



Ministry
of Justice

The Right Honourable
David Lidington CBE MP
Lord Chancellor & Secretary of
State for Justice

Lord Boswell of Aynho
Chair,
European Union Select Committee
House of Lords
SW1A 0PW

1 December 2017

Dear Tim,

**GOVERNMENT RESPONSE TO THE HOUSE OF LORDS EUROPEAN SELECT COMMITTEE 17th
REPORT OF SESSION 2016-2017 “BREXIT: JUSTICE FOR FAMILIES, INDIVIDUALS AND
BUSINESSES?”**

Further to my letter of 22 August, please find enclosed the Government’s response to the House of Lords European Committee report on “Brexit: Justice for Families, individuals and businesses?”

In the first instance, I would like to thank the committee for its thoughtful analysis of how the Government should approach matters of civil judicial cooperation with the European Union. Please accept my apologies for the delayed response.

Since the committee published its report, the Government has triggered Article 50 and has begun negotiations with the European Union. In addition to this, the Government has published a series of papers which sets out its position on its vision for our future relationship with the EU, including the Future Partnership paper on providing a cross border civil judicial cooperation framework which was published on 22 August 2017. The Prime Minister has also set out proposals for a time-limited implementation period where the UK and EU continue to have access to one another’s markets on current terms.

As the United Kingdom leaves the European Union, the Government will seek a deep and special partnership with the EU. Within this partnership, cross-border commerce, trade and family relationships will continue. Building on years of cooperation across borders, it is vital for UK and EU consumers, citizens, families and businesses, that there are coherent common rules to govern interactions between legal systems.

It is the Government’s view that international intergovernmental cooperation and mutual recognition benefits all parties. Therefore, we will seek an agreement with the EU that allows for close and comprehensive cross-border civil judicial cooperation on a reciprocal basis, which reflects closely the substantive principles of cooperation under the current EU framework.

Can I once again take this opportunity to thank the Committee for its thoughtful report and look forward to any ongoing contribution it may have as we continue the process of ensuring the UK's successful exit from the European Union.

Yours sincerely

A handwritten signature in black ink, appearing to read 'David Lidington'. The signature is fluid and cursive, with a large initial 'D'.

RT HON DAVID LIDINGTON CBE MP

The Committee's recommendations are in **bold**, with the Government's response immediately afterwards.

The Brussels I Regulation

- 1. We acknowledge and welcome the UK's influence over the content of these three EU Regulations which are crucial to judicial cooperation in civil matters and reflect the UK's influence and British legal culture. We urge the Government to keep as close to these rules as possible when negotiating their post-Brexit application. (Paragraph 23)**
- 2. The predictability and certainty of the BIR's reciprocal rules are important to UK citizens who travel and do business within the EU. We endorse the outcome of the Government's consultations, that an effective system of cross-border judicial cooperation with common rules is essential post-Brexit. (Paragraph 37)**
- 3. We also note the Minister's confirmation, in evidence to us, that the important principles contained in the Brussels I Regulation (recast) will form part of the forthcoming negotiations with the remaining EU Member States. (Paragraph 38)**
- 4. While academic and legal witnesses differed on the post-Brexit enforceability of UK judgments, it is clear that significant problems will arise for UK citizens and businesses if the UK leaves the EU without agreement on the post-Brexit application of the BIR. (Paragraph 52)**
- 5. The evidence provided to us suggests that the loss of certainty and predictability resulting from the loss of the BIR and the reciprocal rules it engenders will lead to an inevitable increase in cross-border litigation for UK based citizens and businesses as they continue to trade and interact with the remaining 27 EU Member States. (Paragraph 53)**
- 6. We are concerned by the Law Society of England and Wales' evidence that the current uncertainty surrounding Brexit is already having an impact on the UK's market for legal services and commercial litigation, and on the choices businesses are making as to whether or not to select English contract law as the law governing their commercial relationships. (Paragraph 54)**

Response

Our justice system and our legal sector will continue to be the envy of the world after EU Exit. They are seen as predictable, transparent and flexible. UK judges and commercial law firms are internationally regarded for their expertise and English judgments are recognised and enforced in many international jurisdictions. The Government will continue to make the most of the opportunities presented by engagement with international partners, both at home and abroad, to promote UK legal services and English law. The Government is confident that our legal services' track record of success and resilience will see them prosper during and after EU Exit.

The Government has met a range of stakeholders from the legal sector to discuss legal services and commercial litigation following EU Exit. Many have told us about the importance of providing certainty and we are seeking the best possible deal for the UK in order to ensure a smooth transition to future arrangements. The Ministry of Justice helped establish the sector-led Brexit Law Committee (with membership drawn from the Bar Council, Law Society, Magic Circle firms, the City of London Law Society, TheCityUK, City of London Corporation and the judiciary) as a platform for the sector to discuss EU exit and raise concerns about issues affecting the continued competitiveness of the market with government. This, in addition to the government-industry

Professional and Business Services Council - co-chaired by BEIS - and its Mutual Market Access Group, considers the potential effect of EU Exit on the sector, including key issues such as mutual recognition of qualifications.

The Government's Future Partnership Paper 'Providing a Cross-Border Civil Judicial Cooperation Framework' published on 22 August sets out the UK's vision for a future partnership with the EU in this area. Our discussions on civil judicial cooperation will focus on a new relationship based on mutually beneficial rules and processes to facilitate and enable cross-border trade, commerce and family life. We envisage that the new framework will be based on a commitment to: build on the strong foundation of existing cooperation and belief in shared values such as the rule of law, respect for international law and democracy; continue to collaborate at bilateral, regional and multilateral levels; and to develop our relationship over time as our societies, the laws that govern them and opportunities for further cooperation develop.

- 7. The Government urgently needs to address this uncertainty and take steps to mitigate it. We therefore urge the Government to consider whether any interim measures could be adopted to address this problem, while the new UK-EU relationship is being negotiated in the two year period under Article 50. (Paragraph 55)**

Response

As the Government has set out previously, we will need to build a bridge from our exit to our future partnership, to allow business and people time to adjust, and to allow new systems to be put in place. As the Prime Minister has said, people, businesses and public services should only have to plan for one set of changes in the relationship between the UK and the EU.

That is why the Government has proposed a strictly time-limited implementation period, based on the existing structure of EU rules and regulations, during which the UK and the EU would continue to have access to one another's markets on current terms, and the UK would take part in existing security measures.

The length of the period should be determined simply by how long it will take to prepare and implement the new processes and new systems: this points to a period of around two years. It should be agreed as early as possible, so as to provide certainty.

- 8. The evidence we received is clear and conclusive: there is no means by which the reciprocal rules that are central to the functioning of the BIR can be replicated in the Great Repeal Bill, or any other national legislation. It is therefore apparent that an agreement between the EU and the UK on the post-Brexit application of this legislation will be required, whether as part of a withdrawal agreement or under transitional arrangements. (Paragraph 60)**
- 9. The Minister suggested that the Great Repeal Bill will address the need for certainty in the transitional period but evidence we received called this into question. We are in no doubt that legal uncertainty, with its inherent costs to litigants, will follow Brexit unless there are provisions in a withdrawal or transitional agreement specifically addressing the BIR. (Paragraph 61)**

Response

The Government believes that the best way to ensure legal certainty for both UK and EU citizens and businesses as we leave the EU is to facilitate a smooth transition to a new relationship in civil

judicial cooperation. The Government agrees that it is in the interests of the UK and the EU that there continues to be an effective framework for resolving cross-border legal disputes after we leave. That is why we are seeking an agreement with the EU that allows for close and comprehensive cross-border cooperation, reflecting closely the substantive principles of the current framework.

This will provide confidence and certainty to business and individuals, ensuring they can continue to settle cross-border disputes efficiently and effectively in the future. Any future agreement with the EU should maximise certainty and minimise delay and expense for those involved in cross-border disputes. Confidence in, and respect for, choices made about which country's courts will hear a case in the event of a dispute, and which country's law will apply to resolve that dispute, are crucial for businesses engaged in international trade.

The paper 'Providing a Cross-Border Civil Judicial Cooperation Framework', sets out the Government's position on a future relationship with the EU in this area clearly. It is clear that the mutual interests of the UK and EU are served by continued close and comprehensive civil judicial cooperation. However, in the event that we do not agree an arrangement for future civil judicial cooperation with the EU, it will be important to have reached a common view on the general principles that would govern how ongoing cooperation in this area could be wound down. Both the EU and the UK Government have published their general principles for ongoing cooperation in the context of separation, without prejudice to the ongoing negotiations on the future partnership.

- 10. The evidence suggests that jurisdictions in other EU Member States and arbitrators in the UK, stand to gain from the current uncertainty over the post-Brexit application of the BIR, as may other areas of dispute resolution.**
- 11. With regard to arbitration, we acknowledge that the evidence points to a gain for London. But, we are also conscious of the evidence we heard on the importance of the principles of justice, in particular openness and fairness, underpinned by the publication of judgments and authorities, which are fundamental to open law. It is our view that greater recourse to arbitration does not offer a viable solution to the potential loss of the BIR.**

Response

We note the evidence presented to the Committee about the potential gains for the UK if arbitration activity increased. Despite intense international competition, the UK remains and will remain a major global legal centre. The main reasons for this include the widespread use of English law in commercial contracts, the impact of the City and the quality and independence of our courts. The City of London is the pre-eminent centre for commercial dispute resolution, through our Commercial Court in the Rolls Building, as well as for commercial arbitration. Nonetheless, as set out above, we have sought to provide certainty as far as possible that an effective framework of civil judicial cooperation is an important part of the deep and special partnership we want to establish with the EU.

The Brussels IIa Regulation and the Maintenance Regulation

- 12. In dealing with the personal lives of adults and children, both the Brussels IIa Regulation and the Maintenance Regulation operate in a very different context from the more commercially focused Brussels I Regulation (recast) (Paragraph 81)**

13. **These Regulations may appear technical and complex, but the practitioners we heard from were clear that in the era of modern, mobile populations they bring much-needed clarity and certainty to the intricacies of cross-border family relations (Paragraph 82)**
15. **We have significant concerns over the impact of the loss of the Brussels IIa and Maintenance Regulations post-Brexit, if no alternative arrangements are put in place. We are particularly concerned by David Williams QC's evidence on the loss of the provisions dealing with international child abduction. (Paragraph 92)**
16. **To walk away from these Regulations without putting alternatives in place would seriously undermine the family law rights of UK citizens and would, ultimately, be an act of self-harm. (Paragraph 93)**
17. **It is clear that the Government's promised Great Repeal Bill will be insufficient to ensure the continuing application of the Brussels II and Maintenance Regulations in the UK post-Brexit: we are unaware of any domestic legal mechanism that can replicate the reciprocal effect of the rules in these two Regulations. We are concerned that, when this point was put to him, the Minister did not acknowledge the fact that the Great Repeal Bill would not provide for the reciprocal nature of the rules contained in these Regulations. (Paragraph 97)**
18. **We are not convinced that the Government has, as yet, a coherent or workable plan to address the significant problems that will arise in the UK's family law legal system post-Brexit, if alternative arrangements are not put in place. It is therefore imperative that the Government secures adequate alternative arrangements, whether as part of a withdrawal agreement or under transitional arrangements (Paragraph 98)**

Response

It is vital that families can have emotionally difficult and sensitive issues resolved in a way that is fair and speedy. The Government recognises the importance of the Brussels IIa and Maintenance Regulations currently in relation to cross-border family disputes and the impact on parents and children who need to be able to resolve sensitive family issues without undue delay or expense.

As set out in the Future Partnership Paper 'Providing a Cross-Border Civil Judicial Cooperation Framework', published on 22 August, the Government is seeking an agreement with the EU that allows for close and comprehensive cross-border cooperation in family matters, reflecting closely the substantive principles of the current framework. This would provide a range of reciprocal rules and mechanisms for parents to seek to settle disputes around parental responsibility, residence and contact. These rules would minimise the potential for parallel proceedings, establishing clearly which courts should hear a case and allow judgments and court orders from one country to be recognised and enforced in another.

As set out above the Government has proposed a strictly time-limited implementation period, to allow business and people time to adjust, to allow new systems to be put in place and so that businesses and public services should only have to plan for one set of changes in the relationship between the UK and the EU.

Options for the Future

19. **The balance of the evidence was overwhelmingly against returning to the common law rules, which have not been applied in the European context for over 30 years, as a means**

of addressing the loss of the Brussels I Regulation (recast). We note that a return to the common law would also not be the Government's choice. (Paragraph 114)

- 20. A return to the common law rules would, according to most witnesses, be a recipe for confusion, expense and uncertainty. In our view, therefore, the common law is not a viable alternative to an agreement between the EU and the UK on the post-Brexit application of the Brussels I Regulation (recast). (Paragraph 115)**
- 21. Nonetheless, in contrast to key aspects of the two Regulations dealing with family law, Professor Fentiman was of the opinion that in the event that the Government is unable to secure a post-Brexit agreement on the operation of the Brussels I Regulation (recast), a return to the common law rules would at least provide a minimum 'safety net'. (Paragraph 116)**
- 26. Our witnesses were unanimous that a return to common law rules for UK-EU cases would be particularly detrimental for those engaged in family law litigation. The Bar Council also suggested that an already stretched family court system would not be able to cope with the expected increase in litigation. (Paragraph 136)**

Response

While a fall-back on domestic law is possible, it is not the Government's preference. In the areas where there are international agreements to which the UK and EU Member States are party there would not be a need to return to the common law. As well as seeking a specific agreement with the EU in this area, the Government also intends to apply the 2005 Hague Convention on Choice of Court post exit, as well as seek to continue application of the 2007 Lugano Convention to relations with Norway, Iceland and Switzerland.

In family law, the Hague Conventions cover much, although not all, of the same ground as the EU family law Regulations, including rules for jurisdiction and recognition and enforcement in children matters, and cooperation between Central Authorities. During negotiations, the Government will consider the coverage of the alternative international agreements when deciding how best to ensure ongoing reciprocity and mutual recognition.

- 22. The combination of UK membership of the Lugano Convention, implementation of the Rome I and II Regulations through the Great Repeal Bill, and ratification of the Hague Convention on choice-of-court agreements, appears to offer at least a workable solution to the post-Brexit loss of the BIR. (Paragraph 126)**
- 23. The inclusion in the Lugano Convention of a requirement for national courts to "pay due account" to each other's decisions on the content of the Brussels I Regulation, without accepting the direct jurisdiction of the CJEU, could be compatible with the Government's stance on the CJEU's status post-Brexit, as long as the Government does not take too rigid a position. (Paragraph 127)**
- 24. This approach will come at a cost. In particular, it will involve a return to the Brussels I Regulation, with all its inherent faults, which the UK as an EU Member State succeeded, after much time and effort, in reforming. (Paragraph 128)**
- 25. In contrast to the civil and commercial field, we are particularly concerned that, save for the provisions of the Lugano Convention on cases involving maintenance, there is no satisfactory fall-back position in respect of family law. (Paragraph 135)**

- 28. Other witnesses suggested the UK rely on the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children. But the evidence suggests that this Convention offers substantially less clarity and protection for those individuals engaged in family law based litigation. (Paragraph 138)**

Response

The UK is clear that international civil judicial cooperation is in the mutual interest of consumers, citizens, families and businesses in the EU and in the UK. With this in mind, we are seeking a close and comprehensive framework of civil judicial cooperation with the EU.

As the Committee notes, there are a number of international agreements which provide a degree of cooperation with third countries. Brussels IIa contains rules that complement the 1980 Hague Convention on Child Abduction and this Convention will continue to apply to child abductions whether or not there is a continued relationship with the EU on Brussels IIa, as will the 1996 Hague Convention. In addition, the Hague 2007 Convention, which the Government has said that it wishes to continue to participate in, covers recognition and enforcement of maintenance decisions. There is also the Lugano Convention 2007 which contains jurisdiction and recognition and enforcement rules that apply to maintenance decisions as between EU Member States and Norway, Iceland and Switzerland, in which the Government is also seeking to participate.

We recognise the value to families and individuals of the various Hague Conventions, but they are more limited in their scope than the equivalent EU instruments. The UK will therefore seek an agreement with the EU that allows for close and comprehensive cross-border civil judicial cooperation on a reciprocal basis, which reflects closely the substantive principles of cooperation under the current EU framework. It is also the Government's intention to:

- incorporate into domestic law the Rome I and Rome II instruments on choice of law and applicable law in contractual and non-contractual matters, as we legislate for our withdrawal from the EU;
- continue to participate in those Hague Conventions to which we are already a party and those which we currently participate in by virtue of our membership of the EU (such as the 2005 Hague Convention on Choice of Court Agreements); and
- continue to participate in the Lugano Convention that, by virtue of our membership of the EU, forms the basis for the UK's civil judicial cooperation with Norway, Iceland and Switzerland (albeit we recognise that many of the improvements made to the Brussels I Regulation in 2012 are not reflected in its text).

- 27. The Bar Council specifically called for the EU framework in this field to be sustained post-Brexit. But while this may be the optimal solution in legal terms we cannot see how such an outcome can be achieved without the CJEU's oversight. (Paragraph 137)**
- 29. The Minister held fast to the Government's policy that the Court of Justice of the European Union will have no jurisdiction in the UK post-Brexit. We remain concerned, however, that if the Government adheres rigidly to this policy it will severely constrain its choice of adequate alternative arrangements. (Paragraph 142)**
- 30. Clearly, if the Government wishes to maintain these Regulations post- Brexit, it will have to negotiate alternative arrangements with the remaining 27 Member States to provide appropriate judicial oversight. But the Minister was unable to offer us any clear detail on**

the Government's plans. When pressed on alternatives, he mentioned the Lugano Convention and "other arrangements". We were left unable to discern a clear policy. (Paragraph 143)

- 31. The other examples the Minister drew on, Free Trade Agreements with Canada and South Korea, do not deal with the intricate reciprocal regime encompassed by these three Regulations. We do not see them as offering a viable alternative. (Paragraph 144)**

Response

When the UK leaves the EU, it will no longer be a Member State and the EU Treaties will cease to apply in the UK. In leaving the EU, we will therefore bring an end to the direct jurisdiction of the Court of Justice of the European Union (CJEU) in the UK

As set out in our future partnership paper on Enforcement and Dispute Resolution, there are a number of precedents which can be looked at in the interests of managing the risk of the divergence in agreements, and ensuring that disputes can be resolved, without requiring the direct jurisdiction of the CJEU. These include, but are not limited to joint committees, and reporting and monitoring requirements.

As the Government's Future Partnership Paper on civil judicial cooperation points out, where appropriate, the UK and EU will need to ensure future civil judicial cooperation takes into account regional legal arrangements, including the fact that the CJEU will remain the ultimate arbiter of EU law within the EU.

- 32. We believe that the Government has not taken account of the full implications of the impact of Brexit on the areas of EU law covered by the three civil justice Regulations dealt with in this report. In the area of family law, we are very concerned that leaving the EU without an alternative system in place will have a profound and damaging impact on the UK's family justice system and those individuals seeking redress within it. (Paragraph 145)**
- 33. In the civil and commercial field there is the unsatisfactory safety net of the common law. But, at this time, it is unclear whether membership of the Lugano Convention, which is in itself imperfect, will be sought, offered or available. (Paragraph 146)**
- 34. We call on the Government to publish a coherent plan for addressing the post-Brexit application of these three Regulations, and to do so as a matter of urgency. Without alternative adequate replacements, we are in no doubt that there will be great uncertainty affecting many UK and EU citizens. (Paragraph 147)**

Response

The Government's Future Partnership paper on civil judicial cooperation, published on 22 August, provides the Government's clear position on a future relationship with the EU in this area. We believe that international judicial cooperation and mutual recognition benefit all parties. Cross-border commerce, trade and family relationships will continue long after we have left the EU. Where disputes arise, these will also continue to need to be settled. Cooperation on the civil judicial mechanisms and procedures which underpin these relationships is essential, and the best way to deliver that cooperation is through a close and comprehensive agreement between the UK and EU, that sets out coherent common rules.

As mentioned throughout this response, we will also seek to continue to participate in the Lugano Convention that forms the basis for the UK's civil judicial cooperation with Norway, Iceland and Switzerland. We do recognise these instruments' more limited scope including, as the Committee notes, that the Lugano Convention does not reflect the improvements made to Brussels I in 2012, and that most family cooperation provisions are out of its scope. That is why we believe it makes sense for families, businesses and individuals for us to obtain the best coverage by negotiating a new deal with the EU.