



THE BAR
OF IRELAND

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*MEETING OF THE SEANAD SPECIAL SELECT
COMMITTEE ON THE UK'S WITHDRAWAL FROM THE
EUROPEAN UNION*

*IMPLICATIONS FOR THE IRISH ECONOMY OF HARD AND SOFT
EXIT SCENARIOS: CIVIL JUSTICE ISSUES – SUBMISSIONS OF THE
BAR OF IRELAND*

02 May 2017

INTRODUCTION

These are the written submissions of The Bar of Ireland to the Seanad Special Select Committee on the United Kingdom's withdrawal from the European Union. In making submissions on the implications for the Irish economy of hard and soft exit scenarios, The Bar of Ireland confines its submissions to certain issues that may arise in the field of civil justice as a result of Brexit. In that regard, although media commentary has focused on the implications for financial services and insurance companies of a loss of passporting rights, the rights of citizens of the EU to remain in the United Kingdom after Brexit and *vice versa*, and customs or tariffs issues, The Bar of Ireland wishes to highlight the wide range of civil justice¹ issues that are raised by Brexit, particularly in a hard Brexit scenario. As a country with deep economic and personal ties with the United Kingdom, the issues discussed below have the potential to affect Ireland more than perhaps any other country in the European Union. The Bar of Ireland also wishes to highlight some opportunities for Ireland in the market for legal services.

AREAS OF CONCERN

In the area of civil law, the Treaties, Regulations and Directives of the European Union affect parties in civil justice in many diverse areas. In this submission, we highlight some of the issues that may have economic effects in Ireland.

1. Civil Jurisdiction, and the Recognition and Enforcement of Foreign Judgments.

In order to ensure the smooth flow of commerce between the Member States, it is essential that the judgments of one Member State's courts are recognised in the other Member States. Similarly, it is important that companies and individuals know which Courts will deal with disputes, and how Court papers from one Member State's court system may be served in another Member State. In the existing European legal order, in civil and commercial matters, these issues are comprehensively dealt with by the Recast Brussels Regulation (EU 1215/2012). This regulation deals with both

¹ Equally significant issues arise in criminal law, for example in the context of the European Arrest Warrant, or co-operation in judicial and security matters. In addition, serious issues arise in family law, in relation to jurisdictional issues, maintenance, and child abduction. All of these areas merit consideration by the Select Committee, but are not addressed in this paper.

jurisdiction of courts and the recognition and enforcement of judgments in civil and commercial matters.

The regulation, which has direct effect (i.e. force of law) in all Member States, provides that:

- (i) The judgments of the courts of one EU Member State are enforced throughout other Member States as if they were the judgments of the court of the Member State in which enforcement is sought.
- (ii) In general, if a person is domiciled in an EU Member State, they must be sued in that Member State.
- (iii) Where parties choose in their contract that any disputes should be resolved in one Member State, the courts of the other Member States must abide by that choice.

In addition, there are EU-wide rules on the service of judicial and extra-judicial documents. The benefit to such a system is, of course, self-evident. If an Irish company obtains a judgment in Ireland, it will be entitled to enforce that judgment against a defendant in any other Member State. Similarly, the Irish company can be satisfied that it will only be sued in Ireland, unless the rules of the Recast Regulation permit it to be sued elsewhere. In the context of a hard Brexit, none of these rules will apply so that European companies will find it difficult to enforce European judgments in the courts of the United Kingdom. United Kingdom judgments may be unenforceable in certain Member States, and their enforcement in Ireland will be rendered more difficult and more expensive. These issues also affect multinational businesses based in Ireland, or those considering whether to relocate to Ireland.

2. Financial Services and Insurance

In the area of financial services, much of the regulation of the financial services and insurance sector in Europe derives from European Union regulation. Part of that system allows what is known as “passporting”. Under that system, where a regulated entity is situated in one Member State, it is, under certain conditions, entitled to provide services to businesses and consumers in other Member States. Many of the financial services and insurance businesses established in the City of London use those rights

to provide services across the European Union. Similarly, there are many financial services and insurance businesses across the European Union which use passporting to provide services to what is the very large United Kingdom market.

In the context of a hard Brexit, it is likely that the right of companies to passport either out of or into the United Kingdom will be removed. This will give rise to significant disruption in the provision of financial services. Whereas there may be a migration of some businesses to Ireland, and therefore benefits, some Irish companies may lose the right to provide services to the United Kingdom.

3. Insolvency

In the context of insolvency, there is a Europe-wide insolvency regime, given effect by the Insolvency Regulation (Council Regulation EC 1346/2000). Under the rules established by this Regulation, the courts of the Member State where a company's centre of main interests is situated have jurisdiction to open "main insolvency" proceedings in relation to that company. In the area of insolvency, the clarity provided by the Insolvency Regulation is especially valuable where companies routinely trade across borders and have assets and operations across multiple jurisdictions. In the scenario of a hard exit, the courts of EU Member States are unlikely to recognise the United Kingdom and vice versa in an insolvency situation.

4. Other Issues

All of these issues affect citizens across the European Union and particularly in Ireland. There are many other areas where citizens' rights could be affected, such as the right to provide or receive legal services, immigration law, employment law, consumer law, patents, intellectual property, competition law and tax law.²

² For a detailed review of the effect of Brexit in the United Kingdom, see Bar Council Brexit Working Group, *The Brexit Papers*; House of Commons Justice Committee, *Implications of Brexit for the Justice System*; and House of Lords European Union Committee, *Brexit, justice for families, individuals and businesses?*

SOLUTIONS

In the absence of agreement between the European Union and the United Kingdom in a range of areas relevant to civil justice, businesses and individuals will have to fall back on pre-existing international treaties, where they exist, and long standing rules of public and private international law. This is likely to give rise to increased cost and uncertainty in the conduct of commerce between the European Union and the United Kingdom.

Although political considerations fall outside of the remit of The Bar of Ireland, it is clearly in the interests of both the European Union and the United Kingdom to seek replacements for the Brussels Recast Regulation, the Insolvency Regulation, and the other rules which are currently in force across the European Union. The Bar of Ireland notes the stated objective of the United Kingdom to remove its legal system fully from the jurisdiction of the Court of Justice of the European Union. This stated desire may prevent agreement being reached in relation to many of the areas of civil justice where it is clearly desirable that there be the fullest possible co-operation. It may be that some compromise can be reached whereby the United Kingdom would accept the jurisdiction of the Court of Justice of the European Union in relation to the type of procedural issues (in relation to jurisdiction and enforcement) now governed by Brussels Recast Regulation, as opposed to the law of substantive rights.

OPPORTUNITY FOR IRELAND

There are now significant opportunities to expand the market for legal services in Ireland.

The provision of legal services increasingly has a prominent international dimension or involves international issues. In particular, the growth in international trade and investment has increased demand for cross-border legal advice and representation. Over many years past, the United Kingdom has consolidated efforts across a range of stakeholders to increase its share of the international legal services market. At present the United Kingdom is believed to account for 10% of global legal services fee revenue and 20% of European legal services fee revenue.

One of the factors that underpins the United Kingdom's position as the second largest market for legal services globally is parties to international commercial contracts choosing English law to govern their agreements. This is borne out by the volume of litigation and arbitration involving non-UK parties that occurs in the United Kingdom. For example, the data³ suggests that since 2010 around 80% of all (London) Commercial Court cases each

³ *Factors Influencing International Litigants' Decisions to bring Commercial Claims to London Based Courts*, UK Ministry for Justice Analytical series 2015, page 10.

year have involved at least one foreign party. In almost 50% of all cases, all parties are foreign.

The departure of the United Kingdom from the European Union will have significant effects in the field of legal services:

1. There is uncertainty over the next two years as to the final settlement that will be reached between the United Kingdom and the European Union.
2. It appears that the United Kingdom is headed for a hard Brexit, so it will not be integrated into the European legal system within two years.
3. There is a real risk that the judgments of English Courts will not be enforced in Member States as easily as they are now enforced.
4. International consumers of UK legal services are now signalling that they will seek an alternative jurisdiction for the governance of commercial agreements and the resolution of disputes.

Brexit creates an opportunity for Ireland to increase trade in legal services from Ireland to the international sector.

First, Brexit has created considerable uncertainty among UK legal service providers concerning their ability post-Brexit to service their clients as before given that they will no longer be in the European legal order.

Second, Brexit has significantly lessened the attractiveness of English choice of law clauses in commercial contracts. According to a survey conducted for the Bar Council of England and Wales, European clients are already considering moving away from English choice of law for jurisdiction clauses.⁴ In addition, according to the Bar Council of England and Wales, some international parties have already chosen not to issue proceedings in England if final orders may be made after Brexit, with uncertainty as to enforcement.

Following Brexit, Ireland will be the only English-speaking common law jurisdiction fully integrated into the European legal order. This will help attract financial and other service

⁴ See *The Brexit Papers*, Bar Council of England and Wales

industries into Ireland and will provide an opportunity to increase the market for legal services in Ireland. In particular, it will encourage international companies:

1. To incorporate Irish law as the governing law of contracts, in place of English law.
2. To designate Ireland as the forum for the resolution of any disputes in relation to those contracts, whether by way of litigation or arbitration.
3. To use Irish lawyers to advise on European Law.

If Irish law can become the proper law of international contracts, it will inevitably increase the volume of work done by legal service providers in Ireland, including by increasing the volume of litigation and arbitration in Ireland.

The availability of highly skilled common law and English-speaking lawyers in Ireland is an important support for the international business that flows through Ireland. Considerable expertise has been built up by the large solicitors' firms in areas such as the Funds Industry and in Aircraft Leasing. Irish firms are able to rival the large international firms in these and other sectors.

There is further potential for Irish solicitors' firms and barristers to provide legal services from Ireland to clients outside Ireland. Considerable work is required to take advantage of the opportunity to increase trade of legal services to the international sector.

Over time, it ought to be possible to significantly increase trade in legal services from Ireland in Dublin, with increased business opportunities and revenue arising from ancillary support services and increased tax revenues for the State, both by way of Income Tax and VAT. The potential rewards to the Irish economy are very significant. In addition, if Ireland becomes a place in which international litigation and arbitration is routinely carried out, it inevitably enhances the reputation of Ireland as a place to do business, particularly for the type of financial service providers that are now considering a move from London.