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Implications of Brexit for the justice system

Justice Select Committee

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Summary

- 1) UK consumers are currently protected by a complex web of cross-cutting rights, sector-specific rules, access rights, market access benefits and intra-EU locational benefits. Many of these rights operate – and are privately enforced – within a well-established private international law (PIL) framework that exists at EU level. That framework protects consumers from unscrupulous business practices and provides traders with certainty as to where, and under what laws, consumer disputes will be resolved.
- 2) At their most fundamental, PIL arrangements allow UK consumers to (i) sue and be sued in UK courts and (ii) benefit from consumer protections that exist in UK law, even where they are engaging in cross-border transactions or where their sales contract is governed by the law of another Member State.
- 3) These PIL arrangements make it possible for consumers to engage in markets on the understanding that, if things go wrong, there will be a domestic forum for obtaining redress. Conversely, without these PIL rights, there may be little point in having privately enforceable consumer protections in UK law at all. Traders could simply circumvent UK rules by ensuring that UK consumer contracts were governed by foreign laws that offer weaker consumer protections, and by requiring consumers to travel to foreign courts in order to exercise any rights that remained.
- 4) PIL is a complex area that requires careful attention in the context of Britain's exit from the EU. PIL rules clearly have significant implications for commercial litigants, the legal profession and the court system alike. However the importance of PIL for consumers must not be lost in the fray; the implications will be relevant to every UK citizen who purchases goods or services. The UK Government must keep consumer interests at the front of its mind as Britain's negotiating position on PIL develops.

How private international law protects consumers

- 5) There are two core instruments that contain important PIL protections for consumers:
 - Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels Regulation Recast); and
 - Regulation 593/2008 on the law applicable to contractual obligations (Rome I).

- 6) The Brussels Regulation Recast essentially allows consumers to sue or to defend themselves in the courts of the country where they live, and provides for only limited circumstances in which a consumer can be deemed to have agreed that these protections do not apply.¹ Consumers are also able to enforce any judgment in their favour throughout the EU.²
- 7) Rome I provides that consumer contracts will be governed by the law of the country where the consumer lives (e.g. English law for consumers in England, Irish law for consumers in Ireland), assuming the trader does business in that country or directs its activities to that country (e.g. through online marketing).³ This default position is known as an application of the “consumer’s home law”.
- 8) Despite the default position, a trader can include a clause in its terms and conditions (T&Cs) stating that the law of a different country will apply instead. This is most commonly used by traders to ensure that their T&Cs are covered by the laws of the place where they are based. This is known as choosing the “trader’s home law”.
- 9) However – importantly – even if the trader chooses its home law to govern its T&Cs, the consumer will still benefit from the mandatory consumer protections that exist under the consumer’s home law. So even where a trader chooses Greek law, for example, as governing a consumer contract, a UK consumer will still benefit from their UK consumer rights when engaging with that trader.⁴

Why it matters

- 10) Regardless of how the UK ultimately approaches its relationship with the single market, cross-border retail trade between the UK and EU jurisdictions is now a fact of life for most consumers. It is imperative that consumer confidence in these markets is not undermined. Key to consumer confidence is the ability for consumers to efficiently obtain a remedy when things go wrong. We are concerned that, absent the protections afforded by the Brussels Regulation Recast and Rome I, consumers will be exposed to the consequences of jurisdiction and choice of law clauses that are included in standard form, non-negotiable T&Cs.
- 11) A hypothetical example to provide context is as follows:
 - Consider a scenario in which a consumer in England buys a smart phone from a Spanish trader who runs a “.co.uk” website. The phone breaks after three weeks.
 - Currently, based on European PIL rules, the English consumer can seek redress from the trader in the courts of England and Wales and can rely on protections under English law that go over-and-above those under Spanish law.

¹ Articles 17 to 19.

² Article 39.

³ Article 6, noting that Article 6 of Rome I is subject to certain limited exceptions. For example, it does not apply to contracts of carriage or for the sale of land.

⁴ Article 6(2).

- For example, the consumer can exercise their right under the Consumer Rights Act 2015 to return the faulty phone and get a refund within the first 30 days after purchase. This right does not exist in most other Member States.
- Absent the existing PIL rules, the situation would look very different for the consumer. If the trader's T&Cs included a clause stating that the contract was governed by Spanish law, and that any disputes had to be resolved in the Spanish courts, the UK consumer:
 - would not be able to rely on their UK consumer rights (they would instead be subject to Spain's consumer rights regime, which they are likely to know little if anything about); and
 - would need to travel to Spain to seek redress against the trader (in the Spanish language, relying on Spanish procedural and substantive law rules).⁵

12) Instinctively, this kind of situation – in which the consumer deals cross-border with a trader that seeks to rely on its home law – might seem relatively rare. Unfortunately, that is not the case. Take just one example: the UK sales of online retailer Amazon are largely cross-border. This is because the Amazon entity that operates amazon.co.uk is domiciled in Luxembourg. Contracts entered into with UK consumers via amazon.co.uk are governed by Luxembourg law and contain a jurisdiction clause in favour of the courts of the district of Luxembourg City.⁶ The protections currently afforded by the Brussels Regulation Recast are noted in Amazon's T&Cs by a statement that consumers can, nonetheless, bring a claim to enforce their consumer rights in Luxembourg *or* in the EU country in which they live. Should the PIL rules fall away, it would be up to Amazon whether or not this statement is retained.

How the UK can preserve existing consumer protections

13) The Government must do all that it can to preserve the status quo in relation to PIL consumer protections. As online commerce continues to grow, confidence in the digital economy becomes more and more important. It does not matter how robust the UK's consumer protection rules are if traders can circumvent them in practice by choosing to have disputes with UK consumers resolved in another country's courts under another country's laws.

14) We note that the application of PIL principles to consumer contracts *outside* the EU (i.e. where UK consumers purchase goods or services from traders in third countries) is even more complex, generating practical obstacles and uncertainties for both consumers and traders alike. Given the volume of cross-border retail trade between the UK and the single market, it would not be in anyone's interests if that rest-of-world situation was replicated between the UK and the EU.

⁵ Note that there is no mandatory Alternative Dispute Resolution regime for general retail sales which the consumer could rely on to avoid taking their complaint to a court.

⁶ In September 2016, the Court of Justice of the European Union (CJEU) held in *VKI v Amazon EU Sarl* (Case C-191/15) that a term in a consumer contract which favours the trader's home law will be unfair, unless it is made clear that the consumer still benefits from the mandatory protections of the consumer's home law. This is an important decision, but it will only help UK consumers to the extent that (i) the Rome I protections continue to apply after Brexit and (ii) CJEU case law continues to be followed in the UK.

Preserving the Brussels Regulation Recast

- 15) Reciprocity with EU Member States is required in order to preserve the PIL rules relating to jurisdiction (i.e. where consumers can sue and be sued). One of the predecessors to the Brussels Regulation Recast was the Brussels Convention, to which the UK is a signatory.⁷ If the Brussels Convention is “revived” as a result of Britain exiting the EU, then UK consumers will retain most of the protections they currently enjoy under the Brussels Regulation Recast.⁸ The Government must therefore ensure that any revival of the Brussels Convention is legally sufficient to preserve the relevant consumer PIL rules in relation to jurisdiction. Otherwise, an effective jurisdiction regime governing consumer contracts will need to be negotiated afresh when Britain leaves the EU.
- 16) At the very least, it should be made clear by statute that UK courts must not uphold exclusive jurisdiction clauses in traders’ T&Cs which favour the courts of other countries.⁹ This would not solve the problem of how other European courts (i.e. non-UK courts) treat such jurisdiction clauses, but it would be a starting point if there was any issue with preserving / negotiating an effective reciprocal regime.

Preserving Rome I

- 17) Preserving the effect of Rome I (i.e. that UK consumers benefit from their UK consumer rights even where the trader’s home law applies) may be simpler. It is arguable that the Rome I protections would still apply to UK consumers who sued or defended themselves in the courts of other (remaining) EU Member States, because Article 6 of Rome I can be construed as offering protection to *all* consumers, not just those who live in a Member State. The UK may therefore be in a position to act unilaterally to preserve the protections in Rome I, by ensuring¹⁰ that mandatory UK consumer protections apply for the benefit of UK consumers in all cases that come before the UK courts, with cases coming before other EU courts already being covered by Rome I as it stands (unless of course Rome I is amended by the EU post-Brexit).
- 18) Alternatively, Rome I was preceded by the Rome Convention,¹¹ which contains similar consumer protection provisions (in Article 5) and may provide a sufficient fall-back position. If the Rome Convention is relied upon, we would again urge the Government to ensure that this is legally sufficient to preserve the relevant consumer PIL rules in relation to applicable law.

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⁷ Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, implemented in the UK by the Civil Jurisdiction and Judgments Act 1982.

⁸ See Articles 12 to 15 of the Brussels Convention, which are similar in effect to Articles 17 to 19 of the Brussels Regulation Recast. The extraterritoriality of Article 18 of the Brussels Regulation Recast would, however, be lost.

⁹ Although if the UK ratifies the Hague Convention on choice of court agreements, as has been suggested, query whether this would be permissible (the Hague Convention being silent on consumer contracts).

¹⁰ For example as part of the saving provisions of the “Great Repeal Act”.

¹¹ Implemented in the UK by the Contracts (Applicable Law) Act 1990.



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