



## **U.K. Withdrawal from the E.U.: The Recognition of Choice of Court Agreements under the 2005 Hague Convention**

**October 2019**

[www.fmlc.org](http://www.fmlc.org)

**Registered Charity Number: 1164902.**

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<sup>1</sup> This paper can be read as a standalone piece of analysis or as an addendum to the FMLC's 2016 paper. See FMLC, 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, (2 December 2016), available at: <http://fmlc.org/report-u-k-withdrawal-from-the-e-u-2-december-2016/>.

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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 British electorate voted to withdraw from the E.U. (“**Brexit**”), beginning a period of legal and commercial uncertainty. For the financial markets, in particular, one of the first legal questions to arise concerned English governing law and jurisdiction clauses in cross-border financial markets transactions and reliance on these clauses in international commercial litigation. To investigate and address these issues further, the FMLC established a Working Group in August 2016.
- 1.3. The Working Group’s discussion paper was published in December 2016 (the “**2016 Paper**”).<sup>3</sup> The paper explored issues of legal uncertainty likely to arise in the context of cross-border commercial litigation in consequence of Brexit. The looming issue of legal uncertainty, it observed, was that a number of legal instruments which form the bulk of private international law (or “**conflict of laws**”) rules which regulate financial markets transactions apply in the U.K. solely by reason of the fact that the U.K. is a Member State of the E.U. These instruments include the 2005 Hague Convention on Choice of Court Agreements (the “**Hague Convention**” or the “**Convention**”).<sup>4</sup> In order to avoid any disruption in the normal conduct of business, the FMLC had recommended in the 2016 Paper that the U.K. should become a party to the Hague Convention. It had urged HM Government to make efforts 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. so that parties to choice-of-court agreements are not faced with any disruption.
- 1.4. On 29 March 2017, the U.K. served notice of its intention to withdraw from the E.U. under Article 50 of the Treaty of European Union, beginning a two year notice and negotiation period and setting the day on which it would cease to be an E.U. Member State (“**Exit Day**”) as 29 March 2019. The FMLC was encouraged to learn in August 2017 that HM Government intended to incorporate several instruments of private

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<sup>3</sup> FMLC, *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*, (2 December 2016), available at: <http://fmlc.org/report-u-k-withdrawal-from-the-e-u-2-december-2016/>.

<sup>4</sup> Convention of 30 June 2005 on Choice of Court Agreements, available at: <https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court>.

international law into domestic law and to participate in the Hague Convention.<sup>5</sup> The U.K. deposited its instrument of accession to the Hague Convention in December 2018 with the intention that the Convention would come into force for the U.K. on 1 April 2019. In March 2019, HM Government negotiated two extensions to the Article 50 notice period, consequently setting a new Exit Day of 31 October 2019. The depositary for the Hague Convention issued a notice communicating that the U.K.’s accession to the Convention is suspended until 1 November 2019.<sup>6</sup>

- 1.5. The U.K.’s accession to the Hague Convention in its own right has not, however, been the panacea for which market participants and HM Government had hoped. A number of questions have arisen regarding the timing of the Convention’s entry into force in the U.K. and its application to exclusive choice-of-court agreements concluded in the period before the U.K.’s accedes to the Hague Convention in its own right. The suspension raises further issues of interpretation. It is intended that this Addendum survey the situation as it currently stands with respect to exclusive choice-of-court agreements and the recognition of English court judgments—by way of update to one aspect of the 2016 Paper—and set out the better view as to the applicability of the Hague Convention in the U.K.

## 2. BACKGROUND

- 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. While the U.K. is a member of the E.U., 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 European Free Trade Association Member States. This is

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<sup>5</sup> This was first set out in a government policy paper. See, HM Government Department for Exiting the European Union “*Providing a cross-border civil judicial cooperation framework: a future partnership paper*” (22 August 2017) available at <https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper>.

The FMLC wrote to HM Government to request clarification on certain points in November 2017. See, FMLC, *Letter to Ministry of Justice: Cross-Border Civil Judicial Cooperation*, (23 November 2017), available at: [http://fmlc.org/wp-content/uploads/2018/03/letter\\_to\\_nicturmer\\_23\\_november\\_2017.pdf](http://fmlc.org/wp-content/uploads/2018/03/letter_to_nicturmer_23_november_2017.pdf).

<sup>6</sup> HCCH, *Notice from the Depositary*, (12 April 2019), available at: <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1318&disp=resdn>.

owed, in large part, to Regulation (E.U.) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the “**Recast Brussels Regulation**”), which governs the effect of choice-of-court agreements between parties in the E.U.

2.2. E.U. Member States are not signatories to the Hague Convention in their individual capacities; the European Union is a signatory.<sup>7</sup> Under E.U. law, the European Union has exclusive treaty-making power with regard to the Hague Convention.<sup>8</sup> E.U. law also provides that an international agreement concluded by the E.U. is binding on the Member States.<sup>9</sup> The result is that, although they are not individual signatories to the Hague Convention, E.U. Member States have been nevertheless bound by it since 1 October 2015 when the Convention came into force in the E.U. It is on this basis that the Convention applies in the U.K. before Brexit.

2.3. Generally speaking, the Recast Brussels Regulation prevails over the Hague Convention: in other words, a court in the U.K. or in another Member State will apply the Recast Brussels Regulation rather than the Hague Convention if both are applicable according to their terms.<sup>10</sup> Since the Recast Brussels Regulation counts as one of the “rules of a Regional Economic Integration Organisation that is a Party to this Convention”, its application will not be affected by the Hague Convention unless one of the parties is resident in a Contracting State to the Hague Convention that is not an E.U. Member State—for example, Mexico and, after Brexit, the U.K.<sup>11</sup>

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<sup>7</sup> Article 29 of the Hague Convention permits a “Regional Economic Integration Organization” (that is, the European Union) to become a Party to the Convention. Under Article 30, if a Regional Economic Integration Organization has competence over all the matters governed by the Convention, any reference in the Convention to a “Contracting State” applies equally to the Member States of such an organisation.

<sup>8</sup> This follows from the CJEU decision in the *Lugano Convention* case (Opinion 1/03, ECLI:E.U.:C:2006:81, [2006] ECR I-1145), which held that the E.U. had exclusive power to conclude the 2007 (new) Lugano Convention. This was based on the argument that the Lugano Convention would affect the Brussels Regulation. The same argument applies with regard to the Hague Choice-of-Court Convention.

<sup>9</sup> Article 216(2) of The Treaty on the Functioning of the European Union (“TFEU”) which provides that “Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.”

<sup>10</sup> Article 26(6) of the Hague Convention provides that

This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention –

- a) where none of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation;
- b) as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

<sup>11</sup> The Hague Convention uses residence rather than domicile as a connecting factor.

- 2.4. After Brexit, the Recast Brussels Regulation will no longer apply to the U.K. HM Government’s intention is that the Hague Convention will provide some certainty to market participants regarding exclusive choice-of-court agreements.<sup>12</sup> The U.K. will become a Party to the Hague Convention in its own right (rather than *qua* its status as an E.U. Member State), although the terms and operation of the Hague Convention will not change.

### 3. ISSUES OF LEGAL UNCERTAINTY

#### *Entry into force*

- 3.1. The U.K. first became bound by the Hague Convention on 1 October 2015 when the Convention came into force in the E.U. (for the sake of clarity, the period beginning 1 October 2015 and ending on Exit Day is referred to in this paper as the “**Community Competence Period**”). After Brexit, the U.K. will no longer be bound by the Convention *qua* Member State and, as recounted above, has therefore taken steps to accede to the Convention in its own right. Two questions have emerged in this context: (1) whether it is right to say that the Hague Convention was “in force” in the U.K. during the Community Competence Period; and (2) if yes, whether, despite the change in the basis of the U.K.’s membership of the Convention (from E.U. Member State to an individual Contracting Party), the U.K. can be said to have been continuously bound by the Hague Convention since 1 October 2015. The paragraphs below deal with these questions in turn.

#### *Applicability of the Hague Convention in the U.K. from 1 October 2015 to Exit Day*

- 3.2. The U.K.’s proposal to accede to the Hague Convention post-Brexit has given rise to questions about the continued application of the Convention in the U.K. The question has been posed as one concerned with the date of the entry into force of the Hague Convention in the U.K. It has been argued that, when the U.K.’s status as an E.U. Member State comes to an end, the fact that the Convention was “in force” in the U.K. during the Community Competence Period does not count for the purposes of interpreting Article 16 of the Convention (which provides instruction as to the

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<sup>12</sup> It should, however, be noted that the Hague Convention has a narrower subject-matter scope than the Recast Brussels Regulation—for example, it does not apply to the carriage of passengers and goods (Hague Convention, Article 2(2)(f)). Nor does it apply to “asymmetric” or “one-sided” choice-of-court agreements that allows one of the parties (for example, the lender) to bring proceedings in more than one court but restricts the other party (for example, the borrower) to only bring proceedings in one court. See, Hague Conference, Minutes No. 3 of the Twentieth Session, Commission II, paragraphs 2–11; see also Hartley/Dogauchi Report, paragraph 106.

Convention’s application) *vis-à-vis* the U.K.’s accession as an independent signatory.<sup>13</sup> The only relevant date, for proponents of that argument, is the U.K.’s date of accession to the Hague Convention which will be the second, later, date upon which Hague Convention comes into force for the U.K. in its own right (irrespective of how quickly that follows on from Exit Day). The European Commission has expressed the view—albeit non-binding—in its Q&A document of April 2019 that it leans towards such an interpretation of Article 16.<sup>14</sup> In response to a question about the recognition and enforcement of a U.K. judgment given by a court designated in a choice of court agreement for proceedings initiated after Exit Day, the European Commission stated that

On 28 December 2018 the United Kingdom signed and ratified the 2005 Hague Convention on Choice of Court Agreements. It will apply to the United Kingdom when the United Kingdom withdraws from the EU without a withdrawal agreement.

However, according to Article 16(1) of the Convention, **it will only apply to exclusive choice of court agreements concluded after its entry into force for the United Kingdom**, i.e. after the United Kingdom has become party to the Convention.<sup>15</sup>

This answer was followed by a footnote which observed that the “[i]nitial date of accession signalled by the United Kingdom was 1 April 2019, but the United Kingdom has currently postponed it...”<sup>16</sup>

- 3.3. Some market participants have observed that Answer 3.3 and the footnote, in particular, give rise to uncertainties in respect of choice-of-court agreements concluded before Brexit because they seem to signal that the Hague Convention was not in force before the U.K. accedes separately. Conflicting opinions have gained traction among market participants as to whether proceedings initiated under choice-of-court agreements

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<sup>13</sup> Article 16(1) of the Convention provides that “This Convention shall apply to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court.”

<sup>14</sup> European Commission Directorate-General Justice and Consumers, *Questions and Answers related to the United Kingdom's Withdrawal from the European Union in the field of Civil Justice and Private International Law*, (11 April 2019), available at: [https://ec.europa.eu/info/sites/info/files/civil-justice-qa\\_en.pdf](https://ec.europa.eu/info/sites/info/files/civil-justice-qa_en.pdf).

<sup>15</sup> *Ibid*, answer 3.3.

<sup>16</sup> *Ibid*, footnote 11.



designating U.K. courts as the chosen court which were concluded in the Community Competence Period will be upheld after Brexit.

3.4. Article 16 of the Hague Convention, to which the European Commission referred, provides

- (1) This Convention shall apply to exclusive choice of court agreements concluded *after its entry into force* for the State of the chosen court.
- (2) This Convention shall not apply to proceedings instituted before its entry into force for the State of the court seised. (Emphasis added.)

The words of Article 16(1) do not contemplate the possibility that a Contracting Party bound by its membership of a “Regional Economic Integration Organization” might wish to re-accede to the Convention as a separate entity. Article 16 simply requires that the choice-of-court agreement must be concluded after the Hague Convention has entered into force. The U.K. was, however, bound by the Hague Convention during the Community Competence Period.<sup>17</sup> In a similar vein, the European Community, in its Declaration of accession to the Hague Convention, stated that Members States

will not sign, ratify, accept or approve the Convention, but shall be bound by the Convention by virtue of its conclusion by the European Community.<sup>18</sup>

That the Convention was in force in the U.K. during the Community Competence Period can be inferred from the fact that the U.K. was “bound” during the Community Competence Period.<sup>19</sup> On balance, therefore, the FMLC is of the view that a straightforward reading of Article 16(1) and the documentation/declarations suggests

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<sup>17</sup> See, *Press Release on the European Union to deposit instrument of approval for 2005 Convention on Choice of Court Agreements*, (8 December 2014), available at: <https://www.hcch.net/en/news-archive/details/?varevent=389> where the U.K. is listed as a participant.

The Status Table for the Hague Convention, provided by the Depository, lists various E.U. Member States, including the U.K., as being bound by the Convention as a result of the approval by the E.U. In the case of the U.K., it also refers to the deposit by the U.K. of its instrument of accession in December 2018 and its suspended accession until 1 November 2019. Status Table for the Convention of 30 June 2015 on Choice of Court Agreements, available at: <https://www.hcch.net/en/instruments/conventions/status-table/print/?cid=98>

<sup>18</sup> Declaration/Reservation/Notification under Article 30, available at: <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1044&disp=resdn>.

<sup>19</sup> Others have observed that the concept of agreeing to be “bound by” a treaty is a key concept in the Vienna Convention on the Law of Treaties. Article 11 of that Treaty provides that “The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.” The phrase “any other means if so agreed” appears to describe well the purpose and effect of Article 30 of the Hague Convention (“*Accession by a Regional Economic Integration Organisation without its Member States*”). See, Simpson, D. “*The continuing effect of the Hague Convention on Choice of Court Agreements post-Brexit*”, (2019) *Butterworth’s Journal of International Banking and Financial Law*, Volume 34 Issue 9, 571.

that choice-of-court contracts concluded during the Community Competence Period would fall within the scope of the Convention after that period has ended.

### *A scintilla temporis*

- 3.5. Experts have placed importance on the fact that the Hague Convention should apply to the U.K. continuously—i.e., there will be a seamless transition from the U.K. being bound by the Hague Convention as an E.U. Member State to being bound as a Party in its own right with no period between them when the U.K. will not have been bound by the Convention. At the time of writing, the U.K. is due to leave the E.U. on 31 October 2019 and it is expected that the U.K. will become a Party to the Convention on 1 November 2019. There will be a seamless transition only if the E.U. Treaties and the Hague Convention apply back-to-back, leaving no period of time during which the U.K. is not a Party to the Hague Convention. To ensure that the Hague Convention’s application in the U.K. is unbroken, it is important to establish exactly *when* on 31 October the U.K. leaves the E.U., and exactly *when* on 1 November it becomes a Party to the Hague Convention.
- 3.6. Under E.U. law as it stands at the time of writing, the U.K. will leave the European Union on 31 October 2019. The relevant E.U. instrument, a Decision of the European Council, does not expressly state at what time on 31 October this will occur;<sup>20</sup> it is generally accepted, however, that it will be at midnight Brussels time (CET) between 31 October 2019 and 1 November 2019.<sup>21</sup> This follows from a general rule in E.U. law.<sup>22</sup> This has been given effect in U.K. law by section 20(1) of the European Union (Withdrawal) Act 2018, as amended by Regulation 2 of The European Union

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<sup>20</sup> European Council Decision (EU) 2019/584 taken in agreement with the United Kingdom of 11 April 2019 extending the period under Article 50(3) TEU, OJ 2019 L 101, Article 1, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019D0584&from=EN>.

<sup>21</sup> Thus, the Communication from the Commission of 4 September 2019 finalising preparations for the withdrawal of the United Kingdom from the European Union on 1 November 2019 (COM(2019) 394 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX%3A52019DC0394>) states in the first paragraph on page 1 that “the United Kingdom will be a third country as of 1 November 2019 ...”. This implies that withdrawal will occur at the very end of 31 October. See also Recital 9 to the European Council Decision of 11 April 2019 (available at: <https://www.consilium.europa.eu/media/39043/10-euco-art50-decision-en.pdf>), which states that the withdrawal will take place on 1 November 2019 therefore implying the same thing.

<sup>22</sup> Article 4(3) of Council Regulation 1182/71 determining the rules applicable to periods, dates and time limits provides:

Expiry of validity, the termination of effect or the cessation of application of acts of the Council or Commission—or of any provisions of such acts—fixed at a given date shall occur on the expiry of the last hour of the day falling on that date.

Although leaving the European Union involves more than the cessation of application of acts of the Council or Commission, there is no reason why the same rule should not apply. See also the “Brexit Preparedness notice” published by the Commission at [https://ec.europa.eu/info/brexit/brexit-preparedness/preparedness-notice\\_en](https://ec.europa.eu/info/brexit/brexit-preparedness/preparedness-notice_en), in which it is said that the withdrawal date of the United Kingdom from the European Union must be read as 1 November 2019 at 00.00 (CET).

(Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 2) Regulations 2019, which provides that Exit Day means 31 October 2019 at 11.00 p.m. (U.K. time).

- 3.7. As regards the time when the U.K. becomes a Party to the Hague Convention, this is probably the first moment of 1 November. The relevant time zone is likely to be that of The Hague (same time zone as Brussels), since the Netherlands is the depositary for the Convention.<sup>23</sup> If this is correct, the U.K. should become a Party to the Hague Convention immediately after midnight (Hague/Brussels time) or at 11p.m. (U.K. time) on 31 October 2019.
- 3.8. It is possible that the question might ultimately be put to the test. Courts might be asked to consider the question of there was a *scintilla temporis* during which the Hague Convention did not apply, on any basis, to the U.K. Given that the U.K. will both leave the E.U. and accede to the Hague Convention at 11.00p.m. U.K. time, there is unlikely to be even a notional gap in the application of the Hague Convention. A gap will only occur were an unforeseen event to arise.
- 3.9. In the U.K., the post-Brexit accession to the Hague Convention has been implemented in domestic law by means of the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (E.U. Exit) Regulations 2018 (the “**2018 Regulations**”).<sup>24</sup> Regulation 4 of the 2018 Regulations applies when the choice-of-court agreement is concluded during the Community Competence Period. It provides that rights under the choice-of-court agreement will apply as if the United Kingdom had remained without interruption bound by the Convention on and after the day it leaves the E.U. by means of a reference to Article 26(6) of the Hague Convention. It also preserves the primacy of Community law (“shall not effect ...”) in this area in certain respects for such agreements.
- 3.10. The Hague Convention does not provide for its own dispute-resolution system: the courts of the Contracting Parties decide. If the proceedings arise in an E.U. Member State, questions of interpretation will initially be for local courts.<sup>25</sup> Thereafter, the Court

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<sup>23</sup> See the final paragraph of the Hague Convention. That this is a general rule in international law gains support from Article 6 of the Regulations to give effect to Article 102 of the Charter of the United Nations (available at: [https://treaties.un.org/xml/db/MSDB/pageRegulation\\_en.html](https://treaties.un.org/xml/db/MSDB/pageRegulation_en.html)), which provides that “The date of receipt by the Secretariat of the United Nations of the treaty or international agreement registered shall be deemed to be the date of registration ....”.

<sup>24</sup> The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018, available at: <http://www.legislation.gov.uk/uksi/2018/1124/made/data.pdf>.

<sup>25</sup> The question of interpretation under national laws outside the U.K. is beyond the scope of this paper.

of Justice of the European Union (the “CJEU”) would exercise the power to interpret the Convention on a reference from those courts.<sup>26</sup> The CJEU might follow the reasoning of the European Commission and decide that Article 16(1) considers entry into force to occur as a separate event when the U.K. accedes to the Convention in its own right, effectively restarting the period during which choice-of-court agreements are in scope. It is, however, equally possible that the CJEU adopts the better view, that Article 16(1) does not place conditions on entry into force and the U.K.’s re-accession to the Convention does not invalidate the fact that that it was bound by the Convention in the Community Competence Period.

### *Suspension and Article 31*

- 3.11. A different set of concerns have arisen owing to the suspension of the U.K.’s accession to the Convention. These concerns turn on the interpretation of Article 31 (*Entry into force*) of the Hague Convention. Article 31(1) sets out the time which must lapse after the deposit by the original Parties to the Hague Convention of their instrument of ratification, acceptance, approval or accession. Article 31(2) deals with states which might become Parties after the Hague Convention first entered into force. It provides

[...] this Convention shall enter into force -

- a) for each State or Regional Economic Integration Organisation subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;
- b) for a territorial unit to which this Convention has been extended in accordance with Article 28, paragraph 1, on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.<sup>27</sup>

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<sup>26</sup> In 1974, the CJEU held that an international agreement between the E.U. and a non-member State constituted an act of the E.U. Council (an institution of the Union) so as to give the CJEU jurisdiction under Article 267 TFEU to hear references from the courts of Member States on its interpretation: *Haegeman v. Belgium*, Case 181/73, [1974] ECR 449 (paragraphs 2–6 of the judgment).

<sup>27</sup> The effect of the provision is that it would be impossible for the U.K. to become a Party to the Convention without a gap in its application if it did not leave the E.U. at the end of a month. When Exit Day was 29 March 2019, the Hague Convention was expected to enter into force on 1 April 2019. The two-days gap in coverage was acknowledged by HM Government and market participants at the time.

- 3.12. As the Hague Convention contains no provision on the basis of which a Contracting State can alter the fixed date of the entry into force provided by Article 31, various questions have arisen as to how this will be interpreted in the context of the suspension. For example, it could be argued that, following the U.K.'s suspension of its accession to the Hague Convention, the proverbial clock has been paused and will restart on 1 November, creating a three-month *hiatus* in the application of the Hague Convention in the U.K. Market participants have also expressed concerns that the U.K.'s decision to suspend its accession to the Hague Convention, although necessary and pragmatic in the fluid circumstances leading up to the March 2019 Exit Day, was a unilateral declaration, the interpretation of which might differ in U.K. and E.U. courts.
- 3.13. The better view—which is to be inferred and which has been adopted by HM Government—is that “entry into force” requires two ingredients: the deposit of the instrument of accession and the lapse of the prescribed time period. The deposit cannot have been suspended (and there is no suggestion by HM Government or the Depositary that the U.K.'s suspension affected the deposit): the U.K. deposited its instrument of accession on 28 December 2018. The prescribed three months ended on 28 March 2019 and the Hague Convention could have come into force on the first day of the following month—1 April 2019—notwithstanding the accession itself has been suspended in the interim. This leaves a logical difficulty, however, given that the U.K. cannot and does not intend to be bound in its own right while accession is suspended and Brexit is pending. Although it requires an awkward reading of the text, the only way to make logical sense of the text, in light of the unusual circumstances, is if Article 31(2)(a) were to be read as:
- a) for each State or Regional Economic Integration Organisation subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession *or following such longer period between deposit and accession as may be necessary owing to the temporary suspension of the accession.*

#### **4. SOLUTIONS AND CONCLUSION**

- 4.1. This addendum has attempted to expand upon the uncertainties perceived by market participants in respect of the application of the Hague Convention in the U.K. after Brexit. These questions have arisen in the context of the extraordinary circumstances of

Brexit, which the draftsmen of the Convention could not have foreseen. Having laid out these interpretations, the FMLC is of the view that, by depositing the instrument of accession in time to fulfil the three-month “cooling-off” period prescribed in Article 31 of the Hague Convention and by ensuring there is no gap in the application of the Hague Convention in the U.K., HM Government has ensured that the Hague Convention applies to all choice-of-court agreements concluded after 1 October 2015 when the U.K. first became bound by the Convention as an E.U. Member State. The FMLC considers this to be a more straightforward reading of the Convention notwithstanding that it remains uncertain how the CJEU will interpret the application of the Hague Convention to the judgments of courts in the U.K.

## FINANCIAL MARKETS LAW COMMITTEE MEMBERS<sup>28</sup>

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Mark Kalderon, Freshfields Bruckhaus Deringer LLP  
Rachel Kent, Hogan Lovells (International) LLP  
Peter King, HM Treasury  
Sir Robin Knowles CBE  
Sean Martin, Financial Conduct Authority  
Jon May, Marshall Wace LLP  
Sinead Meany, Bank of England  
Chris Newby, AIG  
Jan Putnis, Slaughter and May  
Barnabas Reynolds, Shearman & Sterling LLP  
Peter Spires, Lloyd's of London  
Sanjev Warna-kula-suriya, Latham & Watkins LLP  
Pansy Wong, J.P. Morgan  
Mr Justice Zacaroli

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Joanna Perkins (Chief Executive)

<sup>28</sup> Note that Members act in a purely personal capacity. The names of the institutions that they ordinarily represent are given for information purposes only.