Brexit manoeuvres

David Greene charts the progress of the UK's transition out of Europe

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It is, of course, an old political trick to keep going on about the detailed mundane issues relating to a policy, in order to bore stakeholders into submission. Brexit might be taking on that guise. There are many who will have lost interest in the process and who might be saying, like many Europeans, 'just get on with it'.

It is, however, a crucial time for the detail of our future of relations with our neighbours. Unfortunately we have come to an impasse, bogged down in the political quagmire of just how that future should look. It does seem amazing that with just a year to go until we become a third country to the EU, we still have yet to agree among ourselves the fundamentals of the relationship. It is only when that happens we can start fitting in the detail.

In a paper at the end of November, the European Commission issued a Notice to Stakeholders as to the consequences for the UK in civil justice and international law. The paper is a short exposition of the effect of the UK becoming a third country. It was intended as a stark warning of the effect. As we all know, for instance, UK judgments in civil and family law will no longer be recognised and enforceable in the EU under Brussels I or II. The alternatives to avoid the consequent problems are, of course, up for negotiation but that is somewhat stalled behind the bigger political decisions.

That there should be a transition period appears agreed in principle, but even for that there is much debate as to its format. The EU Council has issued a fresh Notice to Stakeholders (29 January) on how they see the transition period working. Like the civil justice paper the EU position is stark: 'If you want to be in the club for the transition period then you must play by all the rules'.

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As lawyers we might see that as an acceptable outcome for the short period of the transition. It gives us certainty that everything in civil justice will be the same before and after March 2019. And it is certainty that we seek. Becoming a third country without a transition period is a spectacle best remaining wholly unrealised. Time is ticking on putting into place any alternatives. In replacement for the Brussels Regulations the government has committed to join the Lugano Convention, but timing to do so is now difficult. The lead-in to joining the Convention is at least 12 months.

Thus in that transition period Brussels I and II would still apply, as would the Motor Insurers Directive, the Package Holiday Directive and the myriad of reciprocal arrangements that touch on civil justice.

But a political decision this side of the channel has yet to be concluded as to whether we want effectively full membership of the Union for the transition period and until that decision is made the world remains uncertain.

Other events

Putting that all aside, civil practitioners should keep an eye on other events. The Withdrawal Bill is now in the Lords. Removed from the absolute political heat of the Commons we are likely to see many amendments to the Withdrawal Bill as it passes through the House and Committee stages. Civil practitioners might want to keep an eye for instance on Clause 6 of the Bill which deals with the continuing status of European court decisions after Brexit.

After Brexit, UK courts will not be bound by ECJ judgments or the principles they lay down. They 'need not' have regard to anything done by the ECJ but 'may do so' if considered appropriate. The judiciary are concerned that, as drafted, the section places too much pressure on judges and could bring them into the sphere of political decision making. The draft section also raises problems as to how ECJ judgments should be treated in front of the court; as law or fact. A number of stakeholders are seeking clarity in the section and some redrafting and it's in the Lords that we should see progress.

Meanwhile the Commission is, of course, dealing with the day-to-day issues including civil justice. It issued an interesting paper at the end of January on collective redress actions for consumers. There the Commission promotes collective redress, particularly for consumers, for 20 years. It set benchmarks for those actions in a Recommendation of June 2013. The new paper suggests that EU nations have been rather slow in putting the Recommendations into effect, with nine countries having done absolutely nothing.

Comment

As is often the case, the UK (in most but not all respects) leads the field in reflecting the recommendations in its legislation and rules; the modern picture enhanced by the Consumer Rights Act 2015. As a jurisdiction of choice, competition has developed between some of the EU nations on hosting consumer claims with the Netherlands, Germany and UK leading the charge.

But the question remains, does it matter now what the Commission or the EU Parliament say? Will any of it have any effect in this jurisdiction in the future? Until we leave, yes; for the transition period, probably; for the time thereafter, who knows? **NLJ**

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