, I think your secretary has received the Brexit Papers from the Bar. Our paper on the Brussels Regulation has a suggestion at the end on transitional measures, although I also endorse David's point that the difficulty in this area is in dealing with the Brussels Regulations in isolation. For example, the volume of car accident cases is very high, and at the moment if you go to Nicosia, the Algarve or somewhere and are unfortunately involved in a car accident, you can come back to England and sue the Portuguese insurer in England. That is partly the effect of Brussels, but when the European Court of Justice reasoned the case in question—Odenbreit—it took account of the motor insurance Directives. There is an argument that if you maintain Brussels you maintain that right to sue the insurer in

the English courts, which is very practical. That will not make the front page of the *Daily Mail*, but it ought to be of interest to those who make the 44 million British journeys between the EU and the UK each year.

The Chairman: I noticed that a number of hands were up, and I will let Lord Cromwell go first.

Lord Cromwell: Is not the irony here that you are really saying that the system works, but if it is not going to exist we are going to have to reinvent it? Is that not it in a nutshell?

Hugh Mercer QC: Yes. As David says, it sounds from the political noises that we are likely to end up with some sort of bespoke UK solution, but obviously one would hope that it would be based on a system that works. We must also look at it from the other side. All those tourists we saw crossing Westminster Bridge this morning taking their selfies have an interest in making sure that if they cross that bridge and go under a bus, they can get sorted out reasonably easily.

Baroness Shackleton of Belgravia: Following on from that, do you think we have good negotiating powers to pull other people to the table to let us be part of this club that is so good for us? Do you think we have good negotiating powers? It is also good for them, but we are signed up and will continue to be signed up to these Conventions.

Tim Scott QC: So far as family law is concerned, the answer should be yes, because the two Regulations we have been talking about provide a framework that is mutually beneficial for all member states, including member states whose 3 million citizens are resident in the UK. I would hope that it will be easy to sell at an emotional/political level to the British people and at a negotiating level in Brussels the idea that for the stability of families and the welfare of children across the EU it is important to preserve this framework.

Baroness Shackleton of Belgravia: Yes, of course. We see the enormous benefits of a judge in England picking up the phone to a judge in France to try to resolve a problem. There is a great deal of good will that cuts lawyers out of it, which is quite good for punters—

Tim Scott QC: Absolutely.

The Chairman: You are talking particularly about child custody.

Baroness Shackleton of Belgravia: Yes. In any decision, there is a great camaraderie between the people who have signed up to implementing it and not treading on each other's toes. Losing the good will would be a very retrograde step.

Tim Scott QC: The European Judicial Network has become increasingly significant. It has been a slow process and some countries are still better than others, but as Baroness Shackleton says it works and it really helps children.

Dr Helena Raulus: The view in Brussels is that it will also be in trade. If there is trade access and people accept that there should be trade access, it should be combined with recognition and enforcement of judgments. The Lugano Convention was a precursor to the EEA agreement between the EFTA states, although not all of them, and the EU on free trade.

The Chairman: You have to explain to those who are not familiar with the acronyms what you are talking about.

Dr Helena Raulus: The European Economic Area agreement extends a large part of the internal market to Norway, Liechtenstein and Iceland. That would not have been achievable unless there was the Lugano Convention beforehand. We had one of the original negotiators of the EEA agreement in our Brussels office last year, and he explained that it was the mechanism that opened it. From the Brussels perspective, we would be looking at a package that means that if you have X, you will have Y. Of course, most often it is sorted out in relation to internal markets that if you have free movement of goods, you have to have free movement of persons et cetera. I am not talking about that angle here; I am saying simply that if there is trade access it will have to be combined with recognition and enforcement of judgments and some civil co-operation measures. This is a package of issues from the Brussels perspective.

Lord Polak: I may be missing the point, but are we really going into the unknown? I think you referred to the little guy. The little guy may not be from the UK, or even Norway, Iceland or Switzerland, when he has a problem driving or on holiday. He may be from Australia, Canada or the United States. Are there not precedents that Britain can learn from when going into this situation?

Hugh Mercer QC: As I said earlier, there you apply the common law, and the common law works out the jurisdiction on that basis, but the number of those cases is a tiny fraction compared with the number of movements between the EU and the UK. You can deal with those cases. People will try to avoid litigating because of the uncertainties at the beginning of the process about which is the competent court and about enforcing the judgment. If it is a Commonwealth country, enforcement is not an issue, but there is still the discretionary angle at the beginning with the common law. Even Professor Fentiman, when he gave evidence in December, did not suggest that the common law was as good as Brussels. The common law would tide us over and would deal with the import of judgements to England, but it does not help when English judgments go overseas. There the Commonwealth connections help with Commonwealth countries, but if you have a US judgment or a Russian judgment, you have to sue on the judgment. You might get summary judgment, or you might not. We are saying that the degree of links, movement and trade, particularly for smaller businesses trading, mean that having a straightforward, uniform, pretty certain system—it is not wholly certain, as nothing is—is better than the common law alternative.

To go back to the previous question, one could ask for civil justice co-operation going forward. We had the 1968 Convention, the 2001 Regulations, 2007 Lugano and 2012 updated Brussels. This process will carry on, and it is a process in which we have an interest. Article 220 of the original treaty was very short. It said, "Member States shall, so far as is necessary, enter into negotiations with each other". We could suggest that. That is not to say that we are trying to keep within the EU, because the EU is mainly about free movement. We are just saying that because we are close by we need sensible rules to sort out litigation issues and we should try to co-operate on that.

David Greene: From my point of view at least, we need to divorce to some extent the emotion of the EU and Brexit from these provisions, because they are sensible provisions. They have been negotiated over many years. The recast Brussels Regulation came out of negotiations about the failings in the first Regulation and what needed to be changed. Over the years, we have negotiated a sensible solution to providing these rights to consumers. Yes, we can go back, but these solutions to the problems have been worked out. We happen to have worked them out with the European Union because that is where we were, but there is no reason why they should not continue. It is rational that they should continue after Brexit because they are solutions to the problems for consumers, in particular.

The Chairman: I will have to bring this session to a close. There are some questions that we originally intended would come from Baroness Hughes and Lord Polak, but it seems to me that we have covered them. Is there anything you would like to add, Baroness Hughes?

Q28 **Baroness Hughes of Stretford:** I think you have covered the answer to my question, which was about whether you feel that the kind of civil justice co-operation that is covered by the Regulations that we are talking about could be maintained via the UK-EU withdrawal treaty. You all seem to be saying that technically you are optimistic that that could happen provided there is the political will and the negotiating ability and also—I am asking this question—provided that in all the heated issues of the single market, immigration and the rest of it, this issue has sufficient priority for the negotiators. What are your reflections on that? Do you have any inside information about whether there are any concerns among you and your colleagues that it is not sufficiently on the radar screen in the priorities for the negotiations?

The Chairman: That is a very important question. The law is sometimes seen as just law, when actually it is at the heart of everything. Do you think it will be up there at the top of the agenda?

Tim Scott QC: It is very difficult to know, as with almost everything else about Brexit. I was at a meeting at the Bar Council in November that was attended by representatives of seven government departments—including DExEU, as we have learned to call it—to discuss issues similar to this, and all I can say is that they listened very politely and gave nothing away.

Baroness Hughes of Stretford: Depressing.

Hugh Mercer QC: The Lord Chancellor at a breakfast meeting recently was very clear that she is up to speed on this and recognises it as a serious issue that needs some early indication of intent. Laurie Rabinowitz was at a meeting of general counsel a few weeks ago, and the trouble is that at the moment it seems that general counsel of companies writing jurisdiction clauses in contracts are tending to shy away from English law and English jurisdiction.

The Chairman: It is having a consequence at the moment.

Hugh Mercer QC: Absolutely. Irish barristers have told me that they saw litigation arrive in Dublin in September which they did not feel would have come to Dublin before 23 June.

The Chairman: So others will reap the benefits.

Dr Helena Raulus: I do not know whether this is a priority, but another reason why it should be there is that if we take a look at the future, if it is not included in the new EU agreement and the UK would like to negotiate with France or Germany about recognition and enforcement of judgments, it cannot do so. Only the EU has the power to negotiate these agreements because Brussels I and II are EU legislation, so the UK would have to negotiate these agreements with the EU anyway. If it is recognised that the recognition and enforcement framework is not adequate to deal with this, we are back to the negotiating table. That is Opinion 1/09—

Hugh Mercer QC: 1/03.

Dr Helena Raulus: Sorry, 1/03—I am bad with numbers, I am a lawyer—on the Lugano Convention. That should be taken into account.

The Chairman: Lord Polak, is there anything you want to add?

Lord Polak: No.

The Chairman: I thank all of you. This has been a really important and interesting session. I am grateful to you all for coming. I can tell that my view is shared by the whole Committee. Thank you very much indeed. I hope that when you see the report, you will see your views reflected. We must hope that part of any negotiation will be that law does not lose its place in the order of priorities. Thank you very much indeed.