CLAN | COMMERCIAL LITIGATION ASSOCIATION
Patron: Right Honourable The Lord Woolf of Barnes

Dear Sirs

"Brexit: deal or no deal?" – CLAN Response

1. This is the response of the Commercial Litigation Association (CLAN) to the House of Lords inquiry, "*Brexit: deal or no deal?*".

About CLAN

2. CLAN is an interest group of legal practitioners from across the UK. Its purposes are to champion the cause of all who are involved in the practice and business of commercial dispute resolution, to develop a strong national and international network by representing the interests of commercial litigators and to promote best practice and provide training of the highest quality and relevance to practitioners. Its members include judges, solicitors, barristers, academics and other industry professionals at all levels of experience and qualification.

3. More broadly, CLAN's aim is to promote the unrivalled quality of the courts and judiciaries of the UK's jurisdictions as venues for the resolution of commercial disputes.

CLAN's Response

4. CLAN's response will focus on the areas of importance to its members. Of the "key questions" posed on the inquiry's introductory website, CLAN will address the following in its response:

   What are the good and bad implications of the 'no deal' scenario?

   Is a transition arrangement a necessary component of a lasting agreement?

   What are the key components of any transition arrangement?

5. In the time available, and given that CLAN's Steering Committee is comprised of legal services practitioners whose contributions to CLAN are to a very large extent voluntary, it has not been possible to compile a comprehensive response dealing with all aspects of a Brexit "no deal" or transitional arrangement scenario that might impact upon CLAN's members, their practices or their clients. What follows is necessarily broad and high level but is thought to be representative of members' views.

Opening Remarks

6. Brexit is at its heart a change to the law, and as far as changes to the law go, it is probably unprecedented in scale and potential impact. The experience of CLAN's members is, naturally, in advising businesses in relation to business disputes. Regardless of the size of business embroiled in a commercial dispute, a common thread is the value placed on certainty. This manifests itself in a number of ways: clients generally like certainty in relation to costs, certainty in relation to procedural timetable and certainty of outcome. The impact of even a bad outcome can be mitigated if it is predictable. A good outcome would not be half as valuable if it was not certain to stay a good outcome. If an outcome is uncertain it should only ever, ever be good news.

7. To borrow from the playbook of former US Secretary of Defense Donald Rumsfeld, there is certain certainty, and certain uncertainty. Certain certainty is typically good for

business, and certain uncertainty can be managed: the uncertainties can be ring-fenced, atomised, studied and planned for. What should be avoided is uncertain uncertainty.

8. The position of CLAN, through its Steering Committee, is that a transitional arrangement is not "necessary" in the sense of being essential. A transitional arrangement would, however, and by analogy with other changes to the law, likely be of considerable assistance to businesses, litigants and (least importantly) lawyers in managing the change. If there is not to be a transitional arrangement and the UK is to encounter a so-called "hard" Brexit, then this too could be managed, albeit on a tighter timeframe and likely with more margin for error. The question of whether there is to be a transitional arrangement, or instead a "no deal" scenario, is, however, an unacceptable uncertain uncertainty.

What are the good and bad implications of the 'no deal' scenario?

<u>Good Implications</u>

9. CLAN has identified a number of potentially positive implications of a "no deal" scenario. These all concern the UK's competitive advantage as a jurisdiction for the resolution of commercial disputes.

10. First, it would give the UK maximum flexibility regarding the promotion and development of its own laws. English law, with its centuries of fine-tuning and development, generally speaking provides contracting parties with certainty. For example, English law has generally resisted vague concepts like duties of good faith between contracting parties, which duties can produce unpredictable results before a court. English contract law tends to allow commercial parties to agree the "four corners" of their contracts, giving maximum latitude to the parties in what they want to achieve. A "hard Brexit" is the likeliest of all of the options to protect English law from unnecessary and potentially damaging interference, such as the European Commission's long foreshadowed desire to harmonise all contract law on German contract law.

11. Another positive practical implication would be the resurgence of the importance of anti-suit injunctions (ASIs) to restrain litigation brought in violation of arbitration agreements. The Arbitration Act 1996 gives the English Court the power to grant injunctive relief to one party where, in breach of an arbitration agreement between it and another party, the other party commences court proceedings. In a series of cases that came before it, however, the Court of Justice of the European Union (CJEU) made it clear that ASIs were incompatible with the jurisdiction regime established under the Brussels Convention and Brussels Regulation (the Brussels regime). Although the English Court has interpreted these decisions to mean that *damages* can be awarded for breach of an arbitration agreement, ASIs as a tool of practical justice remain much diminished under the Brussels regime, and even under the most recent European statute, the Recast Brussels Regulation, the position is not yet entirely clear. A "no deal" exit from the UK would give greater certainty to commercial parties seeking to avoid multiple sets of parallel proceedings in situations where they thought they had agreed to arbitration (i.e., commercial certainty).

12. A "no deal" Brexit may also make England appear a more neutral venue for European dispute resolution than an existing EU Member State, and thus promote London as a centre for resolving disputes between parties from different EU Member States (whether as a result of choosing English Court litigation or London as the seat of an international arbitration).

13. A "no deal" Brexit will also likely keep the pound weaker against other currencies, such as the US dollar and the euro, thus making English law and English lawyers cheaper than they have been in recent years prior to June 2016. In the experience of CLAN's members, the costs of litigation in the UK are often surprisingly high in the eyes of European parties, so this benefit is not illusory. This will make the jurisdiction as a venue and its laws more cost competitive against other European dispute resolution centres. Admittedly, however, exchange rates are obviously more volatile than other competitive advantages enjoyed by this jurisdiction and may therefore not be a factor when commercial parties select a jurisdiction clause, potentially some years before a dispute is heard.

14. Of course, these positive implications may of course prove to be a feature of a negotiated departure from the EU, too, but they are likelier in a "no deal" scenario.

Bad Implications

15. The most obvious "bad" implication of a "no deal" scenario is that some major pieces of legislation on which commercial litigants rely would cease to apply "over night". While the UK can (and has stated its intention) to transpose EU law as it exists into domestic EU law, absent positive steps taken by the EU there would appear to be nothing to make that arrangement reciprocal: the UK would no longer be an EU "Member State" and therefore, to the extent that citizens or corporate entities of one Member State were granted rights vis-à-vis those of other Member States, the UK's citizens and corporate entities would no longer have those rights.

16. From the perspective of commercial litigation, this applies most obviously to the Brussels regime which regulates between Member States the jurisdiction applicable to disputes and provides for the enforcement of judgments by the courts of EU Member States in the courts of other Member States. Although the UK could voluntarily continue to enforce the judgments of the courts of EU Member States, and follow the Brussels rules on jurisdiction as if they applied to the UK to find that the courts of a Member State had jurisdiction and those of the UK did not, the same need not happen in reverse. English Court judgments would therefore become less enforceable (and therefore potentially less attractive). Parties may also be less inclined to litigate in England if they have less comfort that parallel proceedings will not have to be fought within the EU as well (uncertainty).

17. There is the potential for serious harm to be caused to litigants whose cases are already underway when the Brussels regime ceases to apply. It is incredibly uncertain how the courts of the various Member States would handle such a scenario. For example, under the Brussels regime, an English claimant suing a German defendant in England might find that it has no remedy if the German defendant launched parallel proceedings in Germany once Brussels ceased to apply.

18. Some of these risks are mitigated by the Hague Convention on choice of court agreements. This regime is similar to Brussels in some respects, and could potentially become broader in effect territorially than Brussels (currently, only the EU, Mexico and Singapore have ratified it). In some very important respects, however, it is much narrower than Brussels. First, it only applies to contractual choice of court agreements from 1 October 2015 onwards. Non-contractual tortious claims are not covered, and nor are contracts which pre-date 1 October 2015 (which will obviously matter less over time). Non-exclusive or asymmetric jurisdiction agreements (where one party is granted different or wider jurisdictional rights than another party), and interim remedies such as freezing orders pending judgment, are also not covered by the Hague Convention. The

procedure for enforcing a judgment in a different contracting state is also less straightforward than under Brussels. The UK would in addition likely need to sign and ratify the Hague Convention as it has been ratified by the EU as a bloc. The UK could also rely on the similar Lugano Convention, which applies between members of EFTA.

19. The overnight cessation in applicability of the Brussels regime to the UK might also prove fertile waters for the resurgence of the so-called "Italian torpedo". Under the Brussels regime as initially enacted, courts of Member States were obliged to stay proceedings commenced there (often in accordance with an agreement expressly choosing that forum) if the courts of another Member State were "first seised" of a matter. Opportunistic parties have made tactical use of this provision by commencing proceedings in courts known to adjudicate on their own jurisdiction only after much delay, thereby causing delay and prejudice to other parties. This drawback to Brussels has been addressed by the Recast Brussels Regulation, but the Lugano Convention contains no such protection. The Hague Convention provides similar protection to the Recast Brussels Regulation, but its limitations have already been identified and discussed above.

20. The net result of these issues is that a "no deal" Brexit may mean English Court jurisdiction is comparatively less valuable to would-be litigants (i.e., all businesses and all of their customers) because it provides less certainty than can be found within the EU under the Recast Brussels Regulation. The "fall back" position of the Hague and Lugano Conventions is hardly disastrous, but they do provide less certainty. English Court judgments will also be less enforceable on a reciprocal basis in other Member States until a deal is agreed. It may also make other EU companies reluctant to include English Court jurisdiction clauses in their contracts (or submit their disputes to arbitration with a seat in London). Also, if the London financial market is severely impacted, which now seems unlikely but remains possible, that would in turn ultimately have some negative impact on the London legal world as we are to an extent symbiotic with the financial market.

Is a transition arrangement a necessary component of a lasting agreement?

21. A transition arrangement is not strictly "necessary" in the sense of being mandatory or required. However, one of CLAN's central purposes is to provide relevant and up-to-date training to commercial litigation practitioners. This is a field in which changes to the law are common – whether in terms of changes to, for example, the Civil Procedure Rules, which govern how practitioners go about litigating, or in terms of sea-changes to areas of substantive law such as companies legislation. It tends to be the experience of CLAN's members that when significant changes to the law come into force, practitioners (and therefore, also, the clients they represent) are aided by a transitional period.

22. This would help to avoid "cliff edges" where the environment on the other side is outside the UK's control and therefore very uncertain. A prime example of this would be parties already litigating cross-border EU disputes under the auspices of the Brussels regime. Were it to fall away "over night" the impact (as briefly mentioned above) would be unclear. Would foreign courts construe it such that it applied to cases where proceedings had already begun? Or would it be as if the case had been commenced *ab initio* with the Brussels regime not applying. Different Member States' courts might reach different conclusions and the CJEU itself might have to adjudicate on the question, potentially a long time later. Could the UK be sure that such decisions would not be influenced by the political environment in the EU? For parties who have already invested years and potentially millions of pounds on litigation, these are invidious questions and only some of those posed by a "hard Brexit" withdrawal. Well resourced would-be litigants may

already have received legal advice on the possible outcomes of this type of scenario, but it is impossible to know how the myriad conceivable permutations might play out.

23. One of the most valuable aspects of a transition period is that it allows for lay clients and practitioners to prepare for a new environment and provide essential training. If practitioners are able to know with certainty what the position will be before, during and after the transition period, clients can make informed decisions as to whether and when to take crucial (and sometimes existential decision) and where they will stand when they do.

What are the key components of any transition arrangement?

24. There are a few key components to any transition period that CLAN would like to see implemented.

25. It should be made clear what the position of the Brussels regime vis-a-vis English Court judgments in the EU, and vice versa, will be both during and after the transition period.

26. Across these factors, it should also be made clear what the position is in respect of parties whose:

    (i) causes of action have accrued such that the case *could* be litigated;

    (ii) claims are already being litigated before a Member State court; and

    (iii) cases have reached judgment.

    This would enable the UK and the EU to produce a matrix covering each scenario and give litigants and would-be litigants important certainty.

27. Similar analyses should be undertaken in respect of other crucial EU legislation which affect the conduct of litigation, such as Rome I and Rome II, which govern the law applicable to contractual and non-contractual obligations, respectively.

28. The UK should state its position on ratifying the Hague Convention.

Yours faithfully

The Steering Committee of the Commercial Litigation Association