31:01:2020—the time has come

The UK's position as a primary global legal centre is not going to change with Brexit, but there are some short-term challenges that we should be braced to address, says David Greene

On Friday 31 January the UK leaves the EU. It would be fair to say that this is not an outcome with which all agree, but it is happening, and for good or bad the profession has to work with the event and the consequences. Being entrepreneurial the profession will work to best effect to ensure as smooth a passage as possible to the next stage.

We have 11 months of 'transition' which means that while we will have left the Union it will be as though we were still a member for almost all legislative purposes. Sadly our departure has immediate effect in the European Court of Justice (ECJ) where the UK judges leave now despite the ECJ continuing to have jurisdiction in the transition period.

The Withdrawal Bill receives Royal Assent this week. Eleven months seems an extremely short period to reach agreement on the future relationship and many are calling for that to be extended. Article 132 of the Withdrawal Agreement allows the transitional period (otherwise the 'implementation period') to be extended for up to two years. Clause 33 of the Bill, however, expressly forbids a minister from agreeing any extension. The Bill is full of political statements and perhaps Parliament may be persuaded to revisit the issue in due course.

As Professor Michael Zander QC has written recently in *NLJ*, some of the more controversial elements of the Bill faced opposition and amendment in the Lords despite the warning that any amendments would be rejected by the Commons (see 'The EU Withdrawal Agreement Bill (No 2) (Pt 2)', *NLJ* 24 January 2020, p13). Controversy remains over citizens' rights and the rights of child refugees. Constitutional concerns remain over the wide scope of the licence given to ministers to make and change law in the Brexit process.

> *"It's all up for grabs but in this short period we need to aim at the possible"*

Clause 26 of the Bill also received criticism in the Lords and more widely. It has always been the government position that the UK might diverge from EU law as asserted by the European Court of Justice. That divergence, however, would take place at the highest judicial level only. Clause 26 opens up the possibility of extending that possible divergence to courts and tribunals of first instance. As one, the profession and the judiciary have expressed concern of the uncertainty that this provision, if brought into effect, would generate. It remains to be seen where the government will land.

The length of the transition period requires all hands to the pump in terms of seeking a trade agreement with the EU. The government has also set ambitious timetables for reaching trade agreements with other countries round the world. Its first aim is across the Atlantic to the US,

After the transitional period we will lose some of the pillars of European civil justice co-operation. The Hague Conventions, including the nascent Judgments Convention, offer some limited alternatives. The government has committed to seek to ratify on a single state basis the Lugano Convention. That will need the consent of the EU and the EFTA states. On the optimistic front that should cause no problem but it may be possible for the EU to hold out on consent in negotiations. We shall see.

The profession is also looking at issues in the export of legal services, of which the net value is some £5bn per year. Seeking to reach trade agreements relating to legal services faces a number of common hurdles, clearly not insurmountable, but given the time available one might describe them neutrally as 'challenging'.

- First, trade agreements tend to look at the visible trade in goods and not unregulated (as in customs regulations) trade in services.
- Second, if services are included there needs to be a drill down specifically into legal services.
- Third, insofar as the export requires physical presence there will be immigration and visa issues.
- Fourth there will be a clash between state or federal competence and local regulatory competence, eg there will be a limit on what the US at a federal level can do.
- Finally, the domestic regulatory landscape changes across the EU and the US.

These are challenges but the government seeks us to be ambitious and there are ways to address these issues.

Attaching some reality to what may be achieved in this very short period, the profession seeks the right to establish as freely as possible and the right to advise on English law across the EU and in other jurisdictions, both remotely and on a fly in fly out basis. A foundation stone for this goal will be agreement on the mutual recognition of qualifications. That recognition will take place against the background that the UK is one of the most open jurisdictions in the world. We already welcome lawyers from across the world to come and practise here the law in which they are qualified. This is the basis on which the UK maintains its position as a primary global legal centre. That is not going to change with Brexit. Some might think that we thus have little bargaining power but the openness of the jurisdiction is absolutely essential to our future after Brexit.

It's all up for grabs but in this short period we need to aim at the possible. **NLJ**

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