



Select Committee on the European Union

Justice Sub-Committee

Corrected oral evidence: Civil justice co-operation post Brexit — follow-up inquiry

Tuesday 15 May 2018

10.45 am

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Members present: Baroness Kennedy of The Shaws (Chairman); Lord Anderson of Swansea; Lord Cashman; Lord Cromwell; Lord Gold; Lord Judd; Earl of Kinnoull; Lord Lester of Herne Hill; Baroness Neuberger; Lord Polak; Baroness Shackleton of Belgravia.

Evidence Session No. 1

Heard in Public

Questions 1 - 10

Witnesses

I: Dr Helena Raulus, Head of Brussels Office, UK Law Societies, Joint Brussels Office; Mr Alexander Layton QC, 20 Essex Street, representing the Bar Council.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of Witnesses

Dr Helena Raulus and Alexander Layton QC.

Q1 The Chairman: Welcome. It is very nice to see you both. Before we start, I remind everyone of the work that has been going on in this Committee. We have produced a number of reports, but two of them are particularly relevant today. One is the report on dispute resolution and enforcement. We are particularly concerned about civil justice co-operation post Brexit—this, of course, was the subject of our report, *Brexit: Justice for Families, Individuals and Businesses?*—and what the impact of Brexit will be. Next week we have a session on the family law elements in particular.

I think you have been given some indication of the topics that we want to cover. I want to alert you to a number of things. The session, as you know, is open to the public, and a webcast of it goes out live and is subsequently accessible on the parliamentary website. A verbatim transcript of your evidence is created, and that too will be put on the parliamentary website. A few days after this evidence session you will be sent a copy of the transcript to check for accuracy, and we would be grateful if you could do that as promptly as possible so that we can get the transcript out.

If by any chance after this session there is something that you would like to add to what you said, it is absolutely possible for you to do so. If you have any additional points and you want to submit supplementary written evidence, please do so as promptly as possible. That would be very helpful indeed.

Dr Raulus, you are from the Law Society?

Dr Helena Raulus: Yes, I am the head of the UK Law Society's Brussels office.

The Chairman: Mr Layton?

Alexander Layton QC: I am a practising barrister. I have a background and specialisation in cross-border litigation, and I am a visiting professor at King's College London.

The Chairman: In evidence to our inquiry, Dr Raulus, the Law Society warned that the uncertainty caused by the Brexit was already having an impact on the UK's market for legal services. A year on, has that assessment changed?

Dr Helena Raulus: No. We find more certainty, let us put it that way, in the proposed draft withdrawal treaty and the transition or implementation arrangements, because that would effectively extend the time period available for the negotiations. However, at the end of 2020, we would essentially face the same question again, as highlighted last time. So there is still uncertainty as to whether civil justice will be included in the new treaty. We did not see that in the Council guidelines from March as one of the negotiation topics. We are therefore uncertain whether it would be part of the FTA arrangements. Also, civil justice normally does not form a part of free trade agreement arrangements. So while we have certainty that things will continue as the status quo during the transition period, we still do

not know whether this will be included in the future arrangements or whether there will be a cliff edge there.

The Chairman: So really the can has just been kicked further down the road, in that the transition period means that everything can remain the same until 2020, and you are concerned about what happens at that point in time. Will some formulation not be created during that period of transition? Is that not what it will be used for?

Dr Helena Raulus: Absolutely. The situation is very complex at the moment, because currently it is not possible for the EU states to negotiate with the UK on the new arrangements. What we need first from the EU side is the conclusion of the withdrawal and transition period negotiations, and only after that can negotiations on a new relationship start. We would expect to see information about the negotiations coming nearer to October.

The Chairman: Before I pass to other Committee members, I have made a suggestion on the Floor of the House that there might be a period where cases that were already in the pipeline would continue to use the present regime—the regulations and the use of the European Court of Justice—for perhaps eight years. We all know that civil litigation can take a long time. If you have started in one regime, somehow moving out of it is going to be rather complicated, difficult for lawyers and regrettable for the clients. I did not meet with very much enthusiasm from government, but do you feel there is a need for that for cases that are already in the pipeline?

Dr Helena Raulus: Yes, absolutely. In those circumstances we would require a smooth transition from one regime to another. That needs to be negotiated. Article 63 of the transition agreement now sets up a transition from the formal exit into the transition or implementation period. What we see there is continuation of the cases, under the Brussels I regime or Brussels II bis regime, reflected in Article 63 of the withdrawal agreement.

Let us say that the new agreement includes civil justice co-operation. In that case, the new agreement would also provide this kind of continuation clause. If the UK ends up with the continuation of the Lugano agreements, I would expect protocol provisions to say how these cases, which would be coming from different periods, would be continued.

It is a matter for negotiation, but certainly it has to be brought up into the light.

Lord Lester of Herne Hill: Is there any information about the extent to which English legal practitioners are becoming qualified in other member states in order to continue to be able to argue cases in Luxembourg? My daughter is one example; already, four or five members of her chambers have gone to Ireland to qualify as Irish practitioners so that they can go on as English practitioners arguing in Luxembourg. Have you any information about the extent to which the market is being distorted, and has to be distorted, in order to preserve the position of English practitioners?

Dr Helena Raulus: What we know from the Brussels office when we are in contact with those of our members who are engaged in cross-border practice is that essentially all of them are requalifying. We have already had reports in the press about the Irish qualification route as well, and we know that several thousand of them have used it.

Lord Lester of Herne Hill: And it is quite expensive.

Dr Helena Raulus: Yes, because you will need to get the practising certificate, so it does get expensive. But it is a very easy route currently.

Lord Anderson of Swansea: In the context of uncertainty, do you find that many practitioners of the larger amalgamated firms are sending personnel to other European capitals? Is the location and transfer of personnel a new feature?

Dr Helena Raulus: I have not heard of that yet. That is something that the firms would look at about nine to 12 months before the Brexit date. At this point, of course, most people are waiting to see what will happen with the withdrawal and the transition or implementation period, because that gives breathing space. However, I hear that some firms are supporting solicitors in qualifying in other jurisdictions, so they are putting measures in place already.

Alexander Layton QC: I have something on this, particularly in response to Lord Lester's question. Again, my evidence is anecdotal in that I know personally of English barristers who have specialised in Europe and community law qualifying in Dublin—people like Lord Lester's daughter, and there are a number of those—while others are setting up chambers in Belgium, not necessarily in Brussels but they are being admitted to the Belgian Bar. They are doing the same in Cyprus and other places where they can get a foothold, with a view to doing what Lord Lester says.

Again anecdotally, a number of the large City firms to a pretty large extent have had some of their European law specialists requalifying in Dublin. There has been a bit of a queue in Dublin. One of my friends was admitted to the Irish Bar the other day. She is actually an Irish national, but she said that there were a whole lot of commercial QCs sitting the Irish Bar exams with her when she did it. One has the impression that that is certainly happening with the larger firms.

As regards the transfer of personnel to offices in other places, I have not heard of that happening yet, although one hears of contingency plans.

Lord Anderson of Swansea: As an insurance policy.

Alexander Layton QC: Yes, if need be.

The other thing that I wanted to say on the subject of uncertainty is that uncertainty continues, not least because Article 63, which we will come to later, has not yet been agreed even within the passages of the withdrawal agreement. While that continues, initiatives are being taken in other member states to attract legal business from London. The Belgians have an international commercial court that

becomes effective on 1 July this year. The Paris Court of Appeal has set up a chamber to deal with international commercial cases. The Germans have something called the Frankfurt Initiative through which they are seeking to do the same thing. The intention in all these cases is as far as possible to use English as the language for dispute resolution, and there is a very active campaign, particularly in Germany, to wrestle legal business away from London. It is seen as an opportunity by these other countries.

The Chairman: For those listening beyond this room, it is fair to say that the UK was the place to come to because of the high standards in our legal profession and so on, and people came here as the default place of choice for lots of litigation, even if they were not based in the UK. Is that going to move?

Alexander Layton QC: London has many advantages that will not necessarily be lost. We have seen something of a move to arbitration clauses in the place of jurisdiction clauses in commercial contracts, and that will be unaffected by Brexit.

I think there is a general concern that there will be a loss of business. I do not think it will be wholesale—I do not think we will suddenly find one of the other European capitals becoming as large a worldwide centre for dispute resolution as London—but it will have an effect. It already is.

The Chairman: I am anxious to get on. Can you deal with this briefly, Dr Raulus?

Dr Helena Raulus: Yes. Arbitration is indeed coming back on the scene, so to speak, but our concern about arbitration is that it may be a more expensive and cumbersome mechanism for SMEs and their lawyers. Getting an agreement on civil justice is therefore crucial.

Q2 Lord Cashman: This question is for both of you. When it was published in March 2017, the Committee's report, *Brexit: Justice for Families, Individuals and Businesses?*, called on the Government to take urgent action to mitigate the uncertainty regarding the continuing continuation of the so-called Brussels regulation caused by Brexit. In your opinions, what steps do you believe the Government have taken since March 2017 to mitigate that uncertainty?

Alexander Layton QC: I am not aware of any specific steps. We can say that some degree of notice has been taken of the widely shared view in the legal profession here that it is desirable to continue a system of co-operation based on the current model. Indeed, in her Mansion House speech the Prime Minister used language to the effect that we want to do that.

Having said that, the position paper contained some fine but really very non-specific words on the topic. We know what fine words do—the parsnips remain largely unbuttered. Some non-controversial aspects of it have featured in green in the latest edition of the withdrawal agreement, but the big and important part of it—the Brussels regulation, the Insolvency regulation, the Brussels II bis regulation on family law, and others such as intellectual property—remain unagreed at this stage.

The list of topics for the forthcoming negotiations issued earlier this month does not include those topics. That is a matter of real concern.

Dr Helena Raulus: To add to that, we know that the UK Government want to include all the whole civil justice area in the negotiations. We have the August 2017 position paper, which corresponds to what we as the Law Society and the Bar have been saying, and indeed what you said in your report.

However, the response from the EU side has been more ambivalent, because this is locked behind some of the bigger issues in the negotiations, such as what will happen to the jurisdiction of the Court of Justice and how the new agreement will institutionally link the EU and the UK. So this area, particularly when it comes to civil and commercial law, is considered to be part of the FTA framework that will be agreed on the basis of commercial interests, rather than purely on civil and justice interests. That leaves open the option of the Lugano convention, but we will come back to that as well.

Q3 Lord Gold: Both the Law Society and the Bar Council have done quite a bit of work on the areas that we have just been discussing. As far as those regulations are concerned, are the Government knocking down your door seeking your views and guidance? If they are, are they listening to you? I suspect your answer might be quite short.

Alexander Layton QC: My answer is that I am not actually on the committee of the Bar Council that deals with these matters, but I am sure I would have heard about it if it had happened. I talked the other day to Hugh Mercer, whom you have heard from recently on these topics, and he tells me that the Government have not been knocking down their door.

At an early stage after the vote I was informally consulted by the civil servants in the Ministry of Justice who were wondering, “What do we do now?” Since then, they have been talking to others. They have not been talking to me. I have certainly not found them seeking out our views.

Dr Helena Raulus: We have regular contact with the Ministry of Justice in various different frameworks. We participate in more informal frameworks with the Ministry of Justice, as does the Bar Council, and we find it very supportive in the civil justice area. The civil servants understand the complexities that are involved.

The Chairman: That is good. That has been one of the things that we wondered about—given the extent of the burdens of extensive legal issues that they must be shouldering just now, whether they were absolutely alert to the problems that could be involved in this.

Q4 Baroness Neuberger: I think you have already hinted at this, but we would like to know your assessment of the as yet unagreed provisions in the draft withdrawal agreement addressing the application of the Brussels regime during the transition period—that is, Article 63.

Alexander Layton QC: I am sure members of the Committee know this, but maybe for the benefit of people outside the Committee, Article 63 covers most of the important regulations in the field of civil and judicial co-operation. In addition to Brussels I recast, there is a Brussels II bis on matrimonial matters and parental responsibility; a Maintenance Regulation; certain intellectual property regulations; the General Data Protection Regulation, which is much in the news at the moment; the posting of workers directive; the European enforcement orders; the Insolvency Regulation, which is very important; and various others. It basically provides that these regulations shall continue up to the end of the transition period and shall apply in the case of insolvency proceedings if the proceedings are opened within that period.

Choice of law agreements are dealt with in Article 62, along with choice of law rules and the Rome I and II Regulations on choice of law in contractual and non-contractual obligations respectively, and those will continue to apply to contracts concluded before the end of the transition period and events giving rise to damage that occur before the end of the transition period. There are similar provisions relating to some of the technical regulations on service and the collection of evidence.

My concern is that Article 63, which contains these important regulations, remains unagreed without it being on the agenda for discussion in the next period. Criminal justice is on that list, but not civil justice co-operation.

Dr Helena Raulus: Indeed, and it is very hard to know why it is unagreed. I at least am not privy to any information as to the reasons why these provisions remain white—whether they are technical reasons or whether there is a political reason. The current negotiations have not discussed these provisions.

I do know that the EU is indeed using this as part of the commercial package, as I said earlier. The notices from the EU, for example, which came from the Commission's Brexit Steering Group when it announced the ending of the civil justice co-operation, the ending of company law provisions and so on, were not welcomed by the negotiators here either. Even though they simply state the fact that this will happen, I think this demonstrates that there is a great willingness to try to include this area in the new negotiations.

Alexander Layton QC: I think that at an institutional level there is a desire on both sides—on the part of our Government here and probably on the part of those with detailed understanding of these matters in Brussels—to reach an agreement that largely meets the UK's aspirations of continuing to have a comprehensive package.

My concern is that it has become a bargaining chip in the wider political negotiations. I know that the questions about what happens to the CJEU and so forth are big questions and in some views are more important, but actually, on a day-to-day basis, for traders, creditors, tourists, people who go on holiday and consumers these are far more important than whether or not you can make a reference to the Court of Justice.

Q5 Lord Cromwell: We heard from Ministers from the MoJ and DExEU in earlier sessions, and there seemed to be some sort of agreement that Brussels I and Brussels II would have to be replaced, and I think we coined the terms London I and London II. I do not know if they have done any work on that yet.

More worrying than that was the Government's formal response to our report, which contained the idea that if they could not reach agreement with the EU 27 on civil justice co-operation, they were considering "how ongoing cooperation in this area could be wound down". I was wondering what your reaction to that was and, specifically, where that would leave family justice.

Alexander Layton QC: On family justice, I am probably not the person to give you any detailed understanding. I understand that you are having a special session on that next week.

My reaction to the suggestion about how ongoing co-operation could be wound down is that I am worried about it. It is a strange choice of words when there is an aspiration to replace the existing arrangements with things that are as close as possible. It must be emphasised that this is possible only on the basis of reciprocity, and that we cannot negotiate on a member-state-by-member-state basis because this is an area of exclusive external competence.

That is worrying in relation to our major trading partners and in relation to Ireland. Before the Brussels regulation came in, Ireland had legislation that dated to before independence, the Judgments Extension Act. All that was repealed in 1982, and there is no replacement with Ireland.¹ The cross-border trade on the island of Ireland would be greatly affected by this. That is true across the board elsewhere as well. There may be means by which it can be resolved, but if there is no agreement we have uncertainty and we have trouble.

The Chairman: It is interesting that in all our debates about the border and the potential problems, I have not heard this raised once as being a nightmare scenario in trading. You need to have certainty around law, and this kind of uncertainty has been waiting to bite. I have not heard it mentioned once. Has anyone else?

Lord Anderson of Swansea: It sounds as though it is about reducing co-operation. Surely there is mutuality of interest between us in all the areas that you have covered.

Alexander Layton QC: I have heard keen Brexiteers—I use that phrase without disrespect—saying that this is not a problem, because they would expect judicial co-operation to continue in this country. So it is not a matter of political controversy here, as I understand it. My concern is that it is being used as a bargaining chip by the EU, and indeed by this country, because it is regarded as politically unimportant, whereas in business terms and in terms of people's real lives it is actually very important.

¹ Leaving only the common law mechanisms in each country.

To come back to the point about family law, it would be a nightmare, as I think other people have pointed out, if we fail to continue the judicial co-operation that has been put in place in recent years. Courts co-operate with each other now on cross-border family law questions. The judicial network is mentioned in Article 63, and if we discontinue that, winding it down will be a journey into the wilderness.

The Chairman: Just so that we are not being alarmist, you mentioned that legislation on contractual judicial enforcement in Ireland depends on legislation that was abandoned in 1982 on the basis that we were all now in the European Union, so we do not need that legislation any more. So Ireland reformed its legislation. Is not the answer from those who say that there are solutions that Ireland and Britain would just have to legislate together to create a new enforcement process?

Alexander Layton QC: They are not allowed to as a matter of European law, because of the exclusive external competence of the European Union. No member state can negotiate outside the EU, which of course the United Kingdom would be, in order to deal with these matters, because they are matters exclusively within the competence of the European Union. So it would not be open to the UK and Ireland to reach a bilateral deal on this.

The Chairman: I understand. I am so sorry; I was being obtuse. I can see that this is much more serious than anyone had realised.

Lord Judd: May I just pick up two things that you said? You said that in your dealings with the Ministry of Justice, the civil servants understood the complexities. We have just heard that in the context of family law it is all going to be a nightmare. Do they understand that it is going to be a nightmare?

Dr Helena Raulus: On family law, we have some international options. There will be a great impact on it, because all these international options, such as the so-called Hague conventions, relate only to certain specific areas, such as child abduction or maintenance. There is not good coverage on divorce, which is currently the Brussels II bis. I am not an expert on family law either, but this is the big picture.

With family law, we will end up with much more cumbersome procedures. We will have procedures and some continuation, particularly relating to children and recognition of their positions, but at the same time those procedures will become more cumbersome and difficult to execute.

The core problem is really on the civil justice side. We have options here: the Brussels I regulation, the Lugano convention and the Hague measures. The Hague measures cannot compete. There is a choice of court agreements convention, which relates only to where you have parties with an exclusive choice of court agreement. In my understanding, this would be problematic even in most of the bigger commercial cases, because parties do not use exclusive choice of court agreements.

The Lugano convention network is one way to secure civil and commercial judgments, recognition and enforcement. That is the convention between the EU

and EFTA states. However, it still needs to be negotiated that the UK will get entry to that, and I think we will come back to this. The Brussels I regulation is the measure that deals with the EU. The fact that the EU adopted the Brussels I regulation means, as Mr Layton said, that EU member states can no longer bilaterally make agreements in this field, so in any case this would have to be agreed in a bilateral context.

I am aware that the Ministry of Justice and the UK permanent representation—the people who are working on the civil justice area—are aware of this and of the Irish question, which is raised here. However, the concern is whether this will be brought to the Brexit negotiators' attention, so the Law Society has also run a lot of advertising campaigns in Brussels trying to inform the other EU states that this is not simply about commercial interests but is about SMEs, consumers and employees. That is the added value of the EU and the Lugano frameworks: they provide weaker-party protection. Providing for this weaker-party protection encompasses a wider range of commercial civil and commercial transactions than anything that is available internationally.

Lord Cromwell: May I just follow through on my question? The winding down of co-operation will lead to a nightmare, to use your word.

Alexander Layton QC: Very specifically, it is about the European judicial network. Baroness Shackleton mentioned that in your last evidence session as being an issue. Now if you are a family court you can pick up the phone and talk to a judge in a foreign court in Spain or wherever it may be. While there are some faster and more efficient mechanisms through the Hague conventions than would exist in the absence of any agreement, they are not on a par with the European judicial network.

Lord Cromwell: Yes, but my question is whether, if we lose Brussels I and Brussels II, you agree that we are simply going to have to reinvent them. We jovially referred to London I and London II in a previous session, but we are going to have to reinvent them because they were brought in precisely because Lugano and Hague are not enough. Is that a fair assessment?

Dr Helena Raulus: You cannot reinvent them unilaterally. You will still need the EU to agree to them, because it is all about reciprocity. With the unilateral acts, you can provide that courts in the UK will recognise judgments coming from the EU, but you cannot guarantee that the courts in the other country will do that. That is where you need the agreement. The agreement creates the link and the obligation to give the recognition.

Baroness Shackleton of Belgravia: Is the problem not going to be that there will be no judge on the court from England?

Dr Helena Raulus: The Court of Justice?

Baroness Shackleton of Belgravia: Yes. That is the ultimate appeal court, is it not?

Dr Helena Raulus: It is for Brussels I.

Baroness Shackleton of Belgravia: If we remove our judge, why would they want to co-operate with us?

Dr Helena Raulus: That actually puts them at an advantage, because the Court of Justice would still give judgments with regard to how these areas were applied in the UK. That is why the Law Society recently published a paper. In fact, we submitted a response to an inquiry from this House on the dispute settlement system. We do not recommend direct jurisdiction for the Court of Justice if the UK is no longer a member of the EU, because there will be no UK judge and because the question of access for the UK legal profession arises.

Our paper outlines a slightly different process. We are trying to ensure that individuals and businesses have access to justice and that they can enforce the agreement in the UK, but there would be a UK or an EFTA pillar.

Baroness Shackleton of Belgravia: That is what I am saying: the problem will be for the UK when it does not have a judge. The other 27 are going to be advantaged.

Alexander Layton QC: This is not principally about Luxembourg; it is between individual courts and individual countries. If a parent has flown to Spain with a child and taken the child with them, there is the question of what English law provides about their return and so forth. The Spanish judge can speak to the judge in the Prestatyn County Court or wherever and discover what the arrangements in that particular case are. There is one provision in the Brussels I recast that has a similar provision for communication between national courts at national level, which does not exist in the Lugano provision, because that is older and more out of date.

The Chairman: Is it also right to say that Lugano covers commercial matters but certainly does not deal with family matters?

Alexander Layton QC: That is certainly true, apart from maintenance.

Lord Judd: I was particularly struck at a much earlier stage in our deliberations when two very experienced barristers who were giving evidence broke off from their formal legal observations to say, "Look, all of us around this table care about children". At the centre of this there are vulnerable children in need. It is a burningly important and urgent issue. Do you have the feeling that civil servants and the machine recognise the human dimensions and the urgency of the situation?

Dr Helena Raulus: The European Council guidelines recognise family law specifically, but they do not recognise civil and commercial law in civil justice co-operation. So there is a plan to negotiate on family law matters as well. This of course ties in with both the EU and the UK Government wanting to have a settlement on citizens' rights. Family law is also perceived to be part of the negotiations, but our concern at the moment is that civil and commercial law is not recognised as such.

Q6 The Earl of Kinnoull: We have strayed quite a bit into Lugano. I wonder if I could just

tidy up the Lugano subject. My question is aimed particularly at Mr Layton. In our debate last December on our report on families, individuals and businesses, the Minister said in response, “There is no legal barrier to us becoming party to the Lugano convention”. Obviously that is true, but I wondered what you thought the barriers were.

Could you also refresh us about what any disadvantages might be in being party to that convention? I am thinking particularly of the wonderfully named Italian torpedo.

Alexander Layton QC: To deal with the legal barriers point first, it is not strictly true to say that there are no legal barriers. There are two routes by which the United Kingdom, once it is out of the EU and no longer bound by the Lugano convention as a member of the European Union, could adhere to it.

One route is that if we are a member of EFTA, it would be admitted after some notification requirements and some provision of information to the depositary, which is the Swiss Federal Council. If we are not a member of EFTA, the notification requirements also apply—procedural matters that are not difficult to overcome—but unanimity would be required on the part of all the other parties to the Lugano convention. That is to say, the EU itself, which is a party to it, and, in addition to the European Union, Denmark, which for these purposes is not treated as part of the European Union, Iceland, Norway, and, importantly, Switzerland. You need unanimity on the part of all those parties before the UK would be permitted to adhere freshly to the Lugano II convention.

The difficulty with the Lugano II convention is that it replicates an older version of the Brussels I regulation before the recast came into effect. There were a number of reforms to the Brussels I regulation that were improvements, but we would go back to the unimproved version if we were to adhere to Lugano II. That would be a lot better than nothing, but not as good as finding a way of adhering to the current framework of the Brussels I regulation.²

² In a subsequent email, Mr Layton wrote to the committee: “I note that I failed to give an adequate response to the question by the Earl of Kinnoull ... inviting me to discuss disadvantages of Lugano II in respect particularly of the so-called ‘Italian torpedo’. That is a name given to a litigation tactic whereby a party starts litigation (usually for a declaration of non-liability) in a country where the law’s delays are more marked than elsewhere, and the party is then able to take advantage of the strict *lis pendens* priority rule in the old version of the Brussels I Regulation to prevent a claim against it from being progressed quickly. That priority rule required any court other than the court first seised to cede jurisdiction to the court first seised. I explained in my evidence that the Lugano II Convention replicates that older (2001) version of the Brussels I regime and enables that practice to continue. By contrast, the new (recast) version of the Brussels I Regulation (by what is now Art 31(2)) qualifies that rule for cases in which an exclusive choice of court agreement confers jurisdiction on the courts of another Member State, enabling them to proceed notwithstanding the fact that another court was first seised, and that other court has now to cede priority. The mechanism is not perfect, but it is a distinct improvement on the old position.

Other changes include the following:

- the old provisions on choice of jurisdiction agreements applied only to cases where one of the parties was domiciled in a Member State, while the new regulation removes that restriction;
- the new Regulation contains a recital in its Preamble, clarifying the application of the Regulation to

There is another model that permits that to occur, which is the one that Denmark has with the EU. It has a side agreement that effectively ties it into the Brussels I recast regulation, as it does with one or two of the other regulations, I think. The Danish model is what the Bar Council advocated in its paper of December 2017.

There is a difference between the Danish model and where we would have to be, which is that there would be no right of referral to the Court of Justice in Luxembourg on questions of interpretation. This is actually quite important, because over the 40 years that the Brussels regime has been in place in one form or another there have been somewhere between 250 and 350 decisions by the Court of Justice on meaning and interpretation (of the Brussels I Regulation and its predecessors). Questions continue to come before the Luxembourg court, at a rate of about 20 a year at the moment, on the question of the interpretation of this regulation. So uncertainties remain.

We would no longer be able to make references to the Court of Justice. The Lugano convention is in the same position in that non-member states—Iceland, Switzerland, and Norway—cannot make references, but there is a provision in protocol 2 to the Lugano II convention that enables those non-member states to participate in references made by member states' courts and therefore to have a seat at the table in submissions to the court.

The non-member states are not bound by the decision of the Court of Justice in those cases, but there are provisions requiring any court to have regard to the decisions of courts in other member states and other state parties, including the member states, and to the decisions of the Court of Justice. So it would be a question for our courts here to decide whether to follow a lead given by the Court of Justice. One would expect that they very normally would—this is the position that the Supreme Court has taken about European law generally—but there will be occasions when they will wish to differ from that and will not be prevented from doing so.

The Earl of Kinnoull: You are in fact reminding us that, were we to become a party to the Lugano convention, there is yet another area where the Court of Justice of the European Union would have some element of interaction with the United Kingdom.

arbitration; this had been the subject of a judgment of the CJEU (*Allianz v West Tankers*) which the UK and much of the international arbitration community found to be adverse to the interest of arbitration;

- the new Regulation contains a provision to take account of prior proceedings in third states which was absent from the old version; and
- the procedures for recognition and enforcement of judgments from other Member States have been further streamlined.

In my view, which I believe to be widely shared, the two biggest advantages of the Brussels I Recast as compared with the Lugano II Convention are the partial reversal of the priority rule and the extension of the rules on choice of forum clauses."

Alexander Layton QC: Interaction in the sense that the courts here would be bound by the terms of the international convention in paying due regard to those decisions, but they would not be bound by them. The red line would not have been crossed.

Dr Helena Raulus: It is more of an indirect system where the systems are linked to each other. That means that the interpretations of the conventions cannot diverge so much that the convention become almost useless to the parties.

Parties could try to plead a case in the court of a country. The problem there is that if the interpretations diverge too much, they might be left without a court to take the claim to, and that would not be useful for the purposes of the convention. So interpretation will need to be materially convergent between different parties adherent to the convention. That is why we have provision on interpretation.

On the question of ratification of the Lugano convention, the parties have one year to express their consent. Here we have the question of time: when will the negotiations on the Lugano convention need to be begun in order for the UK to continue its participation in the convention seamlessly?

The Chairman: So there is a need to prevent any gap because of the processes involved.

Dr Helena Raulus: Exactly.

The Earl of Kinnoull: The starting gun for the one year could not be until 30 March next year.

Dr Helena Raulus: Indeed.

Q7 Lord Judd: Following on from your last points, there is a joker in the pack: every now and then the Prime Minister lobs in an observation that requires attention. You will remember that in her Mansion House speech she said: “We will want our agreement to cover civil judicial cooperation, where the EU has already shown that it can reach agreement with non-member states, such as through the Lugano convention, although we would want a broader agreement that reflects our unique starting point”. How realistic and achievable do you think this thought of the Prime Minister will prove to be?

The Chairman: She seemed to be talking about Lugano-plus. It is not a question of settling for anything and it is not just about the EFTA court; she wants something tailor-made for our unique situation—Lugano plus other things, or EFTA plus other things.

Alexander Layton QC: If she is talking about a wider subject-matter range, such as is covered by Brussels II bis, the maintenance regulation and things of that sort, it probably is achievable on the basis of finding a way—whether it is London I, London II or whatever it may be—of continuing that regime.

If on the other hand she wants a new improved version of Lugano, she can probably take it as far as the existing Brussels regime under the Danish model. If she is talking about something that is more ambitious than the European Union has at the moment, that is completely unrealistic. There is no way they are going to allow judicial co-operation with the United Kingdom to go further and faster than among themselves.

Dr Helena Raulus: Realistically, on the table at the moment is either EU civil justice co-operation or the Lugano convention, or both. I am very wary of the Danish model, because Denmark is a member state. It participates in internal market and is subject to all the institutional processes of the EU, including the Court of Justice's jurisdiction.

Under the Danish model, you also have a separate protocol on the Court of Justice. For Denmark it would be more expedient to be part of the civil justice co-operation, but it has not been able to accede because its referendum on this area did not allow it to participate. So it is a very special deal crafted for a special circumstance where you have a member state that cannot participate in a process.

The Chairman: Why could a very special deal not be created for Britain in its unique situation—not the same as Denmark, but unique to us? Why cannot there be the inventiveness to do that?

Dr Helena Raulus: The problem is that if the UK withdraws fully from the internal market and all the co-operation—from the institutional structures—unfortunately, at the end, that will leave only a free trade agreement, which will not include civil justice co-operation.

At that point, of course, we can have the Lugano convention. As was said before, and I fully agree, it is not equally good, but it would be a continuation of recognition and enforcement of judgments.

The Chairman: “Better than nothing”, to quote our witness.

Dr Helena Raulus: Indeed.

Alexander Layton QC: Can I sound a slightly different note? The argument is advanced by some people that we cannot really have the United Kingdom continuing in the civil justice co-operation arrangements when it is not part of the internal market or part of the European Union. I regard that argument as entirely misplaced.

I will give two reasons why, and they are historical. The first is that for the first 20 or so years of the existence of the European Economic Community, it did not have this regime. It was adopted only in 1968 and came into force in 1973, so for almost 20 years the four freedoms were in place without civil justice co-operation in any form.

More focused, however, is the fact that the Lugano convention's predecessor, the first Lugano convention, had a mechanism whereby non-member states potentially

anywhere in the world could become a party to it. That actually happened in the case of Poland. Poland became a party to the old Lugano convention before it became a member of the European Union in 2004, at a time when it had no integration into the EU's market.

It is true to say that in the Treaty of Rome there was a provision in Article 177 to the effect that the then member states would negotiate with each other with a view to establishing arrangements for the mutual recognition and enforcement of judgments. In the event that then expanded to cover jurisdictional rules as well, so it was seen as desirable to be able to chase your debts across borders while you were moving goods and services across borders. However, it was not necessary to be a member of the internal market in order to have this judicial co-operation in its nascent form or indeed in its current form.

Dr Helena Raulus: First, the Brussels I regulation was actually based on the EEC treaty and on the idea that this area was too sensitive to have common harmonisation. Therefore the treaty prescribed a special process of adopting an international convention.

Secondly, the Lugano countries had not joined the Brussels I convention even at the time; a separate international convention was built to accommodate the EFTA states and the acceding states to the EU. This was a precursor to them joining the internal market. That was the rationale at the time.

I am not saying that we can fully dismiss the idea that if you are fully or partially out of the internal market you should not get access to civil justice co-operation, but my point is that the choice is then between the Brussels I regime and the broader EU civil justice regime, which most likely is not available unless a proper institutional link and proper institutional dialogues are in existence.

That leaves the Lugano convention. Having said that, Lugano should not be dismissed, because it provides for recognition and enforcement of judgments between Switzerland and the UK, so in any case Lugano is needed.

Lord Gold: It has just occurred to me, if we go back to the opening of the session, that you commented that some European courts were seeking to take a bigger role and effectively steal cases from the UK. If that is so and it develops, is there not every incentive for those countries to try to agree the matters that we are now discussing so that they can possibly get enforcement in this country?

Alexander Layton QC: Yes, there is definitely some incentive, although perhaps not every incentive, because they are trying to attract dispute resolution business between parties none of which are European parties. London is a big centre for the resolution of disputes between parties that have little connection with London. They can do so by jurisdiction agreement—they will need some connecting factor, to use the technical phrase, in the absence of a jurisdiction agreement—but it attracts international worldwide business. There are three dispute resolution centres in the world of major importance: London, New York and Singapore. That

will be undermined to some extent, although by no means entirely, if we do not reach agreement on these matters.

Q8 **Baroness Shackleton of Belgravia:** During the debate on the EU, it was argued with regard to family law that the Hague measures will effectively ensure that we do not notice that we have left. Do you agree with that?

If you do not, what exceptions are there? I can think of a very clear exception in relation to jurisdiction, which is that under Brussels II, which is not covered by Hague, we have first past the post relating to two of the consenting parties. Obviously we do not have that in America or any other country, so we have to do a forum non conveniens argument for the judges in this country under EU law.

There are probably many more EU divorces than international ones, so you see them fighting in relation to Malaysia, Russia and many other places. That argument is very good; we all dreaded having to implement it when it came in, but when it did it brought certainty and allowed us to get on with it. That is not covered by Hague. Other things are not covered by Hague. Do you see any problems, and can you think of any other examples?

Dr Helena Raulus: I think the biggest problem will be divorces, because that is where there is no comprehensive framework from The Hague. I agree with you on the forum non conveniens argument. At the time, I was doing a PhD on civil and commercial matters and my fellow PhD students were working on family law. For them, the forum non conveniens, as it is in Scots law, would have been much more desirable. They were dreading the lis alibi pendens, which is the first come first served rule in family law cases.

Now, when I hear from those who practise in this area, they refer to a very large extent to the EU measures, because of the certainty that they bring but also because of the procedures, which are cheaper and take less time. There is more efficiency in the enforcement process, which is ultimately what you want: speedy and effortless enforcement.

Baroness Shackleton of Belgravia: But the problem will be that the English court may impose it, say in first past the post, but once we are out the foreign court will then seize jurisdiction on the basis that we are no longer a member of the club. There is going to be a hiccup or a hiatus. No one is going to know what they are doing unless we carry on, and that requires the co-operation of the other European countries.

Dr Helena Raulus: That is why we continuously emphasise that these issues need to be negotiated. There will need to be either a proper transitional period relating to how we deal with these transition cases if there is no agreement available, which we hope will not be the case—we want to have an agreement—or a continuation of these instruments.

We see a lot of litigation coming up on these matters, whether in family law or civil and commercial law. A lot of litigation will be made more difficult as the procedural

rules become much more complex. That will tie up the courts and will mean that a lot of individuals will not have the resources.

Baroness Shackleton of Belgravia: Are you saying that this is in effect nonsense: that Hague cannot replace existing legislation?

Alexander Layton QC: There are three areas that we can talk about. One is the protection of children, one is maintenance and one is divorce. As far as the protection of children is concerned, there is quite a good substitute in the form of the 1996 child protection convention from The Hague, which would provide an alternative that is workable.

Baroness Shackleton of Belgravia: It is just that, as we know, you do not have the community of interests where the judges can pick up the telephone.

Alexander Layton QC: You do not have the priority, no. You do not have the European judicial network, which is why I talked earlier about walking into the wilderness, but you do have the child protection mutuality.

On maintenance, if we do not have the maintenance regulation and we live with the 2007 maintenance convention, we take a step backwards, because the regulation is what in the jargon is called a double instrument: it provides rules both of jurisdiction and of enforcement of judgments. The Hague replacement is a single instrument providing only for the mutual recognition of judgments without providing uniform jurisdictional rules, so that would be a step backwards. We would be looking at using our own jurisdictional rules for the first time in a very long time. As regards divorce, neither Hague convention covers that, and we would be out and back on our own rules again. So there is a partial picture.

There is another practical point here that is very important. If we take these steps backwards, it would be a major change in the law compared with where we stand now. Our family courts are under enormous pressure. The underfunding of the court system is a problem across the board, but is particularly acute in the family courts. The judges are demoralised, as I understand it. There is an idea that we could have this major change in the law, but the last time we had such a change there were intensive training programmes for the judges, who were given detailed assistance in trying to implement the new law. Such a thing would have to happen again, and the money would have to be found for it, if we were to make these backward steps, removing particularly the maintenance regulation, and Brussels II bis in time.

Baroness Shackleton of Belgravia: There is also the question of the time these cases take to come before a court, and of resources, with no legal aid. Litigants in person in already blocked-up courts—it just does not bear thinking about.

Alexander Layton QC: I am sure your Lordships' House hears all the time about these problems in the family courts and criminal courts.

Baroness Shackleton of Belgravia: But they brush them aside, saying that there is

no problem. It just gets put on the back burner.

Lord Anderson of Swansea: It all sounds like damage limitation, effectively. You have mentioned the exclusivity of competence of the European Union, which prevents bilateral deals. Clearly other countries have the same sort of problem. I think you implied that Ireland abrogated its own—

Alexander Layton QC: If I remember correctly, there was a single Judgments Extension Act 1868, which provided for judgments from one part of the United Kingdom to have effect in other parts of the United Kingdom. Upon Irish independence, Ireland took over that statute and kept it on its statute book, and we continued to have it on our statute book until 1982.

Lord Anderson of Swansea: And we used it.

Alexander Layton QC: Yes. If you had a judgment in the High Court in Dublin, it could be enforced in London without much difficulty. But in 1982, the whole thing had been replaced by the then Brussels convention and the statutes were repealed.

Q9 **Lord Anderson of Swansea:** My question relates to countries like Norway. Presumably, at the Scandinavian level there would have been a substantial degree of co-operation involving the Nordic Council or whatever. Would that have been totally abrogated? How does one normally manage with discrete family disputes with Sweden, for example, and is there any precedent for us that might help?

Alexander Layton QC: There was a Nordic convention on civil and commercial matters.

Lord Anderson of Swansea: Not on family matters?

Alexander Layton QC: Not as far as I know. Norway and Sweden are parties to the 1996 child protection convention, so perhaps not on maintenance. But then, interestingly enough, maintenance is covered by the Lugano convention.

The Chairman: Maintenance in family matters?

Alexander Layton QC: Yes, because the Brussels convention originally covered maintenance. The Lugano convention continues to cover maintenance, and it is only in the most recent version of the Brussels regulation that maintenance is excluded, the reason being that we now have a separate free-standing maintenance regulation. So maintenance and child protection would be covered.

The Chairman: Child protection would be covered by the Hague convention.

Alexander Layton QC: Yes.

Lord Anderson of Swansea: Does that cover Switzerland as well?

Alexander Layton QC: It covers Switzerland in respect of maintenance, certainly. I forget whether Switzerland is party to the 1996 convention but, if it is, then it would

cover that.³ So of the three areas, child protection would be adequately covered by Hague, maintenance would be covered within the Lugano states by Lugano—

The Chairman: But divorce would not?

Alexander Layton QC: Divorce would not. So keeping Brussels II bis in place, as is envisaged for the transition period by Article 63 of the withdrawal agreement, is a very desirable outcome.

The Chairman: Lord Polak has the concluding question.

Q10 Lord Polak: As we came towards the millennium, we were told that the planes would fall out of the sky. I want to move you to the day after Brexit, when hopefully the sun will still rise.

Assuming the Government's red line on jurisdiction of the CJEU is adhered to, what will things look like? What will be possible? What will Britain have in place?

Dr Helena Raulus: I think there will be a type of free trade agreement. It can go deeper in certain areas. It is very difficult to predict, because at this point we do not even have the UK offer on commercial matters. I would expect the Lugano convention—one of today's topics—to be included in that, but, as I keep saying, if there is no agreement on the institutional frameworks and on how to solve the linking of the UK jurisdiction to the EU's jurisdiction or the court judgments, I would be very hesitant to say that EU civil justice is available.

Alexander Layton QC: There may be a timing hiatus. In the civil and commercial area, jurisdiction agreements can be covered by the 2005 Hague choice of court convention. We are a freestanding member of the Hague conference and would be able to adhere to that. There would be a time lag, because we cannot do that until after exit day, but if Article 63 is adopted, the problem can be resolved.

On Lugano, as Helena said, there will be a one-year hiatus while other member states have the opportunity to express, or not express, their unanimity that we should adhere if we are not a member of EFTA. You would then be left with a model that is less effective than the current model, unless we find another way of doing it.

It is entirely plausible to think that the United Kingdom could adopt regulations under Clause 5, or whatever the number is now, of the EU withdrawal Bill and to say, "The Brussels I regulation shall continue to have effect in the United Kingdom". The problem is that that would not be EU law, and other member states would not be bound by it. There is the need for reciprocity. It is all very well saying, "You shall recognise our judgments", but they can say, "We will or we won't".

There are further uncertainties. There are half a dozen countries around Europe with which we have old bilateral conventions—dating, in the case of France and Belgium, from 1934; there are others from the 1960s, including incidentally with Norway—which in effect have been asleep during the currency of the Brussels

³ Switzerland ratified the 1996 Convention in 2009.

regime. Technically they are still there as a matter of international law. The systems for implementing them have in many cases been wound down in the other member states, but as a matter of international law they are still there. They are a very poor substitute. Whether they would still be given effect to is a matter of some difficulty; I am thinking of the interpretation of the EU instruments where they have been abrogated to any extent beyond the bit of their subject matter that falls outside the scope of the Brussels regulation.

What is clear is that there is a great deal of uncertainty around the mutual recognition of a judgment in a civil and commercial matter between here and Germany under these old conventions.

The Chairman: Dr Raulus, you have the last word.

Dr Helena Raulus: Thank you. On the effects of old bilateral conventions, we are not getting signals from our members that these would be an option—quite the opposite; they seem to think that we then fall on to national law. It may be very difficult, because, as has been said, the EU has external exclusive competence here, so the competence has been transferred. Of course, if these are still applicable, still alive, in other areas, there will be areas not covered by the Brussels I regulation or EU civil justice that are still in effect between the UK and countries with which there are these bilaterals. That would make them more alive.

However, the point here is that this will be part of the debate after the Brexit date if there is no Lugano, Brussels I or access to any of the civil justice measures. This, again, will increase litigation, litigation costs, litigation time, court resources et cetera.

A small final point on the one-year transition under Lugano. It is good that we know that it is one year—the convention prescribes one year—because, as we know, ratification periods can take a very long time. That is usually with EU treaties, but that is where there are 28 partners. It would take about two years to get ratified, and then there is uncertainty about whether ratification would be fulfilled.

Another minor and perhaps positive point to end with is that EU ratification will be done by the EU itself by qualified majority. The Commission will put forward a proposal and the member states will adopt the changed Lugano convention. Even though it requires the unanimity of the parties, the EU is considered one of the parties, so we no longer have to wait for the EU states to take separate decisions on this.

The Chairman: I have a strong suspicion that we will have you back before us at the end of the year in order to review whether we think that we have got to a good place, whether we have not got anywhere, or whether what is on the prospectus looks as though it will make sure that there are no gaps. It has been really helpful hearing from you both today, and on behalf of the Committee may I say—I see everyone nodding—that it has been really illuminating and very helpful? Thank you very much.