Dear Mr Turner

U.K. EXIT FROM THE EUROPEAN UNION – CROSS-BORDER CIVIL JUDICIAL COOPERATION

Thank you for your letter to Lord Walker dated 22 August 2017, regarding the publication of a Government policy paper entitled Providing a cross-border civil judicial cooperation framework: a future partnership paper (the “Cooperation Paper”) on the same day. In your letter, you invited Lord Walker to share any thoughts or comments on the Cooperation Paper and the Government’s position. Lord Walker and the Financial Markets Law Committee (the “FMLC” or the “Committee”) have asked me to respond to this invitation.

As you may know, the role of FMLC is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks, and to consider how such issues should be addressed. Pursuant to this role, on 2 December 2016 the FMLC published a paper entitled Issues of Legal Uncertainty Arising in the Context of the Withdrawal of the U.K. from the E.U.—the Application of English Law, the Jurisdiction of English Courts and the Enforcement of English Judgments (the “FMLC Paper”), which I enclose.

The FMLC welcomes the approach taken in the Government’s Cooperation Paper, which is closely aligned with its own recommendations set out in the FMLC Paper.

The FMLC Paper

The FMLC Paper identifies issues of legal uncertainty which may arise in the context of cross-border commercial litigation in consequence of Brexit and, where appropriate, suggests potential solutions to these issues. In particular, the FMLC Paper draws attention to: 1) the possibility of reduced certainty and predictability in the field of contractual and non-contractual obligations if the Rome I and Rome II rules on


choice of law were no longer to apply in the U.K.; and 2) the mutual loss of advantages and protections—which may be experienced by the courts and litigants of both the U.K. and the E.U. Member States—if U.K. participation in the conflict of laws framework reflected in the Brussels Recast Regulation\(^5\) is allowed to lapse as a result of Brexit.

In order to mitigate these uncertainties, the FMLC Paper sets out a number of recommendations, including that:

a) Rome I and Rome II should continue to apply under U.K. law after Brexit;

b) the U.K. should become a party to the 2005 Hague Convention on Choice of Court Agreements\(^6\) and the 2007 Lugano Convention;\(^7\) and that

c) the U.K. should try to conclude an agreement with the E.U. under which the Recast Brussels Regulation would continue to apply to the U.K. after it leaves the E.U.

The FMLC Paper also anticipates and reflects on some of the practical issues that may arise when implementing these recommendations.

The Cooperation Paper

The Cooperation Paper—which outlines the Government’s desire for a “deep and special partnership” with the E.U.\(^8\)—advocates: (i) for the incorporation of the Rome I and II instruments into domestic law; (ii) participation in the 2005 Hague Convention on Choice of Court Agreements; and (iii) participation in the 2007 Lugano Convention.\(^9\) In this way, the Cooperation Paper chimes with that produced by the FMLC.

The Cooperation Paper further states that the U.K. will

"...seek an agreement with the EU that allows for close and comprehensive cross-border civil judicial cooperation on a reciprocal basis, which reflects closely the substantive principles of cooperation under the current EU framework.\(^10\)


\(^6\) Convention of 30 June 2005 on Choice of Court Agreements (available at: [www.hcch.net](http://www.hcch.net)).

\(^7\) Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007, O J 2009 L 147, p. 5, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:116029](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:116029). The FMLC Paper further observes that accession to the Lugano Convention will be particularly important if the U.K. does not secure an arrangement under which it continues to be bound by the Recast Brussels Regulation, and that—if possible—the Lugano Convention should be amended to include improvements adopted in the Recast Brussels Regulation.

\(^8\) See fn1, supra, p.2.


\(^10\) See fn1, supra, paragraph 19, p.6.
Based on the Cooperation Paper’s description of the current E.U. framework (Box 1 of the Cooperation Paper lists the existing measures that make up this framework, and includes the Brussels Recast Regulation) this statement suggests that the Government will seek an agreement with the E.U. which replicates the substance of the Brussels Recast Regulation.

Recommendations

While the Cooperation Paper and the FMLC Paper appear to share a common vision for the cross-border judicial cooperation framework post-Brexit, the FMLC Paper offers more granular detail on practical issues such as transition. As such, the FMLC Paper might prove useful to the Government as the first steps towards building the cooperation framework are made.

To this end, the FMLC draws your attention, in particular, to:

a) paragraph 3.5: this paragraph—in the context of the ongoing application of Rome I and Rome II—considers the transition from the old regime to the new one, and more specifically raises the issues of “grandfathering” governing law clauses in legacy financial markets transactions, and the ongoing treatment of the decisions of the CJEU; and

b) paragraphs 5.16-5.24: these paragraphs give thought to issues of transition that will arise if instruments such as the 2005 Hague Convention on Choice of Court Agreements, the 2007 Lugano Convention and the Recast Brussels Regulation enter into force in the U.K: specifically, when each instrument would enter into force, and what arrangements should be made for cases which span the two regimes (i.e. “before” and “after”).

To aid clarity, the FMLC also recommends that the Government confirms its intention to replicate the substance of the Brussels Recast Regulation, allowing for close and comprehensive cross-border civil judicial cooperation on a reciprocal basis.

Annex A

A final, brief, observation remains to be made in respect of paragraph 7 of Annex A of the Cooperation Paper, which sets out the proposed general approach to the winding down of the U.K’s existing relationship in the event that no agreement on a future relationship can be reached. This approach is unsatisfactory and would lead to significant market disruption, as it leaves no provision for new E.U. judicial decisions and new contracts concluded after the withdrawal date.

I and Members of the Committee would be delighted to meet you to discuss the issues raised in this letter. Please do not hesitate to contact me should you require further information or assistance.

Yours sincerely,

Joanna Perkins
FMLC Chief Executive