



FINANCIAL MARKETS LAW COMMITTEE

**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**

DECEMBER 2016

www.fmlc.org

Registered Charity Number: 1164902.

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FINANCIAL MARKETS LAW COMMITTEE

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1. INTRODUCTION

- 1.1 The role of the Financial Markets Law Committee (the “**FMLC**” or the “**Committee**”) 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.
- 1.2 On Thursday 23 June 2016, the U.K. voted to leave the E.U. In the wake of the referendum result, the FMLC announced the establishment of a High Level Advisory Group (“**HLAG**”) to give direction to the Committee's future work programme in this area and to convene a standing forum of experts to contribute to research and publications.² Drawing on these and other resources, the FMLC said it would work to identify, analyse and address legal uncertainties relating to the U.K. withdrawal (“**Brexit**”). Pursuant to the announcement, the HLAG on Brexit was convened by the FMLC Secretariat in July to offer guidance on the approach that the FMLC should take. At the inaugural meeting, the HLAG recommended that the FMLC should establish a working group of experts to consider uncertainties relating specifically to English governing law and jurisdiction clauses in cross-border financial markets transactions and reliance on these clauses in international commercial litigation. Accordingly, a Working Group was established in August 2016 and its discussions form the basis of the analysis set out in this paper.
- 1.3 In the course of its discussions, the Working Group made reference to a number of legal instruments which form the bulk of private international law (or “conflict of laws”) rules which apply in the U.K. to regulate financial markets transactions—and, indeed, all commercial contracts. The looming issue of legal uncertainty can, perhaps, best be summarised by observing that all of these instruments apply in the U.K. solely by reason of the fact that the U.K. is a Member State of the E.U.:
- (a) the 2005 Hague Convention on Choice of Court Agreements the “**Hague Convention**”);³
 - (b) the 2007 Lugano Convention (the “**Lugano Convention**”);⁴
 - (c) the Recast Brussels Regulation (the “**Recast Brussels Regulation**”);⁵
 - (d) the Rome I Regulation (“**Rome I**”);⁶ and

² The text of the announcement and further details of the FMLC's work in this area are available at: <http://www.fmlc.org/the-fmlcs-work-on-brexit.html>.

³ Convention of 30 June 2005 on Choice of Court Agreements (available at: www.hcch.net).

⁴ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007, O J 2009 L 147, p. 5.

⁵ Regulation (E.U.) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2012, L 351, p. 1.

(e) the Rome II Regulation (“**Rome II**”).⁷

1.4 The sections below address issues of legal uncertainty likely to arise in the context of cross-border commercial litigation in consequence of Brexit.⁸ The cause of the Committee’s concern and engagement is briefly stated in section 2. In section 3, the paper examines the situation with regard to choice of law clauses in financial markets contracts and concludes that contractual continuity would be enhanced by the preservation of the current rules after Brexit. Sections 4 and 5 focus on the question of jurisdiction, especially regarding the jurisdiction of English courts under an English choice-of-court agreement and the enforcement of English judgments.⁹ These sections acknowledge the greater problems of legal uncertainty to which Brexit is likely to give rise and, by way of solution, they analyse the consequences were existing E.U. instruments to be replaced in the U.K. by a new conflict of laws agreement with the E.U. or a new accession to existing international conflict of laws instruments. Following this analysis, the FMLC’s conclusions and recommendations are briefly restated, by way of closing, in section 6.

2. THE PROBLEM OF UNCERTAINTY

2.1 Many commercial contracts contain a choice-of-court clause designating the courts of England, often accompanied by a choice-of-law clause designating English law. Frequently, the parties will have no connection with England: they choose English courts and English law because they want a neutral forum and a system of law that is known to them and believed to be satisfactory from a business point of view.

2.2 Until recently, there has been a high degree of certainty that the provisions on choice of law and choice-of-court would be valid and effective both in the U.K. and in other E.U. and EFTA Member States. This is in large part owing to the U.K.’s membership of the E.U. The sections below consider the potential consequences of leaving the E.U. first in relation to choice of law and then jurisdiction and judgments.

⁶ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ 2008, L 177, p. 6.

⁷ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, OJ 2007, L 199, p.40.

⁸ For an earlier study on this topic, see Masters & McRae, “What Does Brexit Mean for the Brussels I Regime?” (2016) 33 *Journal of International Arbitration* 483.

⁹ Separate working groups are being established to consider the question of cross-border insolvency and bank resolution, respectively.

3. CHOICE OF LAW

- 3.1 The two main E.U. instruments in this area are the Rome I Regulation and the Rome II Regulation. Rome I is a more significant element in the legal framework for cross-border financial markets transactions. It deals with the applicable law for contracts and its importance for markets in financial instruments, which are characterised by the prevalence of contracts on market standard terms, cannot be overstated. The commercial heart of the Rome I Regulation is to be found in Article 3(1) which provides that “[a] contract shall be governed by the law chosen by the parties...” but Article 4 (*Applicable law in the absence of choice*) provides a useful rule for determining the governing law of a contract in financial arrangements which do not incorporate a choice of law agreement.¹⁰ Rome II deals with non-contractual obligations and, by way of example, may apply to determine the system of law which will apply to a cross-border claim involving alleged professional negligence or negligent misstatement. In a financial markets context, such claims might include, for instance, claims by investors against issuers, where the investors have purchased their securities in the secondary markets.
- 3.2 Both instruments require courts of the Member States to respect governing law clauses, subject to certain limited exceptions, and are based on the principle of universal application: the rules they lay down operate in the same way irrespective of whether the country whose law is to be applied is a Member State of the E.U. or a Non-member State.¹¹ Therefore, the application of English law under these instruments—for example, under an English choice-of-law clause—will not be affected by Brexit as far as proceedings in the courts of E.U. Member States are concerned. In other words, Member States’ courts would continue to respect English governing law clauses in the wake of Brexit as they do now, and subject to essentially the same limited exceptions.
- 3.3 It is to be assumed that both Rome I and Rome II will cease to apply in the U.K. under E.U. law once Brexit takes place,¹² although a similar result will often be reached under the pre-existing English-law rules. There is, however, much to be said in favour of the U.K. adopting legislation for the continued application of Rome I and Rome II as a matter of U.K. law.¹³ Although the common law rules on choice of law are broadly similar to those set out in these instruments, lawyers and courts in England and elsewhere have grown familiar

¹⁰ Choice of law clauses are less common in some standard form financial transactions than others. Letters of credit, for example, do not always incorporate choice of law clauses.

¹¹ Rome I, Article 2; Rome II, Article 3.

¹² There is no existing model relationship with the E.U. under which a third country agrees to be bound by E.U. conflict of laws regulations. The Agreement on the European Economic Area (which entered into force in 1994), represents the closest treaty relationship yet developed between E.U. and non-E.U. States. It requires implementation by the non-E.U. signatories only of those E.U. rules relating to the four freedoms of movement within the internal European market. On 2 October 2016, the Prime Minister of the U.K. announced plans for a Great Repeal Bill which will, when it comes into force, repeal the European Communities Act 1972. Section 2(1) of the 1972 Act provides that provisions of E.U. law are automatically binding in the U.K. When the 1972 Act is repealed, directly effective E.U. laws such as Rome I and Rome II will cease to have effect in the U.K. unless the contrary is expressly provided for in the Great Repeal Bill.

¹³ When this happens, there will no longer be references to the CJEU from U.K. courts on the interpretation of the Regulations.

with these regulations over the years and their higher level of development—for example, the fact that Rome II makes it clear that a choice of law for non-contractual obligations will be respected—makes outcomes under them more predictable. Retaining their application and effect in the U.K. would help alleviate uncertainty regarding the effects of Brexit.

- 3.4 The Committee is, therefore, of the view that legal certainty would be enhanced were Rome I and Rome II to continue to apply under U.K. law after Brexit, subject only to minor technical amendments, principally to reflect the fact that the U.K. will no longer be part of the E.U.¹⁴ This result might be achieved either by a “standstill” provision under the Great Repeal Bill referring directly to Rome I and Rome II, or by new statutory provision for the conflict of laws in the U.K.
- 3.5 The FMLC notes that consideration might usefully be given to arrangements for the transition from the old regime to the new one and for “grandfathering” governing law clauses in legacy financial markets transactions. For example, a choice-of-law clause adopted when Rome I applies as a matter of E.U. law should apply in the same way after the U.K. leaves the E.U. Continuity would be enhanced were the courts of the U.K. to be required, where appropriate, to have regard to relevant decisions of the CJEU in interpreting the retained provisions.¹⁵

4. CIVIL JURISDICTION AND JUDGMENTS

- 4.1 The position will be different with regard to jurisdiction and recognition of judgments. The Recast Brussels Regulation distinguishes between parties domiciled in a Member State and those not so domiciled, between proceedings in the courts of a Member State and proceedings in other courts, and between judgments given by the courts of Member States and other judgments. For this reason, the U.K.’s withdrawal from the E.U. may make a significant difference, although in relation to the allocation of jurisdiction pursuant to a choice-of-court agreement and the enforcement of judgments, the difference may be greater in theory than in practice (see paragraph 4.4 below).
- 4.2 The most important benefits conferred on Member States (including the U.K.) by the Recast Brussels Regulation are:

¹⁴ References in the instruments to the “European Union” and to “Member States” would no longer be appropriate. In the case of Rome I, these include Article 1(4) (definition of “Member State”), Article 2 (principle of universality) and Article 3(4) (the rule that in certain situations a choice of law by the parties does not prejudice the application of E.U. law). It would also be desirable to make changes to the provisions in Article 7 on insurance contracts, especially in so far as these distinguish between Member States and non-member States. Article 25 should make clear that the rules laid down in the instrument would apply within the U.K.—for example, between England and Wales, on the one hand, and Scotland, on the other hand—in the same way as they apply internationally.

¹⁵ A statement published by HM Department for Exiting the European Union on 2 October 2016 announced that the Great Repeal Bill would end the jurisdiction of the CJEU in the U.K. The statement is available at: <https://www.gov.uk/government/news/government-announces-end-of-european-communities-act>

- (a) in proceedings in the courts of E.U. Member States, U.K.-domiciled defendants are protected from exorbitant jurisdiction—for example, jurisdiction based on the nationality or domicile of the *claimant*;
- (b) if the U.K. courts have exclusive jurisdiction—for example, regarding title to land in the U.K., or the validity of U.K.-registered IP rights—the courts of other Member States are precluded from hearing the case;
- (c) if the English courts are the first courts seised of a matter, the courts of other Member States are precluded from hearing a parallel action (an action between the same parties regarding the same matter);
- (d) if an English court gives a judgment, there is a simple and effective procedure for enforcing it in other Member States; and
- (e) where a contract is governed by an exclusive English choice-of-court agreement, courts of other Member States are precluded from hearing a case to interpret and/or enforce the terms of the contract (this has been made more effective in the Recast Brussels Regulation, which contains provisions to make a jurisdictional manoeuvre known as the “torpedo” ineffective).¹⁶

4.3 After Brexit, absent any agreement with the remaining Member States (as to which see further below), it is to be assumed that the provisions of the Recast Brussels Regulation which confer these benefits will cease to apply to the U.K.¹⁷ The benefits listed above will then be conferred on the U.K., if at all, only on some other basis. Similarly, they will cease to apply (at least on a formal treaty basis) to parties domiciled in the E.U. Member States, insofar as such parties may be subject to proceedings in the U.K.

4.4 As regards benefits currently conferred on the U.K., some may be retained on one of more of the following grounds:

- (a) some benefits may be conferred on U.K.-domiciled defendants under the national laws of E.U. Member States;
- (b) protection for U.K. proceedings may be conferred by the courts of E.U. Member States, who have a discretionary power under the Recast Brussels Regulation to stay proceedings, in specified circumstances, where the courts of a non-member State are

¹⁶ Recast Brussels Regulation, Article 31, paragraphs (2) to (4), read with Recital 22. The “torpedo” refers to a variety of *forum* shopping whereby a prospective defendant seeks pre-emptively to initiate proceedings in a jurisdiction where court procedure militates against a swift resolution of questions of *forum* or jurisdiction. The objective of the manoeuvre is to delay or postpone proceedings in the courts favoured by a contractual jurisdiction clause (which the defendant anticipates will be disinclined to look favourably on his/her defence) on the grounds that the court first (i.e. pre-emptively) seised must of its own motion decline jurisdiction before proceedings can continue in the contractually favoured *forum*.

¹⁷ See n.12 *supra*.

seised first.¹⁸ The protection would be narrower and less effective than under the current regime; and

- (c) the judgments of U.K. courts may be recognised and enforced under the national law of the Member State concerned.¹⁹

4.5 The position regarding choice-of-court agreements in financial markets transactions is more complex. What is said above with regard to the recognition of judgments—i.e. that it may still be achieved under national law in at least some cases—would also apply to judgments granted under a choice-of-court agreement. There is, however, some uncertainty as to the approach that Member States’ courts will take to English jurisdiction clauses following Brexit. This is because the Recast Brussels Regulation does not provide expressly for what Member States’ courts should do if proceedings are brought in the courts of an E.U. Member State which have jurisdiction under the Recast Brussels Regulation (for example, because the defendant is domiciled there), but there is an exclusive choice-of-court agreement designating the courts of a non-Member State—for example, the U.K. Uncertainty has been generated by an Opinion of the CJEU given with a view to determining whether the E.U. had exclusive competence to conclude what became the Lugano Convention.²⁰ A Full Court of the CJEU (21 judges) took a view which, despite earlier authorities to the contrary,²¹ appears to suggest that the choice-of-court agreement would have no effect.

4.6 The CJEU held that the E.U. had exclusive competence to conclude the Lugano Convention.²² To establish this, the CJEU had to show that the proposed Convention would affect an existing E.U. measure. It said that it would affect the Brussels Regulation 2000 (the predecessor to the Recast Brussels Regulation). To illustrate this, the CJEU took the example of two parties, one of whom is domiciled in an E.U. Member State, who conclude a choice-of-court agreement designating the courts of a State which is not an E.U. Member State but which would be a Party to the proposed Convention. It assumed that the party

¹⁸ Recast Brussels Regulation, Articles 33 and 34.

¹⁹ Before the U.K. joined the E.U., it had judgment-recognition conventions with a number of Member States (France, Belgium, Germany, Austria, Italy and the Netherlands: see OJ 2015, C 390/6, List 3). These were superseded by the Brussels Convention and, subsequently, by the Recast Brussels Regulation. These might revive, but this is uncertain. In any event, the law is different in each Member State and in some Member States it is restrictive. In all cases, “exequatur” would have to be obtained and the foreign court would scrutinize the grounds on which the English court took jurisdiction to see whether they were acceptable under its national conflict of laws rules. That is not to say, however, that English judgments will not be enforceable in the Member States post-Brexit. Indeed, in many cases they will be (in the same way as judgments from other non-member States e.g. New York are currently enforced in the E.U.). It will, however, make enforcement more time consuming and costly.

²⁰ Opinion 1/03, ECLI:E.U.:C:2006:81, [2006] ECR I-1145.

²¹ See the (Schlosser) Report on the 1978 Convention of adhesion to the Brussels Convention (by which Denmark, Ireland and the U.K. joined the Convention), OJ 1979 C 59, p. 71, paragraph 176 (p. 124); Case C-387/98, *Coreck Maritime v. Handelsveem*, ECLI:E.U.:C:2000:606, [2000] ECR I-9337.

²² A procedure under Article 218(11) of the Treaty for the Functioning of the European Union allows the Commission, the Council, the Parliament or a Member State to seek the opinion of the Court on the compatibility between the Treaties and an agreement that the Union proposes to conclude with a non-Member State or an international organisation. In such a case, the CJEU opinion is binding.

domiciled in the E.U. Member State is sued in the courts of that Member State. In such a situation, said the CJEU, the court of the Member State would have jurisdiction without the Lugano Convention but would have no jurisdiction with it.²³ Whilst it is far from certain that the CJEU would adopt this approach in the future, the possibility that it might is enough to add a layer of uncertainty.²⁴

Conclusions on the effect of Brexit

- 4.7 The FMLC concludes, on the basis of the analysis above, that Brexit would exacerbate legal uncertainty concerning the enforceability of jurisdiction clauses favouring, and, to some extent, the recognition and enforcement of the judgments of, courts of the U.K. unless additional remedial action were taken to obviate the uncertainty as part of the legal arrangements for the withdrawal.²⁵ A similar point can be made, *mutatis mutandis*, about the recognition in the U.K. of jurisdiction clauses favouring, and the judgments of, the courts of E.U. Member States.

5. POTENTIAL SOLUTIONS FOR JURISDICTION AND JUDGMENTS

The Hague Convention

- 5.1 At present, the U.K. is not a party to the Hague Convention in its own right: the E.U. is a party and the Hague Convention applies to the U.K. under European law.²⁶ In the event of Brexit, the Hague Convention will cease to apply in the U.K. In these circumstances, the U.K. would be entitled to become a party in its own right and this would not require the consent of the E.U. or other contracting states.
- 5.2 The Hague Convention can be summarised as follows: it requires the court or courts designated in an exclusive choice-of-court agreement to hear the case; it precludes courts of other contracting states from hearing parallel proceedings; and it requires any judgment granted by the designated court to be recognised and enforced in other contracting states.

²³ Paragraph 153 of the judgment.

²⁴ In subsequent cases in which it could have decided the point, the CJEU has not done so: Case C-154/11, *Mahamdia v. Algeria*, ECLI:E.U.:C:2012:491; Case C-175/15, *Taser International*, ECLI:E.U.:C:2016:176.

²⁵ There has been speculation as to whether the 1968 Brussels Convention (OJ 1978, L 304, p. 77) or the 1988 Lugano Convention (OJ 1988 L 319/ 9) might revive after Brexit: see Dickinson, “*Back to the Future: the U.K.’s E.U. Exit and the Conflict of Laws*” (2016) 12 *Journal of Private International Law* 195. Both conventions cover roughly the same ground as the current Recast Brussels Regulation. The Brussels Convention was superseded by the Brussels Regulation, 2000 (and now by the Recast Brussels Regulation), except as regards a few obscure overseas territories: Brussels 2000, Article 68; Recast Brussels Regulation, Article 68. The 1988 Lugano Convention was superseded by the 2007 Lugano Convention. It is doubtful whether either of these conventions would revive – the final word, as regards the other E.U. Member States, rests with the CJEU – and there are various practical problems. In any event, the system they establish is outdated compared with the Recast Brussels Regulation: see Dickinson (above), at pp. 203–207.

²⁶ The Hague Convention entered into force in respect of Mexico and the E.U. Member States (excluding Denmark) on 1 October 2015. The transitional provisions of the Convention mean that it will only apply to exclusive choice of court agreements in favour of an E.U. Member State, or Mexico, concluded on or after 1 October 2015.

- 5.3 Its particular advantages from the point of view of parties to a choice-of-court agreement are that, if there were an exclusive choice-of-court agreement designating the courts of the U.K., the Hague Convention would—subject to a possible exception discussed below—prevent parallel proceedings in E.U. Member States (except Denmark)²⁷ and it would require E.U. Member States (except Denmark) to recognise and enforce the resulting judgment.²⁸ The Hague Convention is, however, more limited in its application than the Recast Brussels Regulation.
- 5.4 First, it applies only to exclusive choice-of-court agreements.²⁹ Moreover, an agreement is regarded as exclusive only if it is exclusive irrespective of the party bringing the proceedings.³⁰ Thus, it would not apply to an “asymmetric” jurisdiction agreement, which provides: “The lender may sue the borrower in England or in any other country the courts of which have jurisdiction under their law, but the borrower may sue the lender only in England.”
- 5.5 Secondly, its subject-matter scope is limited. For example, it does not apply to the carriage of persons or goods by land, sea or air;³¹ so choice-of-court agreements in bills of lading are excluded.
- 5.6 Thirdly, the obligation not to entertain parallel proceedings is subject to significant qualifications. Thus, if a party lacks the capacity to conclude the agreement under the law of the State of the court seised, that court would not have to decline jurisdiction.³² It would also not have to decline jurisdiction if giving effect to the agreement would lead to a “manifest injustice” or would be “manifestly contrary to the public policy of the State of the court seised.”³³ These exceptions mean that the circumstances in which a contracting state’s courts may be able to refuse to decline jurisdiction in favour of a court designated in an exclusive jurisdiction clause are wider than those under the Recast Brussels Regulation.

²⁷ Denmark has an opt-out from the relevant E.U. provisions; so it is not bound by the Hague Convention as an E.U. Member State. It has not yet ratified the Convention in its own right.

²⁸ In addition, it would grant us benefits with regard to non-E.U. contracting states, at present Mexico and Singapore.

²⁹ Hague Convention, Article 22 provides for its judgment-recognition provisions to be extended to non-exclusive choice-of-court agreements as between contracting states which have made a declaration to that effect, but the E.U. has made no such declaration.

³⁰ This is not expressly stated in the text but see Minutes No 3 of the Twentieth Session, Commission II, paragraphs 2–11. See, further, the Hartley/Dogauchi Report, paragraph 106.

³¹ Hague Convention, Article 2(2)(f).

³² Hague Convention, Article 6(b). This would mean that if the agreement designates the courts of the U.K. and the parties both have capacity under English law, a court in which parallel proceedings were brought would not have to decline jurisdiction if one party lacked capacity under its law.

³³ Hague Convention, Article 6(c).

- 5.7 Fourthly, the obligation to recognise and enforce judgments given under a choice-of-court agreement is subject to similar exceptions.³⁴
- 5.8 Finally, if there were a direct conflict between the Hague Convention and E.U. law, E.U. law would prevail under the terms of the Hague Convention, unless one of the parties was resident in a State that was a party to the Hague Convention but not a Member State of the E.U.³⁵ This means that the Recast Brussels Regulation would prevail if the parties were, for example, French and German or French and Japanese (assuming that Japan does not join the Hague Convention).
- 5.9 This last restriction would constitute a problem only if there were a direct conflict between the Hague Convention and the Recast Brussels Regulation. The only situation in which this might occur is that discussed above: that is, where the choice-of-court agreement designates the courts of a non-Member State—for example, the U.K. after Brexit—and the proceedings are brought in the E.U. Member State in which the defendant is domiciled. In this situation, there is a possibility that the CJEU might decide that the court of the Member State is precluded from declining jurisdiction, although, as explained above, it is far from certain that it would do so. Even were it to do so, there would still be many situations in which the Hague Convention would require E.U. courts to decline jurisdiction.³⁶

The Lugano Convention

- 5.10 The 2007 Lugano Convention replaces the 1988 Lugano Convention. The parties to this treaty are the E.U., Denmark, Iceland, Norway and Switzerland. Its purpose is to extend the Brussels regime for jurisdiction and judgments to Iceland, Norway and Switzerland. The U.K. is not a party to the Convention but is bound by it because the U.K. is an E.U. Member State. Once the U.K. leaves the E.U., it will no longer be bound. If the U.K. were to become a member of EFTA, it would have a right to join the Lugano Convention.³⁷ Otherwise, it can join only with the unanimous consent of the other parties.³⁸ This means that the E.U. would have to consent.
- 5.11 The main drawback of the Lugano Convention is that it is based on the Brussels Regulation of 2000, now superseded by the Recast Brussels Regulation. This means that it lacks the improvements to be found in the latter instrument, especially the provisions designed to make the jurisdictional “torpedo” manoeuvre ineffective. On a positive note, however, it is

³⁴ Hague Convention, Article 9.

³⁵ Hague Convention, Article 26(6).

³⁶ For example, where the defendant was not domiciled in an EU Member State; or in which one of the parties was domiciled in the U.K. or in another non-EU State that was a Party to Hague.

³⁷ Lugano Convention, Article 71 read with Article 70(1)(a).

³⁸ Lugano Convention, Article 72(3).

reported that efforts will be made to update the Lugano Convention with a view to incorporating these improvements.

- 5.12 Under the Lugano Convention, the final authority for interpreting the Convention is the CJEU as regards cases in E.U. Member States, and the Supreme Courts of the other parties as regards cases in their courts. There is, however, a provision that these courts must “pay due account” to each other’s judgments.³⁹ In practice, the judgments of the CJEU carry considerable weight.

Recast Brussels Regulation

- 5.13 A third possibility is that the U.K. might choose to remain bound by the Recast Brussels Regulation even after it leaves the E.U, with the concurrence of other Member States. A treaty would need to be put in place between the E.U. and the U.K. to achieve this, providing in essence that, for the purpose of the Recast Brussels Regulation, the U.K. is to be treated as if it were still a Member State.
- 5.14 There is precedent for this. Because the Maastricht Treaty accords Denmark the right to opt out of E.U. provisions on private international law, Denmark is not bound by the Recast Brussels Regulation. It has, however, concluded a special treaty with the E.U. under which it is bound as a matter of international law. This treaty makes provision for Denmark to be bound by revisions to the Regulation as well. Were this treaty relationship to be replicated between the U.K. and E.U. Member States, it would confer obvious advantages on both the U.K. (and U.K.-domiciled parties) and E.U. Member States (and Member State-domiciled parties) by enhancing legal certainty, preserving continuity to the greatest extent possible and conferring the mutual advantages of the Recast Brussels Regulation on courts and litigants in both the U.K. and the E.U., even after the U.K.’s withdrawal.
- 5.15 It should be noted that the treaty with Denmark provides for references from the courts of Denmark to the CJEU. A statement published by HM Department for Exiting the European Union on 2 October 2016 announced that the proposed Great Repeal Bill would end the jurisdiction of the CJEU in the U.K.⁴⁰ Were there sufficient political will on both sides, this potential inconsistency could, perhaps, be resolved by requiring the U.K. Supreme Court to pay due account of judgments of the CJEU without being bound by them, but it is not clear that a compromise of this nature will be available.

Coming into force and transitional issues

- 5.16 Transition involves two issues: first, when would one of the putative instruments discussed above enter into force in the U.K. and, second, what arrangements should be made for cases which span the two regimes (i.e. “before” and “after”). These problems will be discussed separately for each instrument.

³⁹ Lugano Convention, Protocol 2, Article 1(1).

⁴⁰ See n.15 *supra*.

Hague Convention

- 5.17 Once Brexit takes place, the Hague Convention will cease to apply in the U.K. unless the U.K. becomes a Party in its own right. If this were done, the Convention would come into force for the U.K. on the first day of the month following the expiration of three months after the deposit of the U.K.'s instrument of ratification.⁴¹ This three-month gap would be unfortunate—unless alternative arrangements were made, it would give rise to a “cliff edge” descent into temporary but acute uncertainty during the 3-month window and disproportionately disadvantage a small number of litigants who had the misfortune to be in dispute at that time. Accordingly, it is desirable that the gap should be eliminated. Whether or not the U.K. would be able in good faith to deposit its instrument of ratification three months before leaving the E.U. is partly a political question, one which would be affected by all the circumstances of the withdrawal.
- 5.18 There are two rules as regards transitional issues. The primary rule is set out in Article 16(1): “the Hague Convention applies to choice-of-court agreements concluded after the entry into force of the Convention in the Home State of the chosen court.” The secondary rule is contained in Article 16(2) of the Convention: “the Convention will not apply to proceedings instituted before its entry into force for the State of the court seised.”
- 5.19 The entry into force of the Hague Convention occurred for all Member States of the E.U.—except Denmark but including the U.K.—on 1 October 2015. In the view of the FMLC, assuming the 3-month gap discussed above can be eliminated, the Hague Convention should apply in respect of all choice-of-court agreements designating U.K. courts concluded after 1 October 2015, notwithstanding that the basis on which the U.K. accedes to the Hague Convention may change.

The Lugano Convention

- 5.20 The position regarding the Lugano Convention depends on whether the U.K. joins the existing Convention, or joins a new, revised Convention (incorporating the improvements adopted in the Recast Brussels Regulation). If the U.K. were to join the existing Convention, it could do so by accession.⁴² The current Parties, including the E.U., would have to give their consent.⁴³ Assuming this were forthcoming,⁴⁴ the Depositary (Switzerland) would invite the applicant State to accede by depositing its instrument of accession. The

⁴¹ Hague Convention, Article 31(2)(a).

⁴² Article 70(1)(c), Article 72 and Article 73.

⁴³ Article 72(3). There is a certain inconsistency between this provision and Article 72(4), the latter suggesting that if not all existing Parties give their consent, the Convention will enter into force between the acceding State (the U.K.) and those Contracting States which have not made any objections to the accession. If there is an inconsistency, Article 72(4) prevails, since Article 72(3) states that it is without prejudice to Article 72(4).

⁴⁴ Article 72(3) states that the Contracting Parties must endeavour to give their consent within one year of being invited to do so by the Depositary.

Convention would enter into force on the first day of the third month following the deposit of the instrument of accession.⁴⁵

- 5.21 If the U.K. were to become a Party to a revised Convention, the coming into force of that Convention would depend on its terms. It would be desirable for provision to be made bringing it into force as between the U.K. and the E.U. as soon as it had been ratified by these two parties, even if other Parties had not yet ratified it.⁴⁶ If this were done, delays in ratification by other Parties would not prejudice the position between the U.K. and the E.U. In any event, the damaging effects of legal uncertainty in both the U.K. and the E.U. can be minimised by reducing, or preferably eliminating, any temporal gap between the date at which the Brussels Recast Regulation no longer has effect in the U.K. and the entry into force of the (revised) Lugano Convention.
- 5.22 As far as applicability to individual proceedings is concerned, the crucial date is the date when the legal proceedings are instituted.⁴⁷ So if, when the proceedings are instituted, the Lugano Convention applies in the U.K., either because the U.K. is a Member State of the E.U. or because the U.K. is a contracting state in its own right, those proceedings will be covered by the Convention. If proceedings are subsequently taken to enforce the judgment in another contracting state, the Convention might not apply unless the U.K. were still a Party to the Convention. There is no obvious reason, however, why it should matter if it were, by then, acceding on a different basis. So there would again appear to be no transitional problems, provided there was no gap between the two regimes.

The Recast Brussels Regulation

- 5.23 The position with regard to the Recast Brussels Regulation would appear to be similar. The putative treaty establishing the new relationship between the U.K. and the E.U. for this purpose would stipulate when it would come into force and set out the necessary transitional provisions. There would again appear to be no transitional problems, provided any temporal gap can be eliminated.
- 5.24 Finally, the FMLC observes that the E.U. treaty-making procedure is complex and tends to be lengthy. For this reason, it is desirable that negotiations on any proposed new instruments or accession arrangements should begin as soon as possible.

Guidance as to preferred political outcomes

- 5.25 In view of the uncertainty created by the U.K.'s intention to leave the E.U., which the FMLC understands is already affecting cross-border financial transactions, public guidance by HM Government as to the action it will take to deal with the matters addressed in this

⁴⁵ See the Explanatory Report by Professor Fausto Pocar, OJ 2009, C 319/1 at pp. 51–52.

⁴⁶ There is a provision along these lines in the 2007 Lugano Convention. See Article 69(4).

⁴⁷ Article 63(1).

paper would be helpful. Such guidance should ideally be as detailed and specific as possible. This would do much to reassure parties to contracts subject to the jurisdiction of the English courts, or to which English law is applicable, that the provisions of their contracts will continue to be effective.

6. CONCLUSION

- 6.1 The objective of this paper has been to identify and, where appropriate, suggest potential solutions to issues of legal uncertainty which may arise in the context of cross-border commercial litigation in consequence of Brexit. The FMLC has drawn attention in particular 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 E.U. Member States, if U.K. participation in the conflict of laws framework reflected in the Brussels Recast Regulation is allowed to lapse as a result of the withdrawal of the U.K. from the E.U.
- 6.2 To address these uncertainties, the FMLC has made recommendations regarding U.K. legislation and accession to both new treaties and existing international agreements. These have been amplified, where appropriate, by suggestions for revisions to existing treaties and agreements. Broadly, the FMLC's recommendations are as follows:
- (a) Rome I and Rome II should continue to apply under U.K. law after Brexit, whether as a result of a "standstill" provision under the Great Repeal Bill or by virtue of new statutory provision for the conflict of laws in the U.K., and subject only to minor technical amendments. In the case where new legislative provision is introduced in respect of contractual obligations, careful attention should be given to arrangements for "grandfathering" choice of law agreements concluded before the provision enters into force;
 - (b) the U.K. should become a party to the Hague Convention. Efforts should be made to ensure that there is no gap in its applicability between the U.K. leaving the E.U. and its coming into force in the U.K.;
 - (c) the U.K. should, if possible, become a party to the Lugano Convention. This 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 (as to which see below). If possible, the Lugano Convention should be amended to include the improvements adopted in the Recast Brussels Regulation;
 - (d) unless the Lugano Convention is amended to include the improvements adopted in the Recast Brussels Regulation, the U.K. should also 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.;

- (e) if the U.K. becomes a party to the Lugano Convention and, equally, if it remains covered by the Recast Brussels Regulation, the relevant provisions should ensure that there is a smooth transition from the present regime to the new one. There should be no gap between the U.K. being bound by these instruments as a Member State of the E.U. and being bound by them under the new arrangements; and
- (f) guidance in the form of a public statement by HM Government as to the action it will take to deal with the matters discussed in this paper would help to minimise uncertainty.

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