



Law Society  
of Scotland

# The Law Society of Scotland's Response

The House of Lords EU Justice Sub-Committee

Brexit: Enforcement and Dispute Resolution Inquiry

January 2018



## Introduction

---

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Constitutional Law Sub-committee welcomes the opportunity to consider and respond to the House of Lords EU Justice Sub-Committee consultation: Brexit Enforcement and Dispute Resolution. The Sub-committee has the following comments to put forward for consideration.

## General Comments

---

### Citizens' Rights

The joint report from the negotiators of the European Union and the United Kingdom published on 8 December sets out the joint commitments of the parties subject to the caveat that "nothing is agreed until everything is agreed". The note clarifies that the parties have reached agreement in principle on the following three points:

- a. protecting the rights of Union citizens in the UK and UK citizens in the Union;
- b. the framework for addressing the unique circumstances in Northern Ireland; and
- c. the financial settlement.

The preliminary agreement on the enforcement mechanism relates to the section on citizens' rights after the UK's exit from the EU.

Both parties have agreed a role for the Court of Justice of the EU (CJEU) in providing consistent interpretation and application of the citizens' rights part.

Paragraph 37 states:

*The Agreement establishes rights for both UK citizens living in the EU and EU citizens in the UK. To protect those rights and give citizens legal certainty, a consistent interpretation and application of the citizens' rights Part is in the interest of both Parties to the Agreement and therefore appropriate mechanisms should be established to ensure this.*

Paragraph 38 elaborates the role which the CJEU will be given in the Agreement between the parties:

*This Part of the Agreement establishes rights for citizens following on from those established in Union law during the UK's membership of the European Union; the CJEU is the ultimate arbiter of the interpretation of Union law. In the context of the application or interpretation of those rights, UK courts shall therefore have due regard to relevant decisions of the CJEU after the specified date. The Agreement should also establish a mechanism enabling UK courts or tribunals to decide, having had due regard to whether relevant case-law exists, to ask the CJEU questions of interpretation of those rights where they consider that a CJEU ruling on the question is necessary for the UK court or tribunal to be able to give judgment in a case before it. This mechanism should be available for UK courts or tribunals for litigation brought within 8 years from the date of application of the citizens' rights Part.*

There is a distinction in paragraph 38 between two concepts:

- a. The obligation on the UK courts to have due regard to relevant decisions of the CJEU after the 'specified date' which is the "time of the UK's withdrawal" defined in the European Union (Withdrawal) bill as exit day i.e. 29 March 2019 at 11pm, and
- b. The referral mechanism which should be available for UK courts or tribunals for litigation brought within 8 years from the date of application of the citizens' rights Part. This date is not identified but presumably will be defined in the Withdrawal Agreement.

Therefore this to an extent provides for the CJEU to have jurisdiction following exit day but there are details to be worked out.

Issues relating to pending cases are still in need of clarification. In the joint report Paragraph 93 states:

*“On ongoing Union judicial procedures, both Parties have agreed that the CJEU should remain competent for UK judicial procedures registered at the CJEU on the date of withdrawal, and that those procedures should continue through to a binding judgment”.*

This may require an amendment to the European Union (Withdrawal) Bill to clarify the precise status of such a decision. There may be litigants who have cases in the UK courts which would merit reference to the CJEU but simply because of timing will be deprived of such a reference. There is a question as to whether this is an outcome which upholds the interests of justice.

## **Dispute Resolution**

The UK's position as stated in "Enforcement and dispute resolution: a future partnership paper" (para 22) is that where rights are expressed in the Withdrawal Agreement or future relationship agreement they will be enforced by the UK courts and ultimately by the UK Supreme Court and in Scottish criminal law cases by the High Court of Justiciary sitting as a court of Appeal. It would be helpful to have clarification from the government on how this position is affected by the December Agreement.

Both parties agree that an enforcement mechanism is needed on the application of the terms of the new UK-EU agreement. Furthermore, ensuring certainty on how any disagreements are resolved is of paramount importance to citizens and businesses.

The Government's White Paper entitled "The United Kingdom's exit from and new partnership with the European Union" acknowledged the need for a dispute resolution mechanism to ensure a "fair and equitable implementation" of the UK's future relationship with Europe.

The paper sets out a number of options for the mechanism based on the existing frameworks available. These included:

- a. The CETA Joint Committee established under the EU-Canada Comprehensive Economic and Trade Agreement (CETA). This Committee supervises the implementation and application of the agreement. If necessary, the parties can refer disputes to an ad hoc arbitration panel. The EU's free trade agreement with South Korea also provides for an arbitration system.
- b. The North American Free Trade Agreement (NAFTA), main settlement procedure provides that the governments' concerned aim to resolve any potential disputes amicably, but if that is not possible, panel procedures.
- c. Mercosur, where disputes are in the first instance resolved politically, but if a political solution is not forthcoming the dispute can be submitted to an ad hoc arbitration tribunal. Decisions of the tribunal may be appealed on a point of law to a Permanent Review Tribunal.
- d. The New Zealand-Korea Free Trade Agreement, where the first approach is cooperation and consultation to reach a mutually satisfactory outcome. The agreement sets out a process for the establishment of an arbitration panel. The parties must comply with its findings and rulings, otherwise compensation may be payable or the benefits of the FTA may be suspended.
- e. The World Trade Organisation (WTO) has a Dispute Settlement Body (made up of all the members of the WTO) which decides on disputes between members relating to WTO agreements. Recommendations are made by a dispute settlement panel or by an Appellate Body which can uphold, modify or reverse the decisions reached by the panel.
- f. EU-Switzerland bilateral agreements or treaties which govern the EU-Switzerland economic and trade relationship. Each agreement deals with different elements of EU law such as free movement of persons where substantive EU law applies. On the other hand the free trade agreement does not apply EU law as such.

Each agreement establishes a joint committee which regulates and applies the agreement. Apart from some cases, there is usually no recourse to a court or tribunal.

The White Paper also contains an annex (Annex A) which contains further illustrations of how other international agreements approach interpretation and dispute resolution.

The White Paper sets out the Government's intention with regard to the future relationship with the EU. The paper states:

*"... the UK will seek to agree a new approach to interpretation and dispute resolution with the EU. This is essential to reassure businesses and individuals that the terms of any agreement can be relied upon, that both parties will have a common understanding of what the agreement means and that disputes can be resolved fairly and efficiently.*

Of course it is up to the UK and the EU to agree the form of dispute resolution they prefer. The paper makes clear that the parties need not be bound by precedent but sets out certain parameters for the agreement. These include that i. any arrangements must be ones that respect UK sovereignty, ii. protect the role of UK courts and iii. maximise legal certainty, including for businesses, consumers, workers and other citizens.

We believe these parameters should include promotion of the rule of law and the interests of justice. Other options which the paper does not discuss include:

- (a) the setting up of a separate permanent court comprised of both UK and EU Judges. We acknowledge that this may be an unpalatable solution not least to the EU which considers the CJEU to be the ultimate arbiter of EU law.
- (b) The creation of a mechanism for an ad hoc court comprised of both UK and EU Judges.

Both of these options are worthy of consideration among the other options which the parties will have to choose from.



**For further information, please contact:**

Michael Clancy  
Director, Law Reform  
Law Society of Scotland  
DD: 0131 476 838

[michaelclancy@lawscot.org.uk](mailto:michaelclancy@lawscot.org.uk)