
**COMMERCIAL BAR ASSOCIATION
BREXIT REPORT
CONFLICT OF LAWS SUB-GROUP**

COMBAR Brexit papers

Members of COMBAR are leading specialists in many of the areas of commercial legal practice that will or may be impacted by Brexit. A series of detailed papers explaining the potential effect of Brexit on these areas of practice have been produced by teams of COMBAR members, in some cases working with non-COMBAR specialists including solicitors, academics and retired judges in the following areas:

- 1. Conflicts of Laws, Jurisdiction, Choice of Court Agreements, Choice of Law, Service of Legal Process and Judicial Assistance in Taking of Evidence.*
- 2. Banking.*
- 3. Financial Services.*
- 4. International Arbitration.*
- 5. Competition.*

These papers were recently submitted to the Ministry of Justice following a meeting with the Lord Chancellor in December attended by a number of members of the COMBAR Brexit Committee. They are now being made available on the COMBAR website. Anyone is welcome to read them and to disseminate them on the understanding that, in doing so, the fact that they were produced by COMBAR will be acknowledged.

A second tranche of papers on other areas of legal practice affected by Brexit will be provided in the near future.

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PART I: SCOPE OF THE REPORT AND THE WORKING GROUP

Scope Of Report

1. This Report is the product of a wide collaboration between self-employed members of COMBAR, former members of the judiciary, academics, solicitors and members of the Bar in employed practice. It addresses a series of questions, which have been collected together for examination by a sub-group dealing with the conflict of laws. Certain of the issues examined in this Report have already been the subject of fairly wide public discussion and analysis. Where this is so, in the interests of brevity we have endeavoured to identify the conclusions already reached and only add such further commentary as is considered desirable.
2. This Report covers:
 - 2.1. Allocation of jurisdiction, choice of court agreements and enforcement of judgments in civil and commercial matters;
 - 2.2. Choice of law;
 - 2.3. Service of process in the European Union (“EU”) under the Service Regulation; and
 - 2.4. Judicial assistance in the taking of evidence.
3. In summary, we recommend that:
 - 3.1. In relation to Allocation of jurisdiction, choice of court agreements and the enforcement of judgments are amongst the highest priorities to be addressed in post-Brexit arrangements for civil justice and the United Kingdom (“UK”) should:
 - 3.1.1. Enter into a UK-EU Agreement with the EU to ensure the continued application of the BIR Recast. The existing EC-Denmark Agreement provides a ready precedent.
 - 3.1.2. Become a signatory to the Lugano Convention 2007.

- 3.1.3. Become a signatory to the Hague Convention 2005.
- 3.1.4. Adopt transitional arrangements to ensure a smooth transition and adopt the recommendations proposed by the Bar Council.
- 3.2. In relation to choice of law, the UK should adopt the Rome I and Rome II Regulations as a matter of domestic law.
- 3.3. In relation to service of process, the UK should seek to conclude a treaty with the EU, which could either be combined with or separate from the proposed treaty in relation to jurisdiction, choice of court agreements and enforcement of judgments.
- 3.4. In relation to judicial assistance in the taking of evidence, it is possible for the UK to proceed by relying on the default position. Alternatively, the UK could seek to conclude a treaty with the EU, which could either be combined with or separate from the proposed treaties already mentioned. A further alternative would be the conclusion of further bilateral agreements and domestic law changes. This area is the lowest priority to be addressed.

Members Of Sub-Group

4. The COMBAR Conflicts Sub-Group is comprised as follows (all members of COMBAR unless otherwise stated):
 - 4.1. David Joseph QC, Chair
 - 4.2. Sir Richard Aikens (Ex Court of Appeal)
 - 4.3. Lucas Bastin
 - 4.4. Ed Bowles (Standard Chartered Bank)
 - 4.5. Simon Colton
 - 4.6. Ed Crosse (Partner Simmons & Simmons and President of London Solicitors Litigation Association)
 - 4.7. Jasbir Dhillon QC
 - 4.8. Andrew Dinsmore

- 4.9. Sarah Garvey (Allen & Overy, Chair of the Law Society's EU Committee and member of the Lord Chancellor's Advisory Committee on Private International Law, chaired by Lord Mance.)
 - 4.10. Richard Hoyle
 - 4.11. Sara Masters QC
 - 4.12. Michael McParland
 - 4.13. Belinda McCrae
 - 4.14. Hugh Mercer QC
 - 4.15. Dr. Louise Merrett (Reader in Law, Trinity College Cambridge)
 - 4.16. Conall Patton
 - 4.17. Henry Forbes Smith
5. As this has been a large collaborative effort, it is necessary to pass on particular thanks and gratitude to all those who have put in an exceptional amount of work in addressing and researching these important questions. In particular, we would like to thank Andrew Dinsmore and Richard Hoyle who acted as Rapporteurs to the Sub-Committee.

PART II: JURISDICTION, CHOICE OF COURT AGREEMENTS AND ENFORCEMENT OF JUDGMENTS

A. GENERAL MATTERS AND RECOMMENDATIONS

6. An efficient and predictable system for the allocation of jurisdiction, enforcement of choice of court agreements and enforcement of subsequent judgments in civil and commercial matters plays an important role not only in the UK but also across all the EU Member States. It provides a secure and stable platform for business to be conducted throughout the EU and is a factor, which not only assists business established in the UK and Europe but also militates in favour of those who are domiciled outside of the EU deciding to conduct business in the UK and throughout the EU.
7. International business seeking to conclude commercial contracts in the EU expects that the contracts entered into and related subsequent judgments will be enforced in an efficient and cost-effective manner. Equally, business rightly expects that choice of court agreements will be respected and enforced. Steps should be taken for the benefit of the wider business community in Europe to ensure that this remains the case even after the UK's exit from the EU following the triggering of Article 50 of the Treaty on European Union ("TEU").
8. The recommendations made in this section are similar to those recommended in a series of papers written from the perspective of most (if not all) sectors of the legal profession which have also examined these issues, and to which we refer herein.
9. The approach of this Sub-Committee has been to examine these recommendations further, identify specific issues for particular consideration, and, as far as is possible, to ensure that our conclusions reflect the interests not only of the UK but also those of the wider business community. This is important because the UK currently enjoys an extremely strong reputation and presence in matters of cross-border commerce and international litigation. The continuation of robust and effective systems for the resolution of international legal disputes is important for the continued strength of the UK legal services industry and the contribution of that sector to the UK economy.

10. One particular matter which we have been able to identify in our research, and discussions in the wider legal community, is the need for certainty. The legal and business communities strive for certainty and place great premium on it not only in terms of the end result, but also the direction of travel. We have concluded that it is strongly desirable for the Government to make its aims in this particular sphere clear and publicly known at the earliest possible stage. There are many competing interest groups in the European legal community now seeking to take advantage of the present uncertainty in order to divert business away from the UK. There is already a growing literature being published by leading European scholars indicating that Brexit may mean that English¹ jurisdiction clauses can no longer safely be utilised and therefore (although we would suggest a little overdramatically) presaging the end of Britain's domination of the market for international legal services.² The worry caused by a lack of certainty is also being voiced by a number of the general counsel of leading companies that have to look after the multi-national interests of their employers.
11. In this context it is important to underscore the importance of the legal services industry to the wider economy.
 - 11.1. It is one of Britain's larger net exporters with an estimated annual positive contribution to the net balance of payments in excess of £3.4bn, over 300,000 are employed in the sector and the most recent figures for annual gross fees billed exceeded £30bn.³
 - 11.2. The popularity and certainty of the UK courts, the judgments of which are almost uniquely enforced across the EU and large parts of the common law world, results in many foreign corporations insisting that their international contracts are governed by English law and subject to English jurisdiction. This enables both UK and foreign companies to litigate under a law and in a system with which they are familiar, thereby saving them litigation costs (including by way of early settlement due to predictable outcomes). Recent

¹ References herein to 'English' courts, jurisdiction clauses, and law, should be understood to refer to the courts, jurisdiction and law of England & Wales.

² Professor Burkhard Hess - *Brexit and English Jurisdiction Clauses- Back to the Past* - Practice of International Private and Procedural Law (IPrax), Volume 36, Issue 5, p 409 September/ October 2016.

³ City UK Survey of the Legal Sector July 2016.

statistical analysis shows that over 80% of cases before the English Commercial Court involve at least one foreign party.

The current position and the default position following Brexit

12. Three areas of central significance to the subject matter of this report are the establishment of jurisdiction, the enforcement of choice of court agreements and the ability to enforce judgments:

12.1. The position in EU Member States on these issues is currently governed by Regulation (EU) No. 1215/2012 (the “**BIR (Recast)**”) which replaced, and made a number of improvements to, Council Regulation (EC) No. 44/2001 (“**BIR**”) and “*superseded*”⁴ the 1968 Brussels Convention.⁵

12.2. As between EU Member States and European Free Trade Area (“**EFTA**”) States,⁶ the position is governed by the Lugano Convention 2007, which replaced the Lugano Convention 1988 and mirrors the provisions of the BIR (i.e. without the further amendments and improvements introduced by the BIR Recast).

12.3. In addition to the above, EU Member States, Mexico and Singapore are all signatories to the Hague Convention on Choice of Court Agreements 2005 (“**Hague Convention 2005**”), which seeks to protect exclusive choice of court agreements and provides for the enforcement of judgments made pursuant to such agreements. The Hague Convention 2005 entered into force on 1 October 2015 as between Mexico and the EU.

13. In the event that Article 50 is triggered and the UK leaves the EU after two years, without some kind of transitional agreement with the EU, the BIR Recast would cease to apply in the UK or in the EU as regards the UK.⁷ Further, the Lugano

⁴ See Article 68 of the BIR Recast; the effect of this provision is discussed below.

⁵ This was signed by the six original States of the European Economic Community and there have been four subsequent amending Accession Conventions in 1978, 1982, 1989 and 1996 leading to a total of 15 Contracting States.

⁶ These presently constitute Iceland, Norway and Switzerland. Although Liechtenstein is an EFTA State, it does not participate in the Lugano regime.

⁷ Art. 50(3) of the TEU states that “*the Treaties*” cease to apply at the end of the two-year period which are defined in Art. 1 of the TEU as being the TEU itself and the Treaty on the Functioning of the European

Convention 2007 and the Hague Convention 2005 would also cease to apply because the UK is not a signatory to these conventions in its own right; rather, they are binding solely through the UK's membership of the EU.⁸ As regards the latter, one important consequence is that unless the UK becomes a party to and ratifies the Hague Convention 2005, it will cease to apply to this jurisdiction as regards exclusive choice of court agreements within the scope of the treaty.

14. If the BIR Recast were to cease to apply following Brexit (and no replacement regime were to be agreed), we anticipate the following material negative consequences:

14.1. A number of corporations presently domiciled or based in the UK would no doubt take into account, amongst other issues, the comparative jurisdictional position of the UK and other EU countries when reaching a decision as to the location or relocation of its business headquarters.⁹

14.2. The jurisdiction of the English courts, including English choice of court and choice of law agreements, would no doubt be seen much less favourably by the international commercial community if there was a question mark over the enforcement of English choice of court agreements and if judgments of the English courts could not be enforced readily across the EU.

14.3. The same applies if proceedings under the jurisdiction of the English courts were not accompanied by the ability to obtain enforceable interim measures

Union ("TFEU"). Thus, Art. 288 of the TEU, which provides that regulations have direct effect in Member States, would cease to have effect such that the BIR Recast, being such a regulation, would no longer be binding in the UK. Moreover, by reason of the wording of Art 36.1 of the BIR Recast, Member State courts would no longer enforce an English court judgment in accordance with the advantageous provisions of the BIR Recast, since the UK would not be a Member State at the time of judgment.

⁸ The Hague Convention 2005 and the Lugano Convention 2007 were signed by the EU for and on behalf of all EU Member States pursuant to its exclusive competence in this sphere and thus are binding upon those Member States without the need for any further domestic ratification as a result of Arts. 216 and 217 of the TFEU and see further *Opinion 1/03* [2006] ECR I 1145. In the event of Brexit, the UK will no longer be a Member State and thus will no longer be a signatory to the Hague Convention 2005 nor Lugano Convention 2007 by virtue of their EU membership. It will therefore be necessary that we sign and ratify in our own right.

⁹ The Irish Industrial Development Agency indicated in December 2016 that it had received inquiries from about 100 corporations looking to relocate from the UK to Ireland. It is to be noted that Ireland, in line with other EU countries, has specific agencies whose brief is to encourage relocation from the UK.

in support from the courts of other EU Member States pursuant to Art 35 of the BIR Recast.

- 14.4. An English defendant sued in another Member State would receive none of the protection afforded under the present BIR Recast regime in terms of the default principle of having the right to proceedings being brought in its own domestic court, albeit subject to well defined narrow exceptions. Instead, such an English defendant (if sued to judgment in the courts of another Member State) would be exposed to that judgment being enforced throughout the EU. The BIR Recast would, of course, still apply amongst the remaining 27 EU Member States.
- 14.5. The BIR Recast provides reinforced protection for certain categories of party or disputes such as matters relating to consumer contracts, employment contracts and insurance. This is generally considered to be desirable given the unequal bargaining power that frequently prevails in these contexts. This protection would no longer prevail if the provisions of the BIR Recast were to cease to apply in the United Kingdom.
- 14.6. Further, without a replacement treaty, it is anticipated that there would be material disadvantages with respect to proceedings brought in the English courts pursuant to an English choice of court agreement. In the event of parallel proceedings before another Member State court, EU Member States will treat jurisdiction agreements in favour of the English courts in the same way as those in favour of a non-EU Member State such that:
 - 14.6.1. The agreement would be outside the scope of Article 25 of the BIR Recast.
 - 14.6.2. Parties would no longer benefit from the reinforced protection given to jurisdiction agreements introduced by Article 31(2) of the BIR Recast in the event one party to the agreement sought to ignore the choice of court and bring a lawsuit in the courts of another Member State. Article 31(2) presently requires the ‘non-chosen court’ to stay its proceedings in order to permit ‘the

chosen court' to rule on the validity of the choice of court agreement.

14.6.3. Instead, the ability of another Member State court which had jurisdiction under the BIR Recast to stay in favour of an English jurisdiction agreement (or more generally) would depend on the application of Articles 33 and 34 thereof. These contain a series of conditions before a stay can be granted. There would therefore be an increased risk of parallel proceedings.

14.7. Equally, the relatively clear demarcation with respect to arbitration proceedings brought in court which is presently expressed in Recital 12 of the BIR Recast, would no longer apply. English common law rules would provide significant protection as regards proceedings in this jurisdiction, nevertheless, there would be an increased risk of conflicting parallel proceedings in the arbitration context too. This would be damaging to the efficacy of international arbitration.

14.8. English judgments made at a time when the UK was not a Member State would no longer be automatically enforceable in other Member States but rather the national law of each state would determine enforceability.

15. As a result, it is crucially important that the UK decides at the earliest possible opportunity on its approach to the allocation of jurisdiction, the enforcement of choice of court agreements and the enforcement of judgments following Brexit. In this context it is important to recognise that negotiations over provisions for choice of court and law take place on a daily basis and the impact of any delay may not be felt for a number of years in the future until parties fall into dispute.¹⁰

¹⁰ See further Thomas Schelling *Micromotives and Macrobehaviour* (1978) with regard to the unintended and unwelcome long term consequences of small changes in behaviour.

Recommendations

16. These issues have been considered in detail in the Bar Council report,¹¹ in the unanimous recommendations given in evidence to the Parliamentary Justice Select Committee,¹² in a number of academic papers,¹³ and by the London Solicitors Litigation Association.¹⁴
17. The Bar Council report and the evidence to the Parliamentary Justice Select Committee each noted that these issues cannot be addressed solely through domestic action, for example through the Government's stated policy of incorporating certain aspects of EU law into domestic law.¹⁵ Whilst domestic action could be taken to address the establishment of jurisdiction in the UK, it would fail to ensure reciprocity with other States such that they would not be obligated to enforce UK judgments or allocate jurisdiction with respect to UK nationals or domiciled corporations as is required at present. Given the vital importance of enforcement and a mutually respected system for the allocation of jurisdiction, a domestic solution is entirely inadequate.
18. As a result, the Bar Council and the evidence given to the Parliamentary Justice Select Committee has recommended that the UK should take the following action as a package:

¹¹ http://www.barcouncil.org.uk/media/508513/the_brexit_papers.pdf

¹² Evidence to Parliamentary Justice Select Committee on 20 December 2016.

¹³ See Aikens & Dinsmore, *Jurisdiction, Enforcement and the Conflict of Laws in Cross-Border Commercial Disputes: What are the Legal Consequences of Brexit?* (2016) 27 (7) EBLR 903; Masters & McRae 33 *Journal of International Arbitration*, Special Issue, 483-500 "What does Brexit mean for the Brussels Regime?" (2016); Prof. Dickinson, *Back to the Future: The UK's EU Exit and the Conflict of Laws* 12 *Journal of Private International Law* 195 (2016); Prof. Burkhard Hess, *Back to the Past Brexit and European International Private and Procedural Law*, *Practice of International Private and Procedural Law (IPrax)*, Volume 36, Issue 5, p 409 September/ October 2016.

¹⁴ Report dated 15 November 2016 available at www.lsla.co.uk.

¹⁵ Sometimes referred to in the popular press by the nomenclature of 'the Great Repeal Bill', see further the House of Commons Library Briefing Paper, '*Legislating for Brexit*' (21 November 2016) at www.researchbriefings.files.parliament.uk/documents/CBP-7793/CBP-7793.pdf at pp. 7-8. By way of example of possible domestic action, the UK could pass domestic legislation that replicated the terms of the BIR Recast. This point was also made quite clear in the evidence to the Parliamentary Justice Select Committee.

- 18.1. Enter into a treaty with the EU to remain bound by the BIR Recast, similar to that agreed by Denmark under the EC-Denmark Agreement¹⁶ (herein a “**UK-EU Agreement**”).¹⁷ This will be an international instrument construed in accordance with public international law; will ensure continuity with the present, sophisticated, regime; and, avoids the need for the unanimous agreement of EU Member States in future.¹⁸
 - 18.2. Become a signatory to the Lugano Convention 2007,¹⁹ which would exist alongside the BIR Recast²⁰ and is necessary to ensure the continued application of a reciprocal regime in EFTA States.
 - 18.3. Become a signatory to the Hague Convention 2005.
19. We agree with these recommendations and wish to make some further detailed observations.

B. FUTURE ROLE OF THE CJEU AND EFFECT OF ITS JUDGMENTS IN RELATION TO THE BIR RECAST

20. In the event that a stand-alone UK- EU Agreement is concluded, it is likely that the role of the Court of Justice of the European Union (“**CJEU**”) will be provided for along the same lines as the EC-Denmark Agreement such that the UK courts must “*take due account*”²¹ of their judgments in relation to the BIR Recast. Although these provisions do envisage a continued role for the CJEU in this somewhat specialised and stand-alone area; nevertheless, it is important to make certain observations in this regard.
21. First, it is important to note that such a treaty would be one of international law and not an EU instrument. It would therefore have to be enacted by UK legislation

¹⁶ The ‘Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters’: see [2005] OJ L299/62.

¹⁷ The UK must conclude a separate treaty with Denmark, or conclude a tripartite agreement with the EU and Denmark, in the light of Denmark’s opt-out from the justice and home affairs pillar: see the Edinburgh Agreement [1992] OJ C348/1.

¹⁸ In this sense, the instrument has been described as ‘evergreen’ across the EU and UK.

¹⁹ There is precedent for a non-EU / EFTA / EEA State joining the Lugano convention in that Poland signed up to the Lugano Convention between 1999 and 2004 before it joined the EU or EFTA.

²⁰ See the BIR Recast, Article 73; Lugano Convention 2007, Article 64(1).

²¹ Art 6(2) of the EC-Denmark Agreement.

to give the treaty effect as a matter of English law before English courts. Nevertheless, even when enacted in domestic legislation, it would be construed in accordance with principles of public international law. In this sphere the most common reference point are the provisions of Articles 31 - 33 of the Vienna Convention on the Law of Treaties (“VCLT”).²² Whilst the VCLT has not been expressly adopted as part of the statute law of the UK, the English courts have generally applied its provisions as reflecting customary international law, which constitutes a source of English law²³ and requires domestic courts, *inter alia*, to have regard to the object and purpose of the convention when construing it, without being unduly influenced by English law preconceptions.²⁴

22. Further, since a central purpose of any such treaty would be to ensure a continuation of a regime of highly predictable rules for the allocation of jurisdiction and the enforcement of judgments across all the participating States, there is a strong likelihood that due regard would be paid to relevant decisions of the CJEU interpreting the identical wording in the BIR Recast in any event. It should also be added that giving due weight to relevant decisions of the CJEU should not be seen as a negative factor. It is desirable that the system for mutual recognition and enforcement is effective. Clarification of issues of interpretation by the CJEU therefore should be seen in this light as adding to the certainty and efficacy of the system across all participating States. It is inherently undesirable that each country should reach its own interpretation.²⁵

23. Moreover, the UK courts generally take an internationalist approach to jurisdiction, such that they take into account a wide variety of legal sources,

²² Article 31.1 provides: “*General rule of interpretation 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*”

²³ The principles of the VCLT are commonly expressed as themselves reflecting customary international law - See, e.g., Judge Villiger’s review of customary basis of the two provisions in Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 439-440 and 448; Lord Bingham in *Sepet v Secretary of State for the Home Department* [2003] 1 WLR 856 at 861 stated that, when interpreting the treaty at hand, “*the House must respect articles 31 and 32 of the Vienna Convention on the Law of Treaties, 1969*; see further Lord Mance in *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69 at [150] and *Fothergill v Monarch Airlines* [1981] AC 251 (re application of Art 31 and 32 by House of Lords when construing the Carriage by Air Act enacted to give effect to the Warsaw Convention)..

²⁴ *Bahamas Oil Refining Co International Limited v The Owners of the Cape Bari* [2016] UKPC 20, [16] - [17] and *CA CGM SA v Classica Shipping Co Limited* [2004] 1 Lloyd’s Rep 460, [9] - [11].

²⁵ See further evidence of Dr Eva Lein to Parliamentary Select Committee on 20 December 2016.

including domestic case law, overseas case law (both EU and non-EU) and academic opinion, particularly when interpreting an international convention.²⁶ Thus, the UK courts are likely to take CJEU judgments into account regardless of whether a UK-EU Agreement expressly requires such.²⁷ In our view, such an obligation is therefore highly unlikely to change the approach of the English courts and agreeing to such an express proviso should not be seen as a cause for concern.

24. The obligation expressed in the wording of the EC-Denmark Agreement is similar to the requirements under Protocol 2 to the Lugano Convention 2007 which requires that Contracting States take “*due account*” of CJEU judgments and thus one with which the courts are familiar.²⁸
25. Such an approach may also be viewed as similar to the test under s. 2(1)(a) of the Human Rights Act 1998 which requires the UK courts to “*take into account*” judgments of the European Court of Human Rights (“**ECHR**”). This has been interpreted to mean that whilst ECHR judgments are not binding, the English court is likely to follow them where there is a “*clear and consistent line of decisions*” provided that there are no special circumstances, i.e. where the line of decisions “*is not inconsistent with some fundamental substantive or procedural aspect of our law*” or has not “*overlooked or misunderstood some argument or point of principle*”.²⁹
26. Further, it is important to distinguish between an obligation to take CJEU judgments into account with respect to decisions on cases involving third parties, and the English courts themselves having an obligation to refer cases to the CJEU. It does not follow that simply because the UK courts will take CJEU judgments into account that they will be under an obligation to refer individual cases to it. However, this will be a matter for negotiation. Article 6(1) of the EC-Denmark Agreement does require a reference to be made in circumstances under which a

²⁶ See, e.g., the decisions of courts of various jurisdictions in the context of interpretation of the Hague Visby Rules discussed in Wilson, *Carriage of Goods by Sea* (7th ed., 2010), chapter 6.

²⁷ See Aikens & Dinsmore, *Jurisdiction, Enforcement and the Conflict of Laws in Cross-Border Commercial Disputes: What are the Legal Consequences of Brexit?* (2016) 27 (7) EBLR 903.

²⁸ See Case C-394/07 *Gambazzi v. Daimler Chrysler Canada Inc*, at [28].

²⁹ *Manchester City Council v Pinnock* [2011] 2 AC 104, at [48].

Member State court would be obliged to refer a case to the CJEU.³⁰ The language of any such commitment will no doubt have to be the subject of negotiation. It is not thought to be likely that the UK, post-Brexit, will have the power to make references to the CJEU as it will no longer be bound by the relevant treaty provisions, or have a judge on the court. This may therefore leave the UK in a position analogous to the Lugano Convention 2007 referred to above - i.e. no power or obligation to refer but an obligation to take due account of relevant decisions.

27. Nevertheless, even if the result of the negotiation was such that mandatory language presently found in Article 6(1) of the EC-Denmark Agreement was retained, we do not believe that this should necessarily be seen in negative terms. There are a number of reasons for reaching this conclusion:

27.1. First, this should be seen in terms of a whole package where the overall destination of maintaining portability of judgments and predictable allocation of jurisdiction is more important than a single provision with regard to interpretation of the treaty.

27.2. Second, in practical terms the effect of such a provision is very limited. The English courts at present under the BIR regime currently in force make only a very limited number of references and there is no reason for that to change.

27.3. Third, there is real benefit in having the treaty interpreted in a consistent manner since the rules are designed to be used, and implemented, across a number of court systems; in this regard, predictability and clarity are what most users really require.

27.4. Fourth, if in relation to a given question of interpretation, the English court did not make a reference to the CJEU, the chances are that another Member State court would, but in circumstances in which the English perspective could not be argued or put before the CJEU and then the English courts

³⁰ Art 6(1).

would be required to take due account of the decision if relevant in a future case before it.

C. PORTABILITY OF JUDGMENTS IS NOT INTRINSICALLY LINKED TO FREEDOM OF MOVEMENT OF GOODS, SERVICES OR PERSONS

28. It is also important to emphasise that the portability of judgments is not intrinsically linked to the free movement of goods, services or persons and so in principle ought not be caught up in the public debate about so called “hard” or “soft” Brexit. The allocation of jurisdiction and enforcement of judgments is of quite a different nature in that it was not initially addressed through the TEU or TFEU in the way that the free movement of goods and people are³¹ and justice has always been an area in which States could opt-out.³² Thus, the position was first addressed through the 1968 Brussels Convention and later through EU Regulations.

29. In our view, there is no reason why negotiation decisions concerning the allocation of jurisdiction and enforcement of judgments should have any necessary implications for negotiation decisions concerning the free movement of goods, services and persons; thus, this former issue should be considered separately to the latter.

D. TAKING NO STEPS IS NOT A REALISTIC OPTION

30. It is also desirable to say something of the argument that if the UK failed to take any steps as recommended in this Report, the 1968 Brussels Convention would automatically revive and apply once the UK ceased to be a Member State. We consider this to be an unsound argument and an insecure means of progressing for a variety of legal and practical reasons addressed below. It would not in any event provide any certainty, which we identified at the outset as one of the key requirements for any solution.

³¹ As to the free movement of goods, see Art. 26 – 29 of the TFEU, and, as to the free movement of people, see Article 3(2) of the TEU and Article 45 of the TFEU.

³² This was the position Denmark took when it became a member of the EU in 1992; the opt outs were contained in the so-called Edinburgh Agreement.

31. It is strongly arguable that the effect of Article 68 of the BIR Recast was permanently to displace the 1968 Brussels Convention as between the Member States whilst at the same time saving its provisions only as regards the small number of non-EU territories for which certain Member States were responsible, such as Aruba.³³ Although not without some difficulty of analysis, this effect can be reached by application of the provisions of Article 59 and 40 of the VCLT in terms of replacement and/or termination of an international treaty especially as the Member States have accorded exclusive internal competence to the EU to regulate this field. Professor Dickinson discusses this view in his recent article referred to above.³⁴ Further, Professor Dickinson puts forward the suggestion that the same end result may be reached by viewing the triggering of Brexit through Article 50 as a '*fundamental change of circumstances*', thereby either giving grounds for termination of or withdrawal from the earlier 1968 Brussels Convention, applying the provisions of Article 62 of the VCLT.
32. It is also arguable that the CJEU would in due course decide that by reason of the close proximity of the 1968 Brussels Convention and the subsequent EU treaties that once the UK ceased to be a Member State, the 1968 Brussels Convention no longer applies as between the UK and other signatories to it. A version of this thesis has been advanced recently by Professor Hess in a recent article and seeks in turn to place reliance upon the origins of the 1968 Brussels Convention and the provisions of Article 54 of the VCLT.³⁵ Irrespective of certain difficulties with this argument, some support for it can be found in influential commentaries, namely the Schlosser Report³⁶ and the Jenard /Moller Report.³⁷ Since the matter would ultimately be considered by the CJEU, it is likely that the CJEU would be influenced by these opinions and reach a decision consistent with their reasoning.

³³ Article 68.1 provides: "*This Regulation shall, as between the Member States, supersede the 1968 Brussels Convention, except as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 355 of the TFEU.*"

³⁴ Prof. Dickinson, *Back to the Future: The UK's EU Exit and the Conflict of Laws* 12 *Journal of Private International Law* 195 (2016).

³⁵ Professor Burkhard Hess - *Brexit and English Jurisdiction Clauses- Back to the Past* - *Practice of International Private and Procedural Law (IPrax)*, Volume 36, Issue 5, p 409 September/ October 2016.

³⁶ At [254].

³⁷ At [97].

33. It should also be stated that irrespective of these legal difficulties and the considerable uncertainty involved, reliance on the 1968 Brussels Convention could never be a long term solution for the UK as it only applies to 15 of the Member States and it would therefore lead to yet more fracturing of the landscape with regard to jurisdiction and judgments. This can only be disadvantageous to the UK.
34. Finally, it should also be mentioned that reverting to the wording of the 1968 Brussels Convention would additionally mean that the UK would lose the benefit of all the hard fought and negotiated amendments to the wording reflected in the wording of the BIR Recast.

E. RELIANCE ON PRE-EU BILATERAL TREATIES NOT A REALISTIC OPTION EITHER

35. There is also an argument that the UK may be able to revert to individual enforcement treaties previously concluded with certain countries that are now Member States³⁸ and which were given effect under the Foreign Judgments (Reciprocal Enforcement) Act 1933. In our view, however, the UK cannot for a number of reasons rely on these treaties as the means through which UK judgments will be enforced abroad because:
- 35.1. These treaties only relate to 6 of the 27 relevant EU Member States.
- 35.2. It would once more lead to a patchwork system of enforcement whereby each state has different enforcement regimes; this will increase uncertainty and increase the costs of litigation.
- 35.3. There is much value in maintaining the current, sophisticated, system that the UK played a significant role in drafting.
- 35.4. The status of the individual treaties which pre-date the European regimes is very unclear and the argument addressed above with regard to replacement and/or implied termination and/or fundamental change of circumstances may also apply to these treaties, albeit with some modification.

³⁸ These were entered into with France, Belgium, the Federal Republic of Germany, Austria, Italy and the Netherlands.

F. IMPORTANCE OF THE HAGUE CONVENTION 2005 IN THE OVERALL SCHEME

36. As to the Hague Convention 2005, there are four important reasons why the UK should become a signatory:

36.1. There are a growing number of signatories which the UK should join, given the importance of exclusive jurisdiction agreements to the international commercial community. The Hague Convention 2005 was the product of lengthy negotiation and there is reason to believe that in due course it will provide a regime parallel in nature to that provided for by the New York Convention, albeit with regard to exclusive choice of court agreements as opposed to arbitration. Given our prominence in this arena, the UK should be at the forefront of developments in the field.

36.2. As regards the subject matter of Hague Convention 2005, the UK can become a signatory after it leaves the EU without any need for approval from the remaining Member States.

36.3. Moreover by becoming a signatory, the UK will ensure that its provisions will be applied by EU Member States in priority to the provisions of the BIR or BIR Recast. The Hague Convention 2005 would therefore continue to have an important role even if a UK – EU Agreement was concluded to replicate the provisions of the BIR Recast.

36.4. The basis for falling within this regime is wider than the Lugano Convention 2007 in that there is no requirement that one party to the jurisdiction agreement be domiciled in a Contracting State to be enforceable thereunder.³⁹ Thus, it has significance to States other than Contracting States to the Lugano Convention 2007, which play a substantial part in international commercial disputes litigated in the UK, and will be of particular significance if the UK does not enter into a UK-EU Agreement on the BIR Recast,⁴⁰ particularly as it would guarantee the

³⁹ It is narrower in that it only applies to exclusive jurisdiction agreements.

⁴⁰ Art. 25 of the BIR Recast does not contain a requirement that one of the parties to the jurisdiction agreement be domiciled in a Member State such that the Hague Convention 2005 has less of a role to play than it does in relation to Contracting States under the Lugano Convention 2007.

enforceability of some (though not all) jurisdiction agreements in favour of English courts.

37. However, whilst it is important that the UK becomes a signatory, such a step is not a sufficient solution on its own to the issues presented in this sphere by Brexit because:

37.1. It does not provide a comprehensive regime for the establishment of jurisdiction; rather, it is limited to the enforcement of exclusive jurisdiction agreements.

37.2. Important areas of commercial litigation are excluded from its scope including carriage of goods, insolvency and anti-trust.⁴¹

37.3. It comes into force three months after a new Contracting State deposits its instrument of ratification and only applies to exclusive choice of court agreements concluded after its entry into force in the state of the chosen court and only to proceedings instituted after its entry into force.

Conclusion

38. In conclusion, we agree with the recommendations of the Bar Council and the evidence given to the Parliamentary Justice Select Committee that the UK should:

38.1. Enter into a UK-EU Agreement to ensure the continued application of the BIR Recast and that the EC-Denmark Agreement provides a readily available template for such a stand-alone treaty.

38.2. Become a signatory to the Lugano Convention 2007.

38.3. Become a signatory to the Hague Convention 2005.

39. Finally, we agree with the Bar Council's conclusion on the transitional arrangements required to address:

⁴¹ Art. 2(2) of the Hague Convention 2005.

- 39.1. Whether UK-domiciled defendants are to be treated as domiciled in a Member State for the purposes of establishing jurisdiction under the European regimes.
 - 39.2. The relevance of pending proceedings before a Member State court to proceedings in an English court (and vice versa).
 - 39.3. The applicable rules as to recognition and enforcement of judgments of and in the English courts.
 - 39.4. The applicable rules for the service of judicial and extra-judicial documents as between the English and Member State courts.
 - 39.5. The applicable choice of law rules in proceedings in the English courts.
40. In this regard, we agree that these could be addressed as follows:
- 40.1. As to the UK-EU Agreement:
 - 40.1.1. The Agreement should apply only to proceedings instituted after its entry into force.⁴²
 - 40.1.2. If proceedings in the state of origin were commenced before the entry into force of the Agreement, judgments given after that date shall be recognised and enforced in accordance with the Agreement.⁴³
 - 40.2. As to the Lugano Convention 2007 and the Hague Convention 2005, the UK is limited by the fact that those treaties are already concluded, meaning that specific transitional regimes are less likely to be agreed. However, the UK might consider issuing a declaration upon ratification of those Conventions to provide for their seamless operation.

⁴² See EC-Denmark Agreement, Article 9(1); Recast Regulation, Article 66(1).

⁴³ Compare EC-Denmark Agreement, Article 9(2); Recast Regulation, Article 66(2).

PART III: CHOICE OF LAW

Contractual obligations: the current position

41. The choice of law rules applied by English courts in contract cases are currently a mixture of EU law, statute law and the common law. The applicable law of a contract is determined:
 - 41.1. For contracts concluded as from 17 December 2009, by the provisions of the Rome I Regulation.⁴⁴
 - 41.2. For contracts concluded from 1 April 1991 until 16 December 2009, by the Contracts (Applicable Law) Act 1990 (“**the 1990 Act**”), which incorporated into English law the Rome Convention 1980, an international convention concluded by the then EEC Member States.
 - 41.3. For contracts concluded before 1 April 1991, and for contractual obligations which are excluded from the material scope of the Rome I Regulation or Rome Convention,⁴⁵ by common law rules.
42. These rules apply even where the events in issue occurred outside the EU, or relate to parties from outside the EU, or where the parties have chosen the law of a non-EU Member State.
43. While the Rome I Regulation provided that it shall “*replace*” the Rome Convention in territories of EU Member States to which it applied,⁴⁶ the Regulation did not require the Member States to denounce the Convention or expressly or impliedly repeal any national legislation giving it effect. Indeed, the Rome Convention necessarily retains its vitality, since it applies to all contractual obligations in the Danish courts (as the Rome I Regulation does not apply to

⁴⁴ Regulation (EC) 593/2008 [2008] OJ L177/6 as amended by the corrigendum [2009] OJ L309/8 (24 November 2009).

⁴⁵ Such as arbitration agreements, obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments, certain questions governed by company law, and the ability of an agent to bind a principal.

⁴⁶ Article 24 of the Rome I Regulation.

Denmark)⁴⁷ and remains in force in other EU Member States in respect of relevant contracts concluded between April 1991 and 16 December 2009.⁴⁸

Contractual obligations: the default position

44. Post-Brexit, the 1990 Act and the common law would provide the conflict of laws rules for contractual obligations. This would constitute a retrograde step. The Ministry of Justice recognised, when proposing that the UK should opt into the Rome I Regulation, that it protected the benefits of the Rome Convention “*and in some cases improves upon it*”.⁴⁹

45. In particular:

45.1. Absent a choice of law, Article 4 of the Rome I Regulation now lays down specific rules for determining the proper law of generic types of common cross-border contracts. The overarching rule is that the proper law will be the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. There is an escape clause where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country (in which case, the law of that other country applies).

45.2. Although superficially similar, Article 4 of the Rome Convention applies a different overarching principle, namely that the proper law will be that of the country with which the contract was most closely connected. Various presumptions are provided as a guide to what that law will be, including a presumption in favour of the place of residence of the person effecting the characteristic performance of the contract. However, these are presumptions only, and they are in any event to be disregarded if it appears from the circumstances as a whole that the contract was more closely connected with another country.

⁴⁷ Recital (46) to the Rome I Regulation.

⁴⁸ As recently demonstrated in the CJEU’s decision in Case C-135/15 *Republik Griechenland v Grigorios Nikiforidis* (18 October 2016).

⁴⁹ Ministry of Justice: “Rome I-Should the UK opt in?” (CP)5/08), p. 3.

- 45.3. The Rome I Regulation is clearer about the circumstances in which the parties may be found to have made a non-express choice of law.
- 45.4. The Rome I Regulation provides clearer and probably broader protection for consumers, employees, passengers and certain parties to insurance contracts against having a choice of law imposed on them.⁵⁰
- 45.5. The rules for determining the applicable law of insurance contracts were incorporated into Article 7 of the Rome I Regulation, improving on the previous position where they were to be found in a mixture of the Rome Convention and the Insurance Directives.
- 45.6. Article 9(3) of the Regulation adopted a new rule for giving effect to the overriding mandatory provisions of the law of a country where obligations arising out of the contract have to be or have been performed, which was modelled on the experience of English case law, and resolved a problem with the equivalent provision of the Rome Convention.

Non-contractual obligations: the current position

46. The applicable law of non-contractual obligations, including claims founded on tort and unjust enrichment, is determined, as regards events giving rise to damage which occur after 11 January 2009, by the Rome II Regulation.⁵¹
47. For tort claims that are not caught by the provisions of the Rome II Regulation, or stem from acts and omissions that occurred between 1 May 1996 and 10 January 2009, the applicable law is determined by the Private International Law (Miscellaneous Provisions) 1995 (“**the 1995 Act**”). Earlier claims, as well as defamation and related claims, are governed by the common law rules.

Non-contractual obligations: the default position

48. Once the UK leaves the EU, the default position (in the absence of new legislation) will be as follows.

⁵⁰ Rome I Regulation, Articles 6, 8, 5(2) and 7 respectively.

⁵¹ Regulation (EC) 864/2007 [2007] OJ L 199/40. There are certain exclusions, notably defamation.

49. In relation to tort claims only, the pre-existing rules set out in the 1995 Act would apply once again.⁵²

49.1. The general rule under section 11 of the 1995 Act is that the applicable law is the law of the country in which the events constituting the tort in question occur. Where elements of those events occur in different countries, the applicable law under the general rule is (leaving aside personal injury and property damage) the law of the country in which the most significant element(s) of those events occurred. By section 12, this general rule can be displaced if, from a comparison of the significance of the factors connecting a tort with the country whose law is applicable under the general rule and the significance of any factors connecting the tort with another country, it is substantially more appropriate for the applicable law for determining the issues (or any of them) to be the law of that other country.

49.2. This contrasts with the general rule in Article 4 of the Rome II Regulation, whereby the applicable law is the law of the country in which the damage occurs or is likely to occur.

49.3. Unlike the Rome II Regulation, the 1995 Act does not give the parties the express power to choose the law applicable to claims in tort, although it may be that any such choice could be regarded as a connecting factor under section 12 capable of displacing the law applicable by virtue of the general rule. The ability under the Rome II Regulation to choose the applicable law in tort has been an important and widely adopted innovation, with many commercial contracts containing an express choice of law for non-contractual obligations.

50. As noted above, the 1995 Act deals only with tort claims, whereas the Rome II Regulation applies to any non-contractual civil law claims for “*damage*”, which extends to any consequence arising out of a tort or delict, as well as unjust

⁵² As with the Rome II Regulation, defamation is specifically excluded from the scope of the 1995 Act and would, in general, be governed by the common law double-actionability rule.

enrichment, *negotiorum gestio* and *culpa in contrahendo*. Thus, in relation to claims for unjust enrichment:

50.1. Article 10 of the Rome II Regulation contains a hierarchy of rules about the choice of law in relation to unjust enrichment: where the obligation concerns an existing relationship that is closely connected with the unjust enrichment, then the law governing that relationship applies; failing that, where the parties have their habitual residence in the same country when the event giving rise to unjust enrichment occurs, the law of that country applies; otherwise the applicable law is the law of the country in which the unjust enrichment took place; save that, where it is clear from all the circumstances of the case that the obligation arising out of unjust enrichment is manifestly more closely connected with another country, the law of that other country applies. The Rome II Regulation also permits parties to choose the law applicable to a non-contractual obligation arising out of unjust enrichment.

50.2. There is no pre-existing UK statutory regime for determining choice of law rules for unjust enrichment claims. Post-Brexit, the common law rules would therefore apply. At the time when the Rome II Regulation came into force, those rules were still at an embryonic stage of development and based on comparatively little case law. The general rule appeared to be that the obligation to restore the benefit of an enrichment was governed by the proper law of the obligation, such that, if the obligation arose in connection with a contract, its proper law was the law applicable to the contract, if the obligation arose in connection with a transaction in land, its proper law was the law of the country where the land was situated, and in any other circumstances, its proper law was the law of the country where the enrichment occurred.⁵³

⁵³ *Dicey, Morris & Collins* (14th ed, 2006), Chapter 34, Rule 230.

Recommendations

51. It would be open to Parliament to legislate to adopt the Rome I and II Regulations as part of English law post-Brexit. Since the Regulations do not depend on reciprocity, this could be achieved by the UK acting unilaterally.
52. In light of the possibility, in the choice of law sphere, to fall back on pre-existing domestic legislation and common law rules, there is a less pressing need than in other areas to adopt the existing EU law regime. We nevertheless believe that it would be highly desirable to do so. The maintenance of the current regime would have the great advantage of continuity, would enable the UK to avail of the innovations in the two Regulations, and would avoid the need for potentially complex transitional provisions in the event of a reversion to the pre-existing law. The continued application of the same choice of law rules as the EU would also be likely to safeguard the attractiveness of London as a centre for commercial litigation for EU-based parties.
53. The Rome I and II Regulations could be adopted as they stand, or with relatively modest modifications. When the UK acceded to the Rome Convention and opted into the Rome II Regulation, a degree of scepticism was expressed by certain commentators as to necessity for or desirability of EU harmonisation of choice of law rules, and whether the instruments in question were best suited to this purpose.⁵⁴ However, insofar as there may be difficulties of interpretation as regards the provisions of either Regulation, we do not consider that these would be readily resolvable by legislative change through Parliament. On that basis, our recommendation is that the Rome I and II Regulations should be adopted as they stand.

⁵⁴ In relation to the enactment of the 1990 Act, see Hansard, vol. 515, 15 February 1990. In relation to the Rome II Regulation, see the report of the House of Lords European Union Committee, *'The Rome II Regulation: Report with Evidence'*, 8th Report of Session 2003-4, 7 April 2004.

PART IV: SERVICE OF PROCESS

The current position

54. EU law regulates the rules governing the service of process in EU Member States. They are found in an EU Regulation, known as the Service Regulation,⁵⁵ which has applied in the UK since 13 November 2008.⁵⁶ That Regulation governs the transmission of judicial and extrajudicial documents from one Member State for service in another Member State. It operates as an exhaustive code in civil and commercial matters,⁵⁷ creating a ‘European judicial area’ for the free movement of those documents.⁵⁸ This is achieved by allowing designated transmitting and receiving agencies in the Member States to effect service between them.⁵⁹

The default position

55. Due to the fact that this matter is governed by an EU Regulation, the UK’s departure from the EU will carry certain immediate consequences for the service of process in both EU Member States and the UK. The primary consequence is that, in the absence of intervening transitional legislation, the Service Regulation will no longer have direct application in the UK at the end of the Article 50 negotiating period.⁶⁰

⁵⁵ Regulation (EC) No. 1393/2007 [2007] OJ L 324/79. This Regulation was preceded by Regulation (EC) No. 1348/2000 [2000] OJ L 160/37.

⁵⁶ The Service Regulation was of direct application in the UK from 13 November 2008 (with the exception of Article 23, which applied from 13 August 2008): see Article 26. The previous version of the Service Regulation, Council Regulation (EC) No. 1348/2000, applied in the UK from 31 May 2001.

⁵⁷ See Article 1(1) of the Service Regulation. The Regulation does not apply to revenue, customs or administrative matters, or to the liability of the State for actions or omissions in the exercise of state authority. Where it applies, a claimant who seeks to serve documents issued in one Member State in the territory of another Member State must do so by the means provided for in the Regulation: *Alder v Orlowska* (Case C-325/11), Judgment of the Court, at [24] and [25]; *Alpha Bank Cyprus Ltd v Si Senh* (Case C-519/13) [2016] 1 WLR 115, at [68]-[70].

⁵⁸ See *Alpha Bank Cyprus Ltd v Si Senh* (Case C-519/13) [2016] 1 WLR 115, at [29]; *Alder v Orlowska* (Case C-325/11), Opinion of Advocate General Bot, 20 September 2012, at [3], [33], [35], [38], [41] and [42]; Judgment of the Court, at [29]. See also Recital (2) of the Service Regulation.

⁵⁹ Article 2, 4 and 6 of the Service Regulation. Other methods of service are also permitted by the Regulation: see Articles 12-15.

⁶⁰ This is the effect of Article 50(3) of the TEU, which provides that the TEU and TFEU shall cease to have effect at the end of the negotiating period (i.e. after the expiry of two years, or the entry into force of the withdrawal agreement, whichever happens first). This includes Article 288 of the TFEU, by which EU Regulations gain their binding effect.

56. The default position post-Brexit is that the common law rules will apply,⁶¹ save to the extent that they are displaced by any applicable bilateral or multilateral treaties.

There are two possible sources of such treaty obligations:

56.1. There is an existing multilateral convention, known as the Hague Service Convention, which will apply between the UK and EU Member States.⁶² This is a treaty that the UK has already signed and ratified in its own right,⁶³ but its application is presently limited by the Service Regulation.⁶⁴ It sets out rules by which courts and other competent authorities in a Contracting State may request the assistance of the equivalent institutions in another Contracting State to serve judicial and extrajudicial documents. However, the principal formal means of transmission contemplated by the Convention are generally slow and cumbersome.⁶⁵ The permissive nature of the regime also creates a less certain framework.⁶⁶

56.2. There is also a series of bilateral service conventions⁶⁷ concluded between the UK and EU Member States that may be engaged, either alone or in

⁶¹ These are summarised in Part 6 of the Civil Procedure Rules and include personal service, first class post and fax or other means of electronic communication (CPR PD 6A). Proceedings can also be served on an agent (CPR r. 6.12), by a contractually specified method (CPR r.6.11) or on an authorised solicitor (CPR r. 6.7). There are specific rules with respect to the service of companies under the Companies Act 2006 and CPR Pt. 6.

⁶² It presently has 71 Contracting States, including 26 EU Member States. Austria and Malta will shortly become Contracting States. On 10 March 2016, the European Council authorised Austria to sign and ratify and Malta to accede to the Hague Service Convention, which must be done by 31 December 2017: see Council Decision (EU) 2014/424.

⁶³ The UK signed the Convention on 10 December 1965 and ratified the Convention on 17 November 1967. It entered into force in the UK on 10 February 1969. It is presently implemented in domestic law by CPR, r. 6.31(a), (c), 6.40 and 6.42-6.43.

⁶⁴ See Article 20(1) of the Service Regulation. The Hague Service Convention continues to apply outside the realm of civil and commercial matters and also applies vis-à-vis non-EU Member States.

⁶⁵ In late 2014, the UK reported to the Hague Conference that the average length of time for the UK's central authority to receive a confirmation of service is reported to be "around four months plus": see Synopsis of Responses to the Questionnaire of November 2013 relating to the Service Convention (updated in August 2014), p 26. In practice, it is commonplace for delays to be far more extensive than that.

⁶⁶ The Convention's Special Commission has described its "non-mandatory but exclusive character": HCCH, 'Conclusions and Recommendations adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions' (28 October to 4 November 2003), at [73].

⁶⁷ The UK concluded treaties with 27 different states, including 17 EU Member States: Austria, Belgium, Czechoslovakia, Denmark, Finland, Federal Republic of Germany, France, Greece, Hungary, Italy, Netherlands, Poland, Portugal, Romania, Spain, Sweden and Yugoslavia. It also concluded such a convention with Norway. They are implemented in domestic law by way of CPR, r. 6.31(c), 6.40 and 6.42-6.43.

combination with the Hague Service Convention.⁶⁸ As with the bilateral recognition and enforcement conventions discussed above, there is uncertainty as to whether this regime could properly be said to revive.⁶⁹ Its revival would also give rise to a number of practical difficulties.⁷⁰

Recommendations

57. Unlike the position for choice of law, it would not be possible for Parliament to legislate to adopt the Service Regulation as part of English law. This is because the Service Regulation functions on a reciprocal basis, which renders the unilateral application of the Regulation impractical. Instead, we believe that the more appropriate course is to conclude a treaty with the EU⁷¹ to allow for the continued application of the Service Regulation in the UK. This approach would bring the considerable advantage of legal certainty and predictability by providing for the maintenance of a mandatory regime whose rules are clearly prescribed and well understood. It would also complement the maintenance of the jurisdiction and enforcement regime discussed above, as both Regulations seek to facilitate the creation of a common EU judicial space.
58. We also recommend that the UK draw on the EU-Denmark Service Agreement as a ready precedent.⁷² This is a treaty which was concluded between the European

⁶⁸ Whilst Article 20(1) states that the Service Regulation prevails over any competing treaty, including the Hague Service Convention, the Hague Service Convention does not prevail over any bilateral equivalent: see Hague Service Convention, Articles 24-25; see also *White Book* (2016), para 60.4.9.

⁶⁹ For the purposes of considering whether those treaties have been impliedly terminated in accordance with Article 59 of the VCLT, it is noteworthy that the language of Article 20(1) is distinct from Article 68(1) of the BIR Recast and Article 24 of the Rome I Regulation, discussed above. Article 20(1) merely stipulates that the Regulation “shall prevail over” other conventions, rather than “supersede” or “replace” them. On the other hand, it refers to treaties “concluded by the Member States” (as opposed to *between* Member States). This could possibly be said to require EU Member States to refuse to apply any bilateral or multilateral treaty (including the Hague Service Convention) vis-à-vis the UK. However, Article 20(1) is unlikely to be interpreted in this way. As the Regulation functions on a reciprocal basis and would no longer apply to the UK, it cannot be properly understood to “prevail over” a treaty to which the UK is party.

⁷⁰ For example, a regime based on a web of historical bilateral conventions is complicated and potentially uncertain, particularly where those conventions contain differing terms and the UK has concluded bilateral conventions with only some Member States. The treaties are also out-dated in many respects.

⁷¹ The UK must conclude a separate treaty with Denmark, or conclude a tripartite agreement with the EU and Denmark, in the light of Denmark’s opt-out from the justice and home affairs pillar: see the Edinburgh Agreement [1992] OJ C348/1.

⁷² Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extra-judicial documents in civil and commercial matters, [2005] OJ L/ 300/55, 17 November 2005 (“**EU-Denmark Service Agreement**”). Denmark has since notified the European Commission that it wishes to apply the revised version of the regulation: see [2008] OJ L 331/21, 10 December 2008.

Community and Denmark to allow for the application of the previous version of the Service Regulation in Denmark (which was in force at the time).⁷³ Unusually for a treaty, it contains a useful mechanism by which it can be flexibly updated in the event of future reform.⁷⁴

59. This instrument could be consolidated with an equivalent arrangement as to jurisdiction and the recognition and enforcement of judgments, or it could be pursued as a separate treaty. Whichever form is selected, the UK will need to negotiate a dispute resolution mechanism in respect of the interpretation and application of the treaty, which is a function presently served by the CJEU in the EU-Denmark service arrangement.⁷⁵ However, it may be that there is little scope for a substantially modified agreement as between the EU and the UK in respect of this mechanism, if the UK wishes to continue to participate in the homogenised EU judicial space.⁷⁶

⁷³ EU-Denmark Service Agreement, Article 2(1).

⁷⁴ EU-Denmark Service Agreement, Article 3(2)-(6).

⁷⁵ Article 6(2) of the EU-Denmark Service Agreement obliges the Danish courts to “*take due account*” of relevant CJEU rulings. Article 6(1) also allows a Danish court to make a reference to the CJEU in a form of a mechanism equivalent to Article 267 of the TFEU, but this option would not be available to an English court unless specific agreement were reached to that effect.

⁷⁶ Indeed, the intention of the EU-Denmark Service Agreement is “*to arrive at a uniform application and interpretation*” of the relevant European instruments, rather than to create a freestanding bilateral regime: Article 1(1).

PART V: JUDICIAL ASSISTANCE IN THE TAKING OF EVIDENCE WITHIN THE EU

60. The ability of an English court, irrespective of EU regulation, to seek the assistance of a foreign court in obtaining relevant evidence for trial from non-parties to litigation has a history going back several hundred years. The exchange of Letters Rogatory, of which a Letter of Request (i.e. for Evidence) is but one variant, is a well-known international procedure employed by many States around the world.
61. It is useful to highlight the two different perspectives involved: outwards Letters of Request involve requesting evidence from a foreign jurisdiction for use in an English court, whereas inwards Letters of Request involve a foreign court requesting evidence that is within the jurisdiction of the English court for use in that foreign court. This has the potential to give rise to certain differences in treatment from one jurisdiction to another if there are not uniform rules, i.e. by way of bilateral or multilateral arrangement. As between the EU Member States, however, this is another area which has now been harmonised through Council Regulation (EC) No. 1206/2001⁷⁷ (the “**Taking of Evidence Regulation**”). Thus, in order to assist in the functioning of the single market, there is essentially no difference between how outwards and inwards Letters of Requests are treated within the EU. This therefore gives rise to the question as to whether it is possible and desirable to maintain the current EU regime, or to fall back upon previously existing arrangements.
62. In our view, the existing EU regime is little used and provides only limited practical advantages over arrangements which are in place with regard to non-EU States. The overall impact and importance of these EU arrangements are thus limited, and, albeit not inconsequential, no great political capital should be spent on attempting to retain them.
63. However, the existing EU regime could certainly be retained if need be. As regards inwards Letters of Request, this could be done on a unilateral basis within English

⁷⁷ Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters

law; however, this would not achieve reciprocal treatment for parties litigating in England and Wales, making outwards Letters of Request to courts in EU Member States.

64. The procedures applicable in EU Member States would, in the absence of agreement, be more variable than at present and obtaining answers to the relevant local law questions before issuing an application in an English court for an outwards request could be burdensome for parties. Therefore, policy makers should give some thought as to whether individual Member States should be invited to enshrine the European regime in their own domestic law for the benefit of the UK, on the basis that the UK would continue to do the same in relation to inwards requests from that Member State. The regulation of a position *vis-à-vis* (what would then be) a non-EU State does not appear to be a question of EU law which would require a common position to be agreed at EU level. Nevertheless, if Treaty arrangements are under negotiation which make provision for the position in relation to jurisdiction and judgments and the service of proceedings as outlined above, similar provision for the taking of evidence could also be pursued in parallel.

The Current EU Regime

65. The Taking of Evidence Regulation applies to all EU Member States except Denmark (the “**Regulation States**”). Denmark, like the UK, enjoys an opt-out from “*justice*” matters. Unlike the UK, however, and despite its moves towards harmonisation in other areas (e.g. jurisdiction and judgments under the EU-Denmark Agreement), it did not decide to participate in this area.
66. The most important features of the Taking of Evidence Regulation are as follows:
 - 66.1. Under the Taking of Evidence Regulation, courts in one Regulation State may request the competent court of another Regulation State to take evidence, or may request permission to take evidence directly in another Regulation State.
 - 66.2. Requests under the Taking of Evidence Regulation are streamlined by requiring court-to-court transmission of common forms (Form A or Form

I), which are annexed to the Regulation. The receiving court either ensures that the request is executed or informs the requesting court as to why it has not been possible to execute the request, again using common forms.

66.3. Additionally, the Taking of Evidence Regulation aims for a turnaround time of 90 days from receipt of request to the provision of the relevant evidence to the requesting court.

The Non-EU Regime to be applied in the Absence of a Replacement Regime

67. The Taking of Evidence Regulation is not the only international instrument governing the taking of evidence. Many countries⁷⁸ are also party to the Hague Convention of 18 March 1970 on taking evidence abroad in civil and commercial matters (the “**Hague Evidence Convention**”), and the UK in addition has bilateral conventions with numerous countries.⁷⁹ At present, these rules have been mostly⁸⁰ displaced by the Taking of Evidence Regulation as between the UK and the other Member States. On the assumption that no replacement regime is introduced, the position is likely to be as follows.

68. In relation to outwards Letters of Requests:

68.1. With the exception of Austria, Belgium and Ireland, all other EU Member States are party to the Hague Evidence Convention, which as a default position would or could regulate the position where there was an outwards Letter of Request to those countries. However, according to the status table,⁸¹ the UK has not yet accepted the accessions of Croatia, Hungary, Lithuania, Malta, Romania and Slovenia, which would need to be done in order to ensure that UK requests are treated in accordance with the rules set out in the Hague Evidence Convention in those countries.

⁷⁸ Para 34.13.8 of the White Book identifies 55 such countries, in addition to the UK.

⁷⁹ Para 34.13.7 of the White Book identifies 26 such countries.

⁸⁰ In Case C-332/11 *ProRail BV*, the CJEU (First Chamber) held that the Taking of Evidence Regulation was aimed to facilitate and improve the taking of evidence and therefore did not occupy the field to the exclusion of all other arrangements for the taking of evidence.

⁸¹ <https://assets.hcch.net/docs/f094fd72-6213-4950-96ea-955f41a311eb.pdf>

- 68.2. Assuming they have continued application,⁸² the UK has (very old) bilateral conventions with Austria and Belgium, which, as a default position, would regulate the position where there was an outwards Letter of Request to those countries.
- 68.3. Ireland appears to be alone in having no international arrangement with the UK which is applicable. An outwards Letter of Request to Ireland is governed in the Irish system by the Foreign Tribunals Evidence Act 1856 and Order 39 of the Rules of the Superior Courts. This statutory regime was that previously used in the UK until the Hague Evidence Convention was incorporated into UK law by the Evidence (Proceedings in Other Jurisdictions) Act 1975 (the “**1975 Act**”) and is more limited than it as regards the types of evidence available to be taken.
69. In relation to inwards Letters of Request, the position is much simpler. The 1975 Act does not distinguish between requests which come from a State party to the Hague Evidence Convention, a bilateral convention, or even a State with which there is no convention at all. In practice, therefore, inwards Requests from all EU States would be treated in the same way,⁸³ i.e. the way non-EU requests are currently treated (assuming no legislative changes are made).

Assessing the value of the Taking of Evidence Regulation

70. There are no substantial differences in the scope of the Taking of Evidence Regulation and the Hague Evidence Convention.⁸⁴ The general approach under

⁸² Article 21 (1) of the Taking of Evidence Regulation states “1. *This Regulation shall, in relation to matters to which it applies, prevail over other provisions contained in bilateral or multilateral agreements or arrangements concluded by the Member States and in particular the Hague Convention of 1 March 1954 on Civil Procedure and the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, in relations between the Member States party thereto...*” but does not prescribe their termination.

⁸³ Subject to a very narrow exception where the bilateral arrangement in question might be wider and thus more generous than the 1975 Act.

⁸⁴ Compare Article 1 of the Taking of Evidence Regulation and Article 1 of the Hague Evidence Convention. Both instruments apply “*in civil or commercial matters*”, and only for evidence intended to be used in “*commenced or contemplated*” judicial proceedings. See also the opinion of Advocate-General Kokott in *Tedesco v Tomasoni Fittings srl* (Case C-175/06). In non-EU cases, a consistent line of case law interpreting the 1975 Act, (and applying this view by analogy to outward requests), has denied the ability of a party to seek a disclosure order against a non-party, instead limiting document production orders to those which comply with an extremely restrictive “*individual documents, separately described*” test. This,

each is broadly similar.⁸⁵ There are also no substantial differences in the procedure applicable for obtaining orders under these two instruments. Where, on the application of a party, a request is to be made that a person be examined out of the jurisdiction under the Hague Evidence Convention or a bilateral convention, and that person is not in a Regulation State, CPR r. 34.13 applies. Where the person is in a Regulation State, CPR r. 34.23 applies. In either case, such examination may be accompanied by an order that the person produce certain specified documents (or categories of documents),⁸⁶ or involve oral examination or document production alone, or involve the production of a variety of different types of evidence.⁸⁷

71. A search of Westlaw for the keywords "*taking of evidence*" and "*1206/2001*" returns a mere 24 results, of which 8 are cases before the Court of Justice. This provides support for the view that the Taking of Evidence Regulation is not widely used before English courts. The other explanation, that the Taking of Evidence Regulation is often used and is used so seamlessly as never to attract reported cases, is rather less likely. In particular, it is notable that the Commission's report into the functioning of the Regulation in 2007 concluded:

"LIMITED APPLICATION OF A LITTLE-KNOWN REGULATORY INSTRUMENT.

Across all the replies to the three questionnaires, we saw a large number of respondents opting for "difficult to say" and "don't know / no answer".

however, is more a defect of English law rather than an advantage of the Taking of Evidence Regulation (which has no such restriction).

⁸⁵ For example, in relation to translations, informing requesting court as to execution problems, execution in accordance with the requested court's procedures but following special requests if possible, presence of parties and potentially judicial representatives, use of coercive measures, effects given to privilege or similar duties, refusal if not within the functions of the judiciary, non-reimbursement of taxes or costs but provision for expert and interpreter's fees.

⁸⁶ See CPR r. 34.8(4) on depositions: "*The order may require the production of any document which the court considers is necessary for the purposes of the examination*".

⁸⁷ See the 1975 Act, s2(2): "*Without prejudice to the generality of subsection (1) above but subject to the provisions of this section, an order under this section may, in particular, make provision— (a)for the examination of witnesses, either orally or in writing; (b)for the production of documents; (c)for the inspection, photographing, preservation, custody or detention of any property; (d)for the taking of samples of any property and the carrying out of any experiments on or with any property; (e)for the medical examination of any person; (f)without prejudice to paragraph (e) above, for the taking and testing of samples of blood from any person*", and in the context of Taking of Evidence Regulation in particular: *Sayers v SmithKline Beecham Plc* [2004] EWHC 1098 (QB) ("*preservation, disclosure and inspection of the data underlying various tests commissioned on behalf of the Claimants and relied upon by the Claimants' experts in their reports*").

*This fact demonstrates that the facilities offered by the Regulation have not been greatly used, a point that was also made clear in the replies relating to the number of applications for the taking of evidence submitted in accordance with the Regulation. This limited application appears to be attributable either to legal practitioners' lack of familiarity with the instrument or to the difficulty of changing previous, well established habits.*⁸⁸

Whilst the Report optimistically suggested that this might be attributable to the Taking of Evidence Regulation being new, it may be the case that this attitude has not really changed, at least in the UK.

72. Four issues might be of concern if the Taking of Evidence Regulation were to fall away without replacement:

72.1. First, as compared to the use of common forms for request and response under the Taking of Evidence Regulation, there is a diversity of regimes that are otherwise potentially applicable in different EU Member States, as set out above, and the potential for an attendant increase in costs for parties attempting to ensure compliance with local rules.

72.2. Second, as compared to the speed recommended for dealing with requests under the Taking of Evidence Regulation (i.e. 90 days), which the Commission report suggested were generally met (albeit not by the UK), there is no particular target being set out in the Hague Evidence Convention, which is often slower.

72.3. Third, clearer rights for the party representatives to actually participate in the examination are available under the Taking of Evidence Regulation,⁸⁹ as compared with the more ambiguous right to be “*present*” under the Hague Evidence Convention.⁹⁰

⁸⁸ http://ec.europa.eu/civiljustice/publications/docs/final_report_ec_1206_2001_a_09032007.pdf at p. 6.

⁸⁹ See Art 11.

⁹⁰ See Art 7.

72.4. Fourth, clearer rights for the representatives of a Regulation court to take evidence directly where the witness agrees are available under the Taking of Evidence Regulation,⁹¹ (although *ad hoc* arrangements could probably be reached if the case was one of sufficient importance).⁹²

Recommendations

73. Given that the types of questions that arise in relation to evidence within the scope of the regime under discussion arise infrequently, the overall impact and importance of these arrangements are probably limited. The consequence of exiting the EU without having a replacement regime in place would be that the Taking of Evidence Regulation would cease to apply. In such a case, the Hague Evidence Convention, and numerous bilateral conventions, would still apply, which would (assuming the relevant accessions were accepted) give nearly comprehensive coverage for outwards requests to EU Member States, whereas coverage for inwards requests would remain uniform under the 1975 Act.
74. In our view, these arrangements are likely to be nearly as effective as the Taking of Evidence Regulation, and so it would not be necessary or urgent to negotiate any particular replacement regime with the EU in this regard. We therefore conclude that this area is one of lower priority than that addressed in Part II above. Having regard to the potential downsides, however, it would certainly not be undesirable to retain the Taking of Evidence Regulation if possible – it is probably a pragmatic decision to be made depending on whether any *quid pro quo* were required.

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⁹¹ See Art 1(b), Art 17.

⁹² See by way of example the Treaty agreed in order to provide for a trial in relation to the Lockerbie bombings that was held under Scots law but on the territory of the Netherlands: <https://treaties.un.org/doc/Publication/UNTS/Volume%202062/v2062.pdf> at p. 82ff.