BRITAIN’S BARGAINING STRENGTH REGARDING POST-BREXIT JURISDICTION ARRANGEMENTS

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FOREWORD

In August 2017 the UK Government proposed an agreement with the EU for close and comprehensive cross-border civil judicial cooperation. This should provide a continuation of clear jurisdictional rules and mutual enforceability of judgments. The UK has found the substance of the current ground rules, under which the defendant's domicile is the principal criterion for jurisdiction, to be perfectly acceptable. Today that substance is provided by the application in the UK of the EU legislation known as the Recast Brussels Regulation. Bearing in mind that both today and in the past a range of reciprocal arrangements in the field of civil jurisdiction have been established by international treaties, there seems no reason in theory why that substance could not in future be founded on a treaty between the UK and EU.

Nonetheless it remains unclear whether the EU27 has the political will to accept such a treaty basis in substitution for the reach of EU Regulation. As in so many other sectors, the sticking point may be the attachment of the EU27 to the umbrella of the direct jurisdiction of the European Court of Justice. So civil jurisdiction may be just one more topic on which a hard negotiation lies ahead.

This paper not only describes what arrangements the UK should seek, and why: it also analyses the parties' bargaining strength. It shows that on this topic the UK is in a strong position. That is because in the absence of a continuation of a rule of defendant's domicile as the main basis for jurisdiction, English courts would revert to the common law. Under the common law English courts have what David Wolfson calls "long-arm jurisdictional rules". This could lead to mainland courts losing work, and mainland companies losing the comfort of being sued at home, as the global allure of London as a legal centre sucks ever more business to Fetter Lane. He also draws attention to overlooked bilateral treaties between the UK and the main continental economies, which have ceased to play a role since the Recast Brussels Regulation, but which are still in force, and which could provide the enforceability in their countries of future English court judgments.

David Wolfson QC writes with great authority in this field. He is one of the most sought-after commercial silks at the Bar. He has appeared in many of the leading cases on jurisdiction and the enforcement of judgments in English courts at every level up to the Supreme Court, as well as before a range of foreign courts and international tribunals.

The Society of Conservative Lawyers is delighted to be able to present this contribution to the wider Brexit discussion.

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Introduction

1. This paper poses the question: what agreements should the UK seek to conclude, and what arrangements should the UK seek to put in place, in respect of jurisdiction and enforcement of judgments in light of the UK's decision to leave the EU?

2. It does not purport to be a comprehensive treatment of all related questions, such as those of service of documents. Nor does it consider questions of substantive law, such as whether the UK should continue, by way of enactment into domestic law, to apply the Rome I and Rome II Conventions which set out the principles for determining the governing law of contractual, and non-contractual, obligations.

3. The discussion as to questions of jurisdiction and the enforcement of judgments after Brexit is relevant to all courts in the UK, but in particular to the English Commercial Court, which has a huge international reach. It is estimated that at least 70% of cases heard in the English Commercial Court have at least one non-UK party: the Commercial Court itself recorded that, over the period from 31 March 2012 to 1 April 2013, almost 81% of cases before it involved a foreign party, and around 49% of cases were entirely between foreign parties. Although work often comes to that court because of the parties' choice of English law, a specific choice of English jurisdiction remains popular in many economic sectors, both in bilaterally negotiated contracts between individual businesses, and in standard-form contracts such as the Master Agreements promoted by the Internal Swaps and Derivatives Association (ISDA).

Importance of jurisdictional rules and enforceability of judgments

4. It is obvious that clear jurisdictional rules, and the ability to enforce abroad judgments emanating from the English court, are critically important for the

continued pre-eminence of England[1] as an international centre for dispute resolution.

5. Both elements – clear jurisdictional rules, and the ability to enforce abroad judgments emanating from courts of the United Kingdom – are important.

6. Clear jurisdictional rules are required so that parties know when, and on what principles, the English court will exert jurisdiction over parties outside the court's immediate jurisdiction. Parties also need to know how they can structure their legal relations, and in particular their contracts, so as to fall within (or, perhaps, outside) the jurisdiction of the English court.

7. So far as concerns the ability to enforce a judgment abroad, it is self-evident that the ability to enforce an English judgment in other jurisdictions – and in particular in those jurisdictions where the defendant's assets might be based – may well be of critical commercial importance. The commercial value of a judgment is significantly diminished if it is enforceable in the jurisdiction of the court which delivered it, but nowhere else.

The Recast Brussels Regulation

8. The current jurisdictional regime is set out in Regulation (EU) No. 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, commonly known as the Recast Brussels Regulation[2]. It applies to cases involving parties domiciled in the EU.[3]

9. The Recast Brussels Regulation sets out clear rules on both jurisdiction and enforcement of judgments. As to jurisdiction, it provides the various bases on

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[1] Given the separate Scottish legal system, the focus in this paper is on the English court (to use the customary shorthand).
[2] Because it recast (and improved) various provisions of the predecessor Regulation (EC) 44/2001.
[3] But it can apply to non-EU parties also, e.g. a contract between a US claimant and a Hong Kong defendant providing for the exclusive jurisdiction of the English court will fall within Article 25 of the Recast Brussels Regulation.

which a court in a Member State[4] will have jurisdiction, and also provides for cases in which more than one such court would be entitled to exert jurisdiction. As to the enforcement of judgments, the essential approach is that once a court in a Member State has delivered a judgment, that judgment is, with very limited exceptions, immediately enforceable in all other Member States.

10. Importantly, the Recast Brussels Regulation operates on a "club" or reciprocal basis. In other words, the same rules – i.e. those set out in the Recast Brussels Regulation – apply in each jurisdiction. Where a dispute arises as to how those rules operate, or what they mean, the dispute is ultimately determined by the European Court of Justice ("ECJ"), whose decision applies to all of the States within the scope of the Recast Brussels Regulation. There is thus a single set of rules, and a single court with the ultimate power to interpret and apply those rules.

11. There are a number of points which underpin the operation of the Recast Brussels Regulation.

    (a) The starting point is that a defendant is entitled to be sued in its country of domicile. The importance of domicile in the scheme of the Recast Brussels Regulation cannot be overstated. That principle underpins all the other jurisdictional rules.

    (b) There are a number of exceptions to the domicile rule. For present purposes, the most important exception is when the parties have agreed contractually that disputes should only be heard in the courts of another Member State (commonly referred to as an "exclusive jurisdiction clause"). The Recast Brussels Regulation recognises and gives effect to such clauses, and requires all other

[4] The Recast Brussels Regulation does not have direct effect in Denmark, but the EU and Denmark have agreed that it will be applied to relations between the EU and Denmark. The Danish Ministry of Justice confirmed that the Recast Brussels Regulation was implemented by Denmark by way of domestic legislation which entered into force on 1 June 2013.

courts to decline jurisdiction in favour of the court contractually chosen by the parties.

(c) Each court, when presented with a jurisdictional challenge, is to decide for itself whether it has, or does not have, jurisdiction under the rules set out in the Recast Brussels Regulation.

(d) Those rules can sometimes lead to the situation that more than one court could exert jurisdiction. In order to avoid the risk of competing proceedings and potentially irreconcilable judgments, once proceedings have been commenced in the courts of one Member State, the courts of all other Member States are required to stay any other proceedings, pending a decision by the court first seized as to whether it does have jurisdiction. This led to the situation colloquially (and perhaps unfairly) known as the "Italian Torpedo", where parties would commence proceedings in a court which plainly did not have jurisdiction over the dispute (often, Italy), on the basis that it would take a long time for that court to reach a decision on its own jurisdiction and, until that decision had been reached, no other court could exert jurisdiction.

(e) A defendant may be joined to a case proceeding in the courts of a country which is not that defendant's domicile if the proceedings against the existing defendant(s) and the proposed additional defendant are "*so closely connected that it is expedient to hear and determine them together to avoid the risk of a irreconcilable judgment*". This provision provides a useful example of the importance of domicile in the scheme of the Recast Brussels Regulation: unlike the corresponding provision under the English common law rules (which the English court applies to cases falling outside the scope of the Recast Brussels Regulation) under which the proposed additional defendant can be joined regardless of the source of the English court's jurisdiction over the other defendant(s), under the Recast Brussels Regulation the proposed

additional defendant can only be joined if the court has jurisdiction over at least one of the other defendants on the basis of that defendant's domicile (and not, for example, if the court has jurisdiction over one of the other defendants on the basis of an exclusive jurisdiction clause).

(f) Once a judgment is delivered, it can be enforced throughout the other Member States as if it were a judgment of a court of the state in which the judgment is sought to be enforced. There is no need to register the judgment in the enforcing court, and the enforcing court cannot review the substance of the decision. The enforcement rules apply not only to the judgment itself, but also to "*protective measures*" which can be ordered in support of a judgment, for example an injunction freezing the assets of the defendant or requiring the defendant to provide information about the whereabouts and value of its assets. Similarly, the courts of a Member State may order "*protective measures*" to support the enforcement of a judgment given by the court of another Member State or to assist with proceedings which are taking place in another Member State.

The effect of Brexit

12. The UK's notice under Article 50 of the Lisbon Treaty, and the repeal of the European Communities Act 1972, will remove the UK from the scope of the Recast Brussels Regulation (as well as other regulations of the European Union).

13. In addition, it will remove the UK from the Lugano II Convention (Regulation (EC) 2201/2003) which applies to jurisdiction and enforcement of judgments as between the EU and Iceland, Norway and Switzerland. The UK will be removed from the Lugano II Convention because that is a convention between the states of Iceland, Norway and Switzerland on the one part, and the EU itself on the other part; it is not a Convention between those three states and

the individual Member States of the EU. Accordingly, the UK as a state is not a party to the Lugano II Convention because it was concluded by the EU itself and not by the constituent Member States.

14. A technical argument has been discussed by some commentators to the effect that the predecessor to the Recast Brussels Regulation, i.e. the original Brussels Convention (Regulation (EC) 44/2001) might still be in legal effect, and could be revived once the Recast Brussels Regulation has fallen away. The basis of this argument is that the Brussels Convention was created in the form of an international treaty and was therefore enacted into English law as primary legislation by way of the Civil Jurisdiction and Judgments Act 1982. The argument is that the abrogation of the Recast Brussels Regulation, so far as the UK is concerned, has no effect on the rights and obligations agreed between the UK and (the then) EU Member States in the Brussels Convention, as enacted into English law.

15. Whatever the theoretical merits of this argument, it is not one which is likely to have any practical application. Not only will not all (and, probably, none) of the Member States agree with this analysis, but the final say will be that of the ECJ, as the ultimate arbiter of both the original Brussels Convention and the Recast Brussels Regulation. The prospects of the ECJ agreeing with the rather convoluted analysis that the original Brussels Convention, which has itself been superseded by the Recast Brussels Regulation, somehow still remains alive and can be used as the basis for the continuing jurisdictional agreement between the UK and the Member States, are effectively zero.

Consequences of the UK being outside the Recast Brussels Regulation

16. If the UK ceases to be party to the Recast Brussels Regulation, there are a number of potential consequences.

17. First, parties may be concerned as to whether an English exclusive jurisdiction clause would be respected by courts in the remaining Member States. An exclusive English jurisdiction clause would of course be given effect to by the

English court. But to ensure that the nominated court takes jurisdiction is only half of the picture. Not only is it important that an English exclusive jurisdiction clause is given effect to by the English court (which it would be), but it is also important that the clause – representing the parties' jurisdictional agreement – is respected by other courts so as to avoid competing proceedings and the risk of irreconcilable judgments. Similarly, parties may also be concerned as to whether the English court would respect jurisdiction clauses in favour of the court of one of the remaining Member States.

18. Second, parties will be concerned whether a judgment obtained from the English court could be enforced in the courts of the remaining Member States. A judgment which can only be enforced in the courts of the state in which the judgment was delivered is of significantly reduced value, and a judgment which can be enforced aboard, but only after a difficult and expensive process, might not be worth much more.

Options for the UK after Brexit

19. The effect of the reciprocal nature of the Recast Brussels Regulation (and of the Lugano II Convention) is that those instruments cannot simply be unilaterally re-enacted by the UK so as to preserve the current position.[5]

20. That is because the UK cannot itself pass legislation which would require the courts in other Member States to decline jurisdiction on the basis that proceedings were already underway in the English court, nor to give effect to judgments of the English court. The UK could agree to be bound by the Recast Brussels Regulation, in the way that Denmark has done, but that would mean accepting any subsequent changes in the Recast Brussels Regulation without

[5] This can be contrasted, for example, with the position in relation to the Rome I and Rome II Regulations, which set out provisions to establish the governing law of both contractual and non-contractual obligations, and will survive in the UK as retained EU law under the provisions of the European Union (Withdrawal) Bill currently before Parliament. They will also continue to apply within the remaining Member States. Those Regulations determine the law applicable to a given dispute, and they provide that where parties have agreed on a governing law, that choice is to be respected – even if the chosen law is the law of a non-Member State. Accordingly, if a court in a Member State is seised with a dispute where the parties have chosen English law as the governing law, that court must apply English law, even after Brexit.

being able to influence such changes, and also accepting the jurisdiction of the ECJ without contributing to either its jurisprudence or its Justices, both of which are legally unattractive, and neither of which is likely to be politically possible.

21. In other words, the reciprocal nature of the Recast Brussels Regulation and the Lugano II Convention means that there are essentially two broad options available for the UK. First, to enter into a new agreement or treaty which would either replicate or closely replicate the Recast Brussels Regulation and the Lugano II Convention; second, to use the existing common law rules.

A new agreement on jurisdiction and enforcement of judgments

22. The first option available for the UK after Brexit is to reach an agreement which either replicates, or closely replicates, the current arrangements in the Recast Brussels Convention.

23. This would be achieved by the UK entering into an agreement with the remaining Member States (and also with Denmark), and which might be modelled on the existing jurisdiction agreement between Denmark and the EU.

24. The stated position of the Government is that it does seek such a deal: see paragraphs 19 and 25 of the Government's paper dated 22 August 2017, *Providing a Cross-Border Civil Judicial Cooperation Framework: a Future Partnership Paper*:

> 19. The UK will therefore seek an agreement with the EU that allows for close and comprehensive cross-border civil judicial cooperation on a reciprocal basis, which reflects closely the substantive principles of cooperation under the current EU framework. As we legislate for our withdrawal from the EU, it is also our intention to incorporate into domestic law the Rome I and II instruments on choice of law and applicable law in contractual and non-contractual matters. This will provide a coherent legal framework for UK and EU businesses to trade and invest with confidence across borders and support the protection of individuals' and family rights in cross-border situations.
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> 25. The UK is clear that international civil judicial cooperation is in the mutual interest of consumers, citizens, families and businesses in the EU and in the UK.

> With this in mind, we are seeking a close and comprehensive framework of civil judicial cooperation with the EU. That framework would be on a reciprocal basis, which would mirror closely the current EU system and would provide a clear legal basis to support cross-border activities, after the UK's withdrawal.

25. Similarly, in the EU and UK Joint Report of 8 December 2017 it was stated:

> 91. On cooperation in civil and commercial matters there is a need to provide legal certainty and clarity. There is a general consensus between both Parties that Union rules on conflict of laws should continue to apply to contracts before the withdrawal date and non-contractual obligations where an event causing damage occurred before the withdrawal date. There was also agreement to provide legal certainty as to the circumstances under which Union law on jurisdiction, recognition and enforcement of judgments will continue to apply, and that judicial cooperation measures should be finalised.

26. It would appear that there is close alignment, in principle, between the UK and the EU on the proposed transitional arrangements (i.e. comparing the EU's position paper on *Essential Principles on Ongoing Cooperation in Civil and Commercial Matters* (12 July 2017) and the UK's position paper of 22 August 2017.[6]

27. Although some commentators have asserted that there would be no interest on the part of the other Member States in concluding a new treaty or regulation with the UK, that is questionable. It is the Recast Brussels Regulation, with its emphasis on domicile, which limits the scope for defendants situated in those Member States to be brought before the English court. Absent the protection of the European instruments, or similar agreements replacing and reflecting them, those defendants would be susceptible to being brought before the English court, and having an English judgment rendered against them. That might not be in the interests of the remaining Member States, or litigants domiciled therein.

28. Accordingly, one of the issues facing the remaining Member States is whether they would be content for defendants domiciled in those Member States to be susceptible to the jurisdiction of the English court (i.e. under the English

[6] Both papers proceeded on the basis that a choice of forum made before the withdrawal date should be valid. However, the EU's position is that enforcement of a judgment should take place under EU law only where a judgment is delivered before the withdrawal date, whereas the UK's position is that should also apply if the judgment is given in proceedings which were instituted before the withdrawal date.

common law rules). That is likely to be something which would concern commercial parties in those Member States, given both the long-arm nature of the common law jurisdictional rules, and the status and enforceability of an English judgment, and one would expect that they would push for a new agreement rather than be susceptible to the untrammelled effect of the common law. The threat of reverting to long-arm English jurisdictional rules gives the UK bargaining power in the discussions about a new agreement, and could be deployed, for example, to ensure that the ECJ is not the final arbiter of any such new agreement.

29. The position of the ECJ has been said to be one of the sticking points in any bespoke agreement, with the EU demanding that the ECJ be the ultimate arbiter and appellate court, and the UK resisting this. As a matter of principle, it is hard to see why the ECJ should be the ultimate arbiter of a bespoke treaty; (as noted below) the ECJ is not the ultimate arbiter of the Lugano II Convention. A bespoke treaty ought, in principle, to have a bespoke arbiter: one possibility would be the formation of a distinct tribunal, comprising an equal number of judges from the UK and the Member States, perhaps with the chair of each panel hearing a particular case to be decided by lot (or alternating between a judge drawn from the Uk or the EU).[7]

The Lugano II and Hague Conventions

30. At the same time, the UK should also seek to sign up to the Lugano II Convention which would keep in place the current jurisdictional position with respect to Iceland, Norway and Switzerland.

31. The UK could accede to the Lugano II Convention if it becomes a member of the European Free Trade Association ("EFTA")[8]. But becoming a member of EFTA has political costs; it would involve the making of substantial

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[7] Such a court would, incidentally, also be well-placed to deal with any other legal issues arising from Brexit, but such a discussion strays beyond the scope of this paper.
[8] Pursuant to Article 70 of the Lugano II Convention.

payments, and also accepting the free movement of persons (albeit with some limitations). If the UK does not become a member of EFTA, it could accede to the Lugano II Convention with the agreement of the other contracting parties.

32. The Lugano II Convention lacks the improvements made by the later Recast Regulation (for example, Article 31 of the Recast Regulation which defuses the Italian torpedo) but it is still serviceable. Its enforcement provisions also prevent a review of the substance of the judgment, but the judgment does have to go through a recognition procedure (*exequatur*). Although pursuant to Article 1, Protocol 2 the courts in Iceland, Norway and Switzerland are to "*pay due regard to the principles laid down by any relevant decision ... rendered by the courts of the states bound by this Convention and by the [ECJ]*", the ECJ itself has no jurisdiction in Iceland, Norway and Switzerland.

33. The UK should also accede (and, unlike with regard to the Lugano II Convention, can do so unilaterally) to the Hague Convention on Choice of Court Agreements[9], which would have the effect that the courts of the other Member States would have a duty to give effect to exclusive jurisdiction clauses, and also to judgments which have been delivered in consequence of such agreements.

34. The Hague Convention operates in the following way:

    (a) The chosen court must, in principle, hear the case (Article 5);

    (b) Any court other than the chosen court must, in principle, decline to hear the case (Article 6);

    (c) Any judgment of the chosen court must be recognised and enforced in other contracting states, unless there is a good reason to refuse recognition or enforcement (Article 8).

[9] Adopted on 30 June 2005 by the Hague Conference on Private International Law

35. Although the UK is party to the Hague Convention at the moment, that is because it is a Member State of the EU, which has ratified the Hague Convention on behalf of the Member States (apart from Denmark)[10]. Accordingly, the UK will not automatically continue to be a party to the Hague Convention after Brexit, but will have to ratify on its own behalf.

36. The states which have to date ratified the Hague Convention include only Mexico and Singapore, in addition to the Member States of the EU (excluding Denmark). The Hague Convention came into force as between the Member States of the EU (except Denmark) and Mexico on 1 October 2015, and between those states and Singapore on 1 October 2016.

37. The fact that the EU is a signatory means that if the UK were to ratify the Hague Convention, a judgment given by an English court which had jurisdiction on the basis of an exclusive jurisdiction clause would be enforceable in all Member States (apart from Denmark). In addition, the US, Ukraine and also recently China (September 2017) and Montenegro (October 2017) have signed but not ratified the Hague Convention; the accession of the UK as a ratifying state might persuade those states to ratify the Hague Convention also.

38. However, there are four important limitations with regard to the Hague Convention.

39. First, the Hague Convention only assists if the jurisdiction clause is an exclusive jurisdiction clause, i.e. a clause which gives jurisdiction only to the nominated court (which must be the court of a contracting state[11]). It does not therefore apply to non-exclusive jurisdiction clauses (under which the parties agree that the courts of one state have jurisdiction, but not to the exclusion of any other court which might otherwise have jurisdiction), or asymmetric jurisdiction clauses (which take effect as an exclusive jurisdiction clause if proceedings are commenced by one party only – typically the borrower in

[10] The EU signed the Hague Convention on 1 April 2009 and deposited its instrument of acceptance on 11 June 2015.
[11] See the definition of "*exclusive choice of court agreement*" in Article 3(a).

finance agreements – but not if commenced by the other party or parties to the contract).[12]

40. Second, it only applies prospectively: Article 16 of the Hague Convention provides that the Convention applies to exclusive jurisdiction agreements made after the Convention came into force for the chosen state, and that it does not apply to such agreements made before the chosen state became a party to the Convention. One option would be for parties with existing contracts to restate their contracts immediately after the UK accedes to the Hague Convention, but that is cumbersome and unlikely to happen in practice. Alternatively, there may be an available argument to the effect that, because the EU has ratified the Convention for all of the Member States, including at present the UK, the Convention is already in force in the UK.

41. Third, there is the risk of a "gap". Article 31 of the Hague Convention provides that the Convention shall enter into force three months after the deposit of the relevant instrument of ratification. But Article 16 provides, as noted above, that the Convention will apply only to exclusive jurisdiction agreements made after the Convention came into force for the chosen State. Accordingly there is a risk of a three month "gap" during which the Hague Convention would have no applicability. One possibility would be for the UK to deposit the relevant instrument of ratification three months before the date on which it would leave the scope of the Recast Regulation – but this would require the agreement of the EU (which otherwise has exclusive competence in this area until the UK leaves the EU).

42. Fourth, and unlike the Recast Regulation, the enforcement provisions of the Hague Convention apply only to final judgments, and not to "*interim measures of protection*" (Article 7). The Hague Convention neither requires nor precludes the grant or refusal of such interim relief, by any court in a

[12] In Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc [2017] EWHC 161 (Comm) Cranston J considered, *obiter*, that there were "*good arguments in my view*" that the definition of exclusive jurisdiction clauses in Article 3(a) of the Hague Convention would extend to asymmetric jurisdiction clauses. This is not the plain reading of that Article.

contracting state, but its enforcement provisions do not extend to such interim orders.

43. Joining the Hague Convention appears to be the Government's aim in the ensuing negotiations: see paragraph 22 of the Government's paper dated 22 August 2017, *Providing a Cross-Border Civil Judicial Cooperation Framework: a Future Partnership Paper*:

> 22. It is our intention to continue to be a leading member in the Hague Conference and to participate in those Hague Conventions to which we are already a party and those which we currently participate in by virtue of our membership of the EU. Similarly, we will seek to continue to participate in the Lugano Convention that, by virtue of our membership of the EU, forms the basis for the UK's civil judicial cooperation with Norway, Iceland and Switzerland.

Reverting to the common law rules

44. In default of a new bespoke agreement, the UK can revert to the common law rules.

45. Unlike the position with goods and services, which require an agreement in order to supply those goods and services from one state into another state (whether that be under a bilateral agreement between those states or under WTO rules to which both states are party), no such agreement needs to be in place with regard to jurisdictional rules. The English court can create, apply and enforce its own jurisdictional rules without the need for the agreement of any other state. Prior to the Brussels Convention, the common law jurisdictional rules applied to all cases with defendants domiciled outside the UK, and they continue to apply to the (vast majority of) defendants domiciled outside the remaining Member States. Moreover, one advantage of the common law rules is that unlike the European instruments such as the Recast Brussels Regulation, which are cumbersome to amend, the common law rules can easily be amended to meet changing needs.

46. But in other areas, agreement is required: the UK cannot unilaterally adopt rules which render English judgments entitled to recognition and enforcement

in the remaining Member States, nor can it unilaterally prevent parallel litigation in the UK and the remaining Member States.

47. The essential question is whether the common law jurisdictional rules can fill the gap left by the Recast Brussels Regulation, so far as concerns jurisdictional issues with the remaining Member States. Or, to put it another way, whether in light of the availability of the common law rules, no (bespoke) deal is better than a bad deal.

48. A number of points may be made in this regard.

(a) The common law rules would have the effect of increasing the jurisdictional reach of the English court. At present, unless one of the exceptions in the Recast Brussels Regulation applies, it is impossible to bring a defendant domiciled in another Member State before the English court. That is because of the fundamental position afforded to domicile. If the English court were no longer bound by those rules, it would more easily be able to bring defendants domiciled in other Member States before the English court. Conversely, of course, an English defendant would lose the jurisdictional privileges of a defendant domiciled in an EU Member State.

(b) Under the common law rules, an additional defendant can be brought before the English court regardless of the source of the English court's jurisdiction over the existing defendants, whereas under the Recast Brussels Regulation the English court must have jurisdiction on the basis of domicile of one of the existing defendants.

(c) Another effect of the English court being outside the scope of the Recast Brussels Regulation is that there will be no need for the English court to wait for a foreign court to decide on its own

jurisdiction, in circumstances where it is plain that the foreign court does not have jurisdiction. The "Italian torpedo" will be no more.

(d) So far as the enforcement of judgments is concerned, it is important to appreciate that before one considers enforcement in another State, an English judgment always remains enforceable in England. Having an unsatisfied English judgment is not something which many commercial entities would regard with equanimity.

(e) However, reverting to common law rules would mean that a judgment debtor sued on a judgment emanating from one of the remaining Member States could resist enforcement in England on wider grounds than are presently available under the Recast Brussels Regulation, e.g. that the foreign court did not have jurisdiction.

(f) As regards enforcement of judgments abroad, there would be no element of reciprocity: the ability of a judgment creditor under an English judgment to enforce that judgment in a Member State would be dependent on the law of that Member State.

(g) But reverting to the common law rules does not mean that an English judgment cannot be enforced within the Member States; it could be enforced under the relevant provisions of local law. Further, the UK still has bilateral treaties with six countries: Austria, Belgium, France, Germany, Italy and the Netherlands[13]. Those treaties were not abrogated or discontinued by the entry into force of the Brussels Convention or the Recast Brussels Regulation and they remain in effect.[14] It may well be the case that enforcement in those six countries alone will meet the needs of the vast majority of commercial disputes.

[13] See *Dicey, Morris & Collins on the Conflict of Laws*, 4th Cumulative Supplement to 15th Edition, Preface, page ix)

[14] Cf the Recast Brussels Regulation which superseded and replaced the Brussels Convention.

(h) Being outside the scope of the Recast Brussels Regulation might make an English judgment (and thus the English court as a place to litigate) more attractive – because the English court could give more aid to a litigant seeking to enforce that judgment abroad. The effect of the rules contained within the Recast Brussel Regulation is that the enforcement of a judgment of the court of a Member State in the courts of another Member State falls within the exclusive jurisdiction of the courts of the second Member State. Accordingly, once the UK is outside the scope of the Recast Brussels Regulation there will be no limitation on the orders which an English court can make in support of the enforcement of its own judgment in another Member State. This might make the English court more attractive to litigants because its powers to give orders in support of the enforcement of its judgments will be unconstrained – the English court could assist a successful litigant with a more aggressive enforcement abroad of its judgments and orders than it is presently able to do.

Conclusion

49. The main advantages of a bespoke agreement are that it prevents a clash of jurisdictions, by setting out rules which prevent more than one court having jurisdiction over a dispute at any one time, and that it provides for more streamlined rules of enforcement. The reciprocal nature of a bespoke agreement means that it can cater for cases where more than one court has jurisdiction in a way which purely national jurisdictional and enforcement rules, such as those of the common law, cannot replicate. For those reasons, a new bespoke agreement or treaty would be the preferable solution.

50. However, there is no reason to conclude that reverting to the common law rules, in the absence of such new agreement or treaty, would be an irredeemably bad option. Indeed, as set out above, there are several ways in which the common law rules might be regarded as preferable to those found in the Recast Brussels Regulation. Nor are there sound reasons to conclude that,

in the absence of a new agreement or treaty, London's position as an international centre for dispute resolution would be under any more threat than it already is – although those threats come mainly from international arbitration and new litigation centres such as the Singapore International Commercial Court, rather than from European courts such as Paris or Frankfurt.

51. As the former Lord Chief Justice of England and Wales, Lord Thomas, has said:

> "*In some quarters it has even been suggested that Brexit makes the law of the UK uncertain. This is all quite wrong. Brexit will have no effect on London's key strengths*."