What does Brexit mean for the Brussels regime?

Sara Masters QC
Belinda McRae

21 September 2016

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Part I: Choice of law – Contract and Tort

Sara Masters QC

Current position – Contract

- **Rome I Regulation (Regulation (EC) 593/2008)**
  - Replaced the Rome Convention 1980 (implemented by the Contracts (Applicable Law) Act 1990)
  - Applies to contracts concluded after 17 December 2009
  - In absence of express/implied choice of law, the general rule (Article 4): law of country of habitual residence of the party required "to effect the characteristic performance" of the contract
  - NB: Certain matters are excluded including "arbitration agreements and agreements on the choice of courts"

Current position – Tort

- **Rome II Regulation (Regulation (EC) 864/2007)**
  - Applies from 11 January 2009
  - The general rule (Article 4): law of country in which damage occurs
  - It also governs choice of law for some restitutionary/quasi-contract claims (unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*).
  - It does not cover claims for defamation/libel, which are governed by the common law. The rule of double actionability still applies.

Default position – Contract

- Effect of Article 50(3) TFEU: Rome I Regulation would no longer apply once the withdrawal agreement is in force or the negotiating period has expired (whichever occurs first)
- A return to the common law and the 1990 Act?
- Would Rome I Convention automatically revive? See 1990 Act and Article 24 of Rome I Regulation:

> *"This Regulation shall replace the Rome Convention in the Member States except as regards the territories of the Member States which fall within the territorial scope of that Convention and to which this Regulation does not apply pursuant to Article 299."*

Default position – Tort

- Effect of Article 50(3) TFEU on Rome II – as before
- No prior Convention
- Return to 1995 Private International Law (Miscellaneous Provisions) Act
- Save for where double actionability still applies (defamation and libel)

Options post-Brexit – Contract and Tort

1. Adopt Rome I and Rome II Regulations as part of UK domestic legislation
2. Negotiate separate bilateral and multilateral agreements
3. Return to the pre-existing position

Option 1 – Adopt Rome I and Rome II

- Unlike the Brussels regime where reciprocity is required, we could simply pass an Act of Parliament applying Rome I and II by statute
- **Advantages**
  - Legal certainty and continuity
  - The UK could modify the content as it wished
  - The CJEU would no longer have role to play in interpretation

Option 1 – Adopt Rome I and Rome II

- **Disadvantages**
  - No possibility of reference to the CJEU
  - Risk of diverging application between the UK and EU Member States

Option 2 – New bilateral/multilateral conventions

- Probably not viable:
  - No existing general multilateral conventions on choice of law
  - No possibility of bilateral conventions between the UK and separate EU Member States, as the EU has exclusive competence
  - No advantage to a bilateral treaty between the EU and the UK

Option 3– Return to pre-existing position

- **Contract**
  - Return to the 1990 Act implementing the Rome I Convention
  - Would lose the innovations and reforms introduced by the Rome I Regulation
    - Article 3: Express/implied choice of law
    - Article 4: Further rules governing choice of law in absence of choice
    - Article 9(1): Definition of "overriding mandatory provisions"
    - Article 9(3): Effect of mandatory provisions in country where they are to be performed

Option 3– Return to pre-existing position

- **Tort**
  - Return to 1995 Act (and double actionability where Act does not apply)
  - Rules in 1995 Act are very different from Rome II:
    - The general rule in Rome II (place where damage occurred) vs the general rule in the 1995 Act (place where events constituting tort occurred)
  - Parties would lose right to choose law applicable to non-contractual obligations
  - Possibility of dépeçage
  - Some areas covered by Rome II are not covered by 1995 Act (e.g. unjust enrichment). Return to the common law?

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Part II: Jurisdiction and judgments

Belinda McRae

Possible alternatives

1. The **Recast** Regulation by agreement
2. The **Lugano** Convention 2007
3. The **Hague** Convention(s)
4. The **revival** of bilateral/ multilateral Conventions (i.e., the Brussels Convention, the 1988 Lugano Convention and/or bilateral enforcement conventions via the 1933 Act)
5. The **common law**

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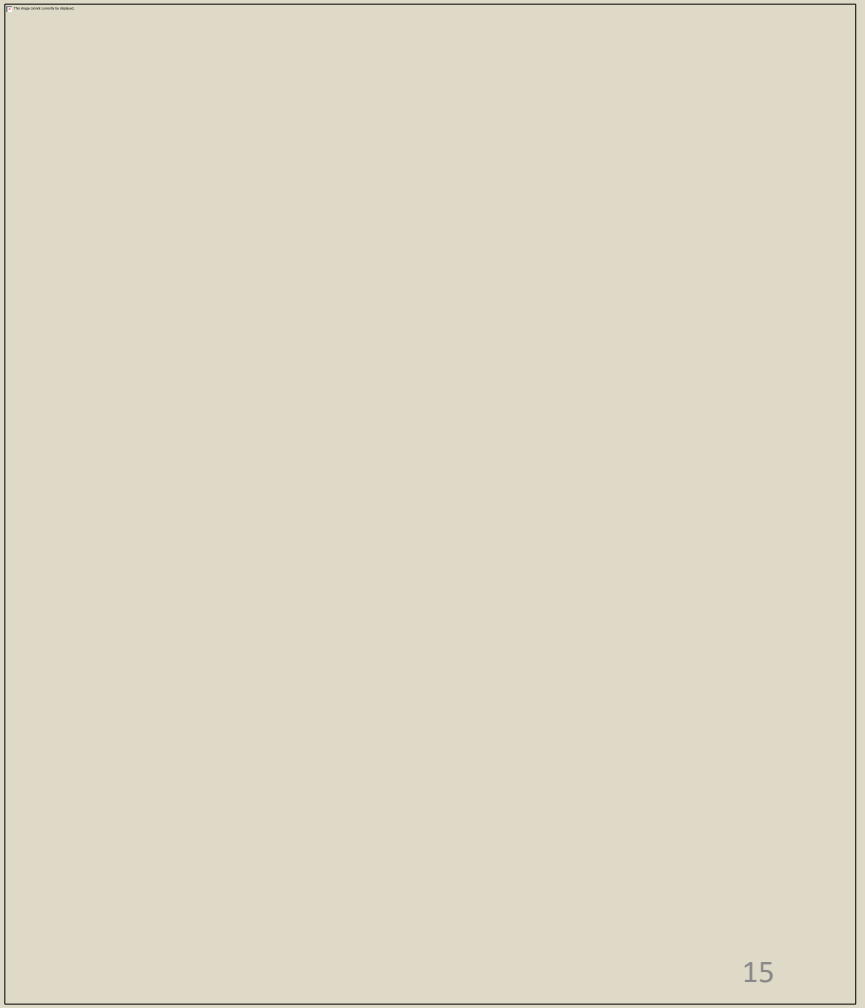
Option 1: Recast Regulation by agreement

Proposal:
To maintain the application of the Recast Regulation by agreement, or to agree an equivalent instrument (similar to **Denmark**)

1. EU-UK Agreement applying Reg (EU) No 1215/2012



Option 1: Recast Regulation by agreement

Benefits:

1. The UK could benefit from the **same rules**, based on the uniform allocation of jurisdiction and the straightforward enforcement of judgments

2. Minimise **uncertainty** as to the applicable regime and associated litigation

3. Avoid a return to **varying domestic law** in EU states

4. A **template** already exists: the EC-Denmark Agreement

5. So, too, does the **domestic legal framework**

6. The agreement could be updated by reference to take into account **future reform** (like the EC-Denmark Agreement)

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Option 1: Recast Regulation by agreement

Disadvantages:

1. Agreement from the **EU** is required
2. Lack of **participation** in future reform (NB: termination threat)
3. Limitation on entering into **future agreements** (NB: Hague Convention?)
4. Relationship with the **CJEU**: How to make a reference as a non-Member State? Obligation to "take due account"?

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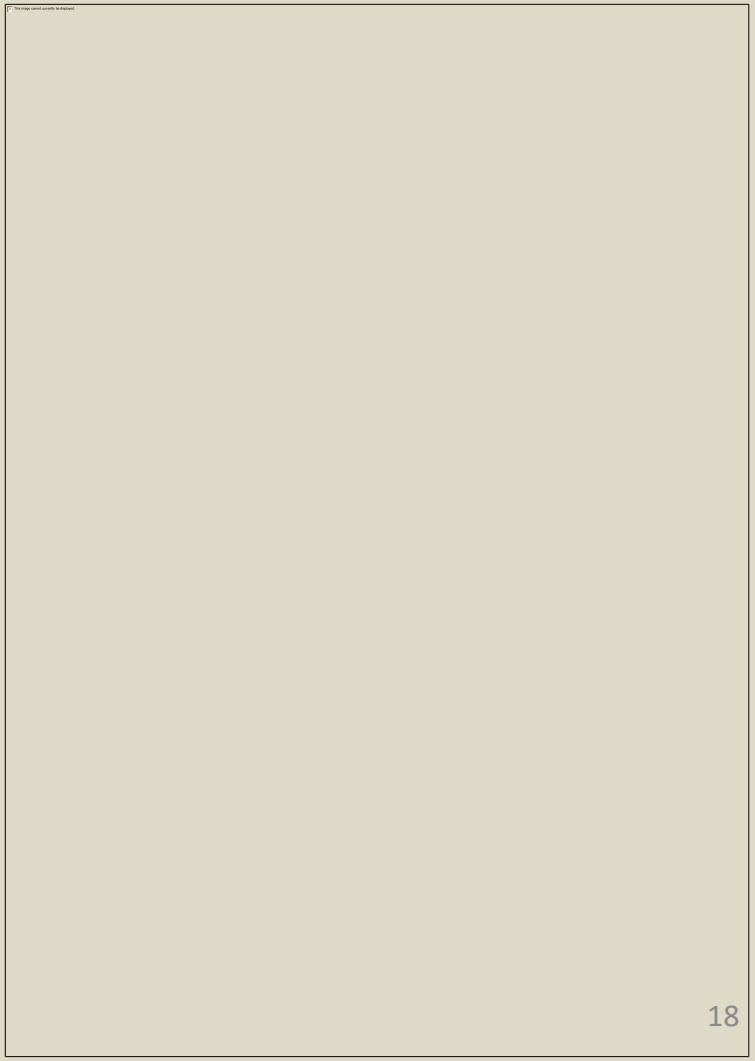
Option 2: The Lugano Convention 2007

2. Lugano Convention, L339, 21/12/2007



Proposal:

To sign and ratify the Lugano Convention 2007, alongside Norway, Switzerland, Iceland, Denmark and the EC

Option 2: The Lugano Convention 2007

Advantages:

1. Continuing the present regime: **certainty** and **predictability**

2. Convention is theoretically capable of **immediate signature** post-withdrawal, if the consent of Contracting States is obtained in advance

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Option 2: The Lugano Convention 2007

Principal difficulty:
it would be a backward step from the Recast Regulation

- Lugano was unaffected by the Recast Regulation (Article 73(1), RR)
- Instead, it requires revision (Article 76, LC), but this is presently unlikely (see Standing Committee statement on 25/9/13):

> "At its second meeting (25 September 2013), the Standing Committee on the LugC discussed the possible modification of the revised Lugano Convention (LugC) to bring it line with the new version of the Brussels I Regulation (1215/2012). The Standing Committee **made no recommendation on the possible amendment of the Lugano Convention and did not decide on any further steps**. In addition, it was discussed whether an amendment of the Lugano Convention was necessary in connection with the planned introduction of the European patent with unitary effect and the Unified Patent Court. Here the Standing committee decided to wait for the results of further investigations into the necessity of an amendment, and to consider the question again if so required."

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Option 2: The Lugano Convention 2007

The 5 key changes in the Recast Regulation that would be lost:

1. Clarification of the arbitration exception (Recital 12)

2. Changes to the rules relating to jurisdiction agreements – including that parties need not be domiciled in a Regulation state (Article 25(1))

3. An exception to the *lis pendens* provisions where there is an exclusive jurisdiction clause, in order to prevent the 'Italian torpedo' (Article 31(2))

4. New *lis pendens* rules allowing a discretion to stay proceedings in favour of proceedings pending before the courts of a non-Regulation state (Articles 33 and 34)

5. Abolition of *exequatur* to simplify enforcement (Article 39)

Option 2: The Lugano Convention 2007

Further difficulties:

1. The **unanimous agreement** of the Contracting Parties is required (for a non-EFTA State)

2. The UK must submit **specific information** regarding its judicial system and laws: what about any inconsistencies between EU and UK law?

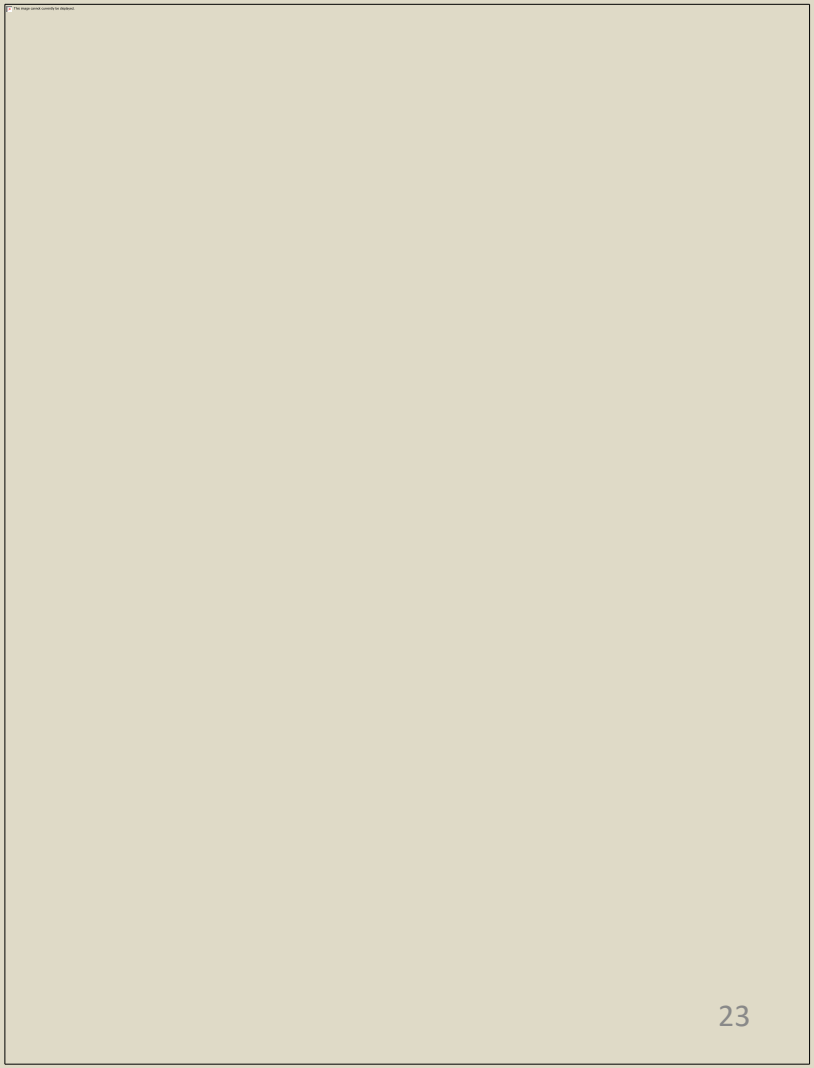
3. The relationship with the **CJEU** (NB: Protocol No. 2 – "pay due account")
    - Only an EU state may refer a question to the CJEU
    - The UK could make written submissions in cases concerning it

Option 3: Alternative treaty

Proposal:
To sign and ratify the Hague Convention on Choice of Court Agreements 2005

NB: Recall the EU's exclusive competence

3. Hague Convention



Option 3: Alternative treaty

Benefits:

1. The **EU** has already acceded to it (except Denmark)
2. The Convention is open to signature by any State, so **no need for consent**
3. It has already been **implemented** in the UK
4. There is no **CJEU/EFTA Court** equivalent

Difficulties:

1. Applies only to **exclusive jurisdiction agreements**
2. Applies only in the **territory** of its few Contracting States, so not yet a global mechanism (i.e., EU, Mexico and shortly Singapore; but US/Ukraine have signed)
3. It has a more cumbersome **recognition/enforcement** regime
4. Difficulties with the **transitional** period?

Option 3: Alternative treaty

Proposal:
A new Hague Convention on Recognition and Enforcement of Judgments?

- New Hague Convention is presently being negotiated by the Hague Conference on Private International Law
- First meeting of Special Commission was from 1-9 June 2016; second meeting in February 2017
- Preliminary Draft Convention now available

Watch this space!

Option 4: Revived Conventions?

Brussels Convention

- The UK is a party to the Convention in its own right (but limited number of parties)
- It is still in force: it applies to territories unaffected by the 2001 Reg (e.g. Aruba)
- Article 68 of the 2001 Reg provides that it shall "**supersede**" the Convention: what does that mean?
- What effect does that have under the VCLT? Is it an **implied termination**?
  - NB: Art 59 of the VCLT deals only with "**later treaties**"
- Possibility of UK's withdrawal by consent: Art 54

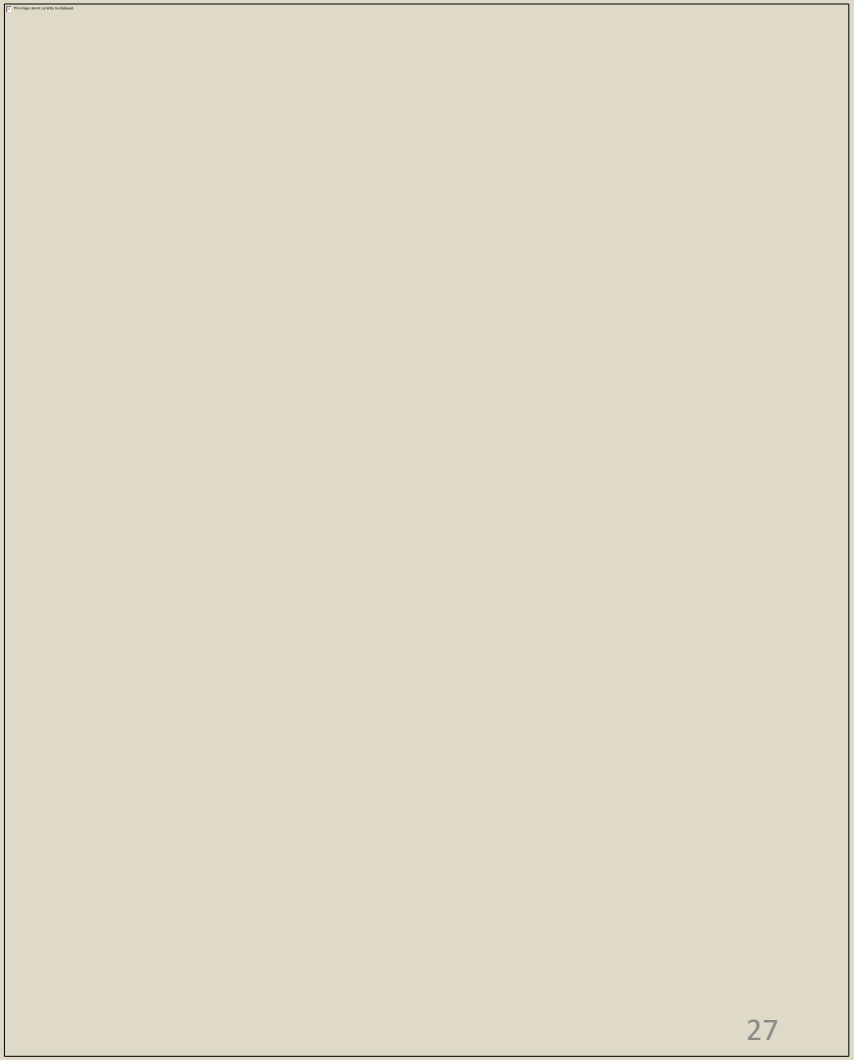
1988 Lugano Convention?

- Same argument – but more likely to be terminated by 2007 Lugano Convention

Option 4: Revived Conventions?

Bilateral enforcement conventions

- **6** bilateral enforcement conventions with **EU states** (France, Belgium, Germany, Austria, Italy, Netherlands), plus one with **Norway**
- Effect via the the **Foreign Judgments (Reciprocal Enforcement) Act 1933**
- Did Art 69 of the Recast Reg **impliedly terminate** the EU bilateral conventions (or Art 65 of the Lugano Convention 2007 for Norway)?
  - NB: UK's lists included those conventions, so presently suspended



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Option 5: The common law

- This could be done by default, or by specific legislation.
- It is a **radically different regime** that has not been applied in this context in nearly 30 years.
- A return to the common law is less desirable and less likely:
  - **Uncertainty and confusion** involved in returning to previous regime
  - Greater **cost**
  - **Enforcement** difficulties
- Revival of the anti-suit injunction?

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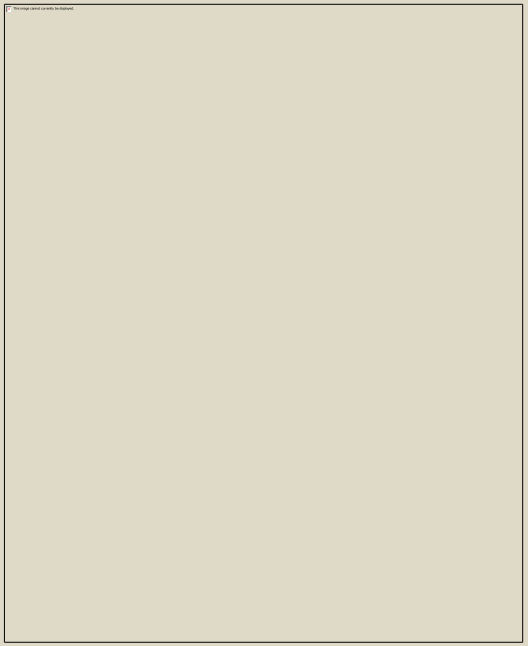
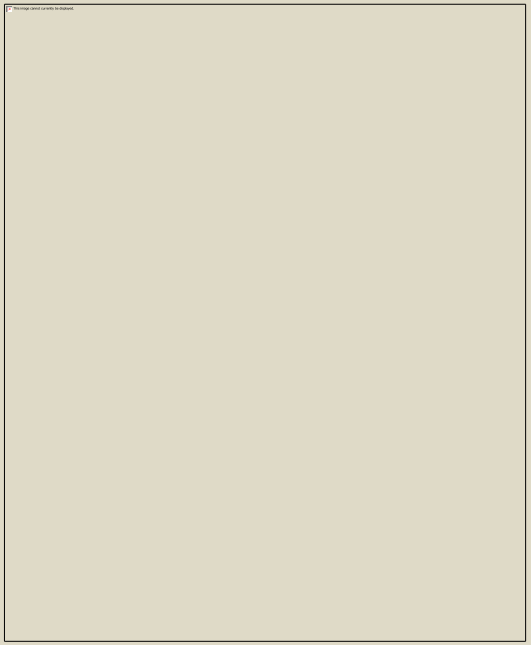
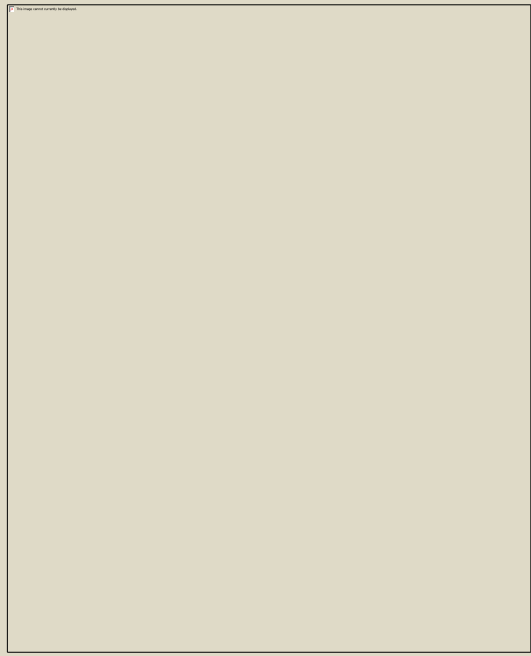
Conclusion







What next?

- EU-UK-Denmark agreement
- Lugano Convention 2007
- Hague Convention 2005

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Part III: Jurisdiction and choice of law clauses

Sara Masters QC

Jurisdiction clauses

- Currently governed by Article 25 of the Recast Regulation
- Post Brexit, there are two central concerns:

1. Will English jurisdiction clauses be respected by EU/EFTA Courts?
2. Will English judgments be recognised and enforced in EU/EFTA States?

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Enforcement of English jurisdiction clauses

- Optimum solution: EU-UK-Denmark agreement, Lugano Convention 2007 and Hague Convention 2005 adopted (together with suitable transitional arrangements)

- But, until solution is worked out, uncertainties remain, particularly as to potential impact on medium/long-term contracts

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Enforcement of English jurisdiction clauses

- But if the post-Brexit solution does not include the Brussels/Lugano/Hague regime, the UK will become a "third state"

- There are a number of approaches that the EU Courts may take:
  - Impact of Article 33/34 of Recast Regulation – discretion to stay in favour of non EU Courts
  - Possible reflexive effect of Article 25 – *Plaza BV v Law Debenture Trust Corp* [2015] EWHC 43 (Ch)
  - Apply own domestic law on validity of jurisdiction clauses
  - If an EU Court has jurisdiction under Article 4, it may refuse to enforce jurisdiction clause on basis of *Owusu v Jackson* (C-281/02)
  - NB: Article 46 MIFIR – firm from third state must "*offer to submit any disputes relating to those services or activities to the jurisdiction of a court or arbitral tribunal in a Member State*"

Recognition of English judgments

- Optimum solution as before: EU-UK-Denmark agreement, Lugano Convention 2007 and Hague Convention 2005 (together with suitable transitional arrangements)

- If not, the UK becomes a "third state" and recognition/enforcement is a question of domestic national law (subject to possible "revival" of Brussels/Lugano/bilateral treaties)

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Choice of law

- Even if Rome I and Rome II are not adopted under English domestic law, the universality of Rome I and Rome II means that EU States are obliged to give effect to English choice of law – Article 3(1), Rome I and Article 14, Rome II