Brexit & transition. Prepare for the worst & hope for the best, says David Greene

The Brexit negotiations enter a new stage and drop away from the headlines as the negotiators get down to the detail. The Transitional Agreement (TA), albeit not yet in its final form, adding just short of two years to the exit process has calmed slightly the exit jitters for business and law firms promising the general retention of the status quo until December 2020. As we debated, however, earlier this month in a session with the French and Paris Bar in London businesses and law firms in the UK are still preparing for a no deal exit, just in case. Our French colleagues reassured us for the future that a positive deal will be done but positive for who? And what will happen if a deal is not reached? Subject to that what have we established and what does the future hold for civil justice and judicial co-operation and for firms?

The transition

The Transition/Implementation deal or more formally the transitional elements of the draft Withdrawal Agreement is, like the whole document currently subject to a traffic light colour coding. Green for agreed, yellow for agreed in principle and white for items proposed by the EU but as yet not agreed. Perhaps adopting traffic light coding and the colour red for the unagreed might have seemed a little negative to all concerned. The majority of the Agreement is coloured green. For the parts of the TA that remain unagreed one of the seeds of continuing disagreement remains the red line the UK Government initially put through the continuing role of the CJEU. That line has become pinkish but the extent of any role remains contentious.

For the transition period the rights of citizens to reside and work in the transitional period are agreed, as is the recognition of professional qualifications. For our IP colleagues parts of the IP Title (Part 3 Title IV) of the TA have yet to be agreed. Just one small part of the Title dealing with police and judicial co-operation in criminal matters is agreed.

Title VI (Part 3) of the TA deals with Judicial Co-operation in Civil and Commercial Matters. Rome I and II will apply respectively to contracts concluded and events giving rise to damage occurring before the end of the transition period. The Service of Documents Regulation is also agreed to apply in the transition period.

The continuing application of the Brussels I recast (recognition and enforcement of judgments in civil and commercial matters) and Brussels II (recognition and enforcement in matrimonial and parental matters) and a host of other Regulations and Directives in civil justice, eg insolvency, are not agreed.

At least one sticking point in all of these is the role of the CJEU in the transition period.

Title X of the TA deals with the CJEU during the transition period. This has yet to be agreed although in relation to citizens' rights the role of the CJEU is agreed in Part 6 Chapter 1 of the TA. The EU proposes business as usual but this clearly crosses the UK's red (pinkish?) line. For those practising competition, IP and EU related law the continuing right to plead in the CJEU will be an important element of the TA.

One would assume a bit of give and take will get us over the line for the transition period but even then one can readily see the potential for much litigation over these provisions and over Brexit generally.

The longer term

So that's all fine for the transition but what of the longer term? This is a much more difficult issue. The EU Brexit Taskforce's position is that civil justice co-operation is a reflection of the Single Market and when the UK leaves it will be treated like any other third country. That may be a stance to take in negotiation but it is myopic and unless we crash out one cannot see it being carried through. Such is the integration between the EU 27 and the UK built up over the past 45 years co-operation in civil justice is a substantive two way street with benefits both sides. Further while the EU may wish to buttonhole civil justice, co-operation as a reflection simply of economics affects the day to day lives of citizens and their rights. One would assume that in the end the EU will want to do some deal to ensure the well-being of its own citizens.

On the UK Government's side it has committed to Lugano and the Hague Convention on Recognition but the jurisdiction of the CJEU remains a barrier to full co-operation. As we know, the Lugano Convention has its limits. These were addressed in Brussels Recast and the better solution would be to, effectively, retain Brussels Recast and Brussels II as international instruments like Denmark. This does raise the spectre of the CJEU but in the Denmark model the Danish courts have only 'to take due account of' decisions of the CJEU. The Danish agreement still has CJEU reference provisions but there seems no reason why this can't be addressed. The European Council has already formally recognised UK's red line on the CJEU and exclusion from it post Brexit. The Government has certainly had to move its position in the transition period making the red line a little pinkish but it will take a negotiating shift to come to a permanent conclusion that might give a little more in the best interests of its citizens.

The message at the moment remains prepare for the worst but hope for the best. While the two negotiating sides are setting out their stalls and a few toys are thrown out of the respective prams it will be in the interests of both sides and particularly in the interests of the current citizens of the EU that there is a coming together of positions to ensure close co-operation for civil justice in the future. NLJ

David Greene, *NLJ* consultant editor & senior partner at Edwin Coe LLP (@LitLawyer).