I INTRODUCTION

On 23 June 2016, the people of the UK were asked whether they believed their country should remain a member of the European Union or leave. A majority (51.9 per cent) voted to leave. The UK government immediately committed to giving effect to the referendum’s result. It indicated that it would do so by following the process set out in Article 50 of the Treaty on European Union; the Prime Minister said, in October 2016, that formal notice of the UK’s intention to leave will be delivered to the European Council before the end of March 2017.

Various claimants subsequently challenged the authority of ministers unilaterally to issue a notification under Article 50 and, on 24 January 2017, the Supreme Court agreed, holding by a majority of eight to three that the government may only act under the authority of an Act of Parliament. Two days after the Supreme Court’s ruling, a short bill was introduced in the House of Commons that would grant the government the necessary authority. The government’s intention is to secure passage of the bill in good time to allow it to make a notification under Article 50 in accordance with the timetable originally set out by the Prime Minister.

Once notice has been given, the UK will leave the EU upon the earlier of a withdrawal agreement entering into force or the second anniversary of the notification. In practice, that means that the UK is likely to remain a member of the EU until at least March 2019.

Much of the law that underpins the UK’s dispute resolution architecture is, directly or indirectly, European in origin. In theory, all of that law (at least to the extent it is of direct effect) will cease to apply in the UK when it leaves the EU. To mitigate such legal upheaval, the government has said it will introduce legislation (a ‘Great Repeal Act’) that would convert EU law in force at the time of Britain’s exit into domestic law, although it acknowledges that

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this will not be possible or practical in all areas. In practice, and notwithstanding the legal and political challenges that Brexit will present, there are good reasons to suppose that, in many of the areas considered below, the post-Brexit legal landscape will be more or less similar to the present.

In this special chapter, we consider the potential implications of Brexit on the legal framework relating to:

- the determination of governing law;
- the jurisdiction of the courts over disputes;
- the cross-border enforcement of judgments; and
- arbitration.

We do so by setting out briefly the law as it currently stands in each of these four areas, discussing the leading options for a post-Brexit framework, and the practical and commercial implications of these changes.

II GOVERNING LAW

i The present position

The governing law of a contract or a dispute relating to a non-contractual obligation is determined according to EU rules.

**Contract**

The Rome I Regulation determines the governing law of a contract. Rome I has ‘direct effect’; that means that it operates in and binds the UK (and the other Member States) automatically, without the need for Member States to pass their own implementing legislation.

Where a contract was entered into before 17 December 2009, the Rome Convention applies in the determination of its governing law. The intent and content of the Convention are broadly similar to Rome I, but its legal character is different and it does not have direct effect. Instead it was implemented in the UK by means of the Contracts (Applicable Law) Act 1990.

The cornerstone of Rome I (and of the Rome Convention) is party autonomy: the parties are free to choose the law they wish to govern their contractual obligations. This default rule is subject to various exceptions that are intended to protect the weaker party in certain types of contracts (for example, contracts for the carriage of passengers, consumer contracts, employment contracts and insurance contracts) and to respect public policy imperatives in the law of the forum (such that, where the parties have chosen one country’s law to govern their contract but all the other elements of the situation at the time they made that choice point to a different country, certain mandatory provisions of that country’s law may be applicable).

Where the parties have not made an express choice of law in their contract, Rome I sets out how it should be determined. In addition to the overriding rules described above, various other situations are catered for. For example, in a contract for the sale of goods, the governing law shall be that of the country where the seller has his habitual residence. And in a contract for the provision of services, the governing law shall be that of the country in which the service provider has his or her habitual residence.
Importantly, Rome I is of ‘universal application’: a Member State court is bound to apply whichever law Rome I dictates should apply in the particular circumstances; it is irrelevant whether that law is or is not the law of a Member State.

**Non-contractual obligations**

The Rome II Regulation provides for the determination of the governing law of non-contractual obligations. It has been in force across the EU since 11 January 2009 in respect of events giving rise to damage since that date; like Rome I, it has direct effect in the Member States.

Rome II allows parties to expressly agree on a law to govern their non-contractual obligations. That agreement can be made either before or after the happening of an event that gives rise to damage. In the absence of such agreement, the default rule – where the non-contractual obligation is tortious – is that the applicable law shall be that of the country where the damage occurred. Like Rome I, a court must apply whichever law the application of Rome II specifies, whether or not that law is the law of a Member State.

**ii The effect of Brexit and options for a future framework**

Unless some transitional or other agreement is reached between the UK and the EU, Rome I and Rome II will cease to have effect at the moment of the UK’s withdrawal from the EU. Post-Brexit, the most likely options for the UK are as follows.

**Maintain the status quo by transposing Rome I and Rome II into domestic UK law**

This option has the singular virtue of being commercially advantageous and legally straightforward; it appears to be the government’s preferred option at the moment, at least in that it is capable of implementation in the context of the government’s proposed ‘Great Repeal Act’. It is commercially advantageous because it would allow the seamless continuation of a regime that is familiar to commercial parties, lawyers and judges and that has, for the most part, been considered consistent with the historic approach of English law to these issues. The notable exception to that is Rome II, which (as set out below in ‘Revert to the pre-Rome I and Rome II position’) is somewhat different from the English law it replaced. Even here, though, it is by no means clear that a reversion to the pre-existing position would be preferable; the benefits of certainty, structure and continuity may be thought to trump the potential advantages of disinterring the previous system.

The transposition of Rome I and Rome II into UK law would preserve the effect of the current regime – in both the UK and the EU – without the need for any new or separate agreement between the UK and the EU. This is because, as already noted, it is a feature of the Rome Regulations that Member State courts must apply whichever law an application of the rules specifies – regardless of whether that law is the law of a Member State. Therefore, continuing Member State courts (applying the Rome Regulations) and English courts (applying a domesticated version of the Rome Regulations) would continue to reach the same conclusions on applicable law as they do today.

However, transposition is not without potential problems. Most notably, it would be necessary to specify how the English courts should construe Rome I and Rome II in their transposed form. As EU instruments, the CJEU is the final arbiter for Member States of their meaning and interpretation. The CJEU’s rulings are made in response to references from the courts of Member States, which are then bound to apply its jurisprudence. This cross-border uniformity of application is one of the Rome regime’s attractions for commercial parties. The question arises of whether the UK would wish to continue to be bound by CJEU
jurisprudence and even to retain a right to refer questions to the CJEU. It may be that, for a post-Brexit UK, the submission to the CJEU implicit in such a step would be politically unacceptable, constitutionally anomalous or both.

However, the 2007 Lugano Convention (see Section III, infra) may provide a model for a workable compromise. A protocol to the convention seeks to ensure its uniform interpretation across all the contracting states while also respecting the sovereignty of the European Free Trade Association (EFTA) states which, along with the EU, are parties to it. The protocol provides that any EFTA state court applying and interpreting the convention shall pay due account to the principles laid down by any relevant decision rendered by the courts of the other contracting parties (including the CJEU). It also establishes information-sharing systems to facilitate this homogeneity of approach.

**Reversion to the pre-Rome I and Rome II position**
The UK could revert to the legal position that existed before Rome I and Rome II. As noted above, before Rome I came into force, the Rome Convention, as implemented in the Contracts (Applicable Law) Act 1990 (the 1990 Act), had effect. Before Rome II came into force, the position for non-contractual obligations was determined in accordance with Part III of the Private International Law (Miscellaneous Provisions) Act 1995 (the 1995 Act). (The 1995 Act still has effect in respect of certain residual categories that fall outside the scope of Rome II.)

It is arguable that the 1990 Act and the 1995 Act, both of which are still on the statute book, would fill the gap left by Rome I and Rome II respectively (although it should be noted that this is a matter of some contention, particularly as regards the 1990 Act).

However, even if technically feasible, there are various issues with a reversion to the old law. As regards contracts, whether or not the UK seeks to fall back on the Rome Convention (via the 1990 Act), the rest of the EU will not. Absent some strong countervailing reason for preferring the Rome Convention, it is probably commercially undesirable that the UK should revert to a mechanism for the determination of governing law that is similar to, but not quite the same as, the regime in force elsewhere in the EU. In addition, the question of which court is to have primacy as arbiter of the Rome Convention arises. The issue is essentially the same as with Rome I and Rome II: at present, the CJEU is that arbiter (and the 1990 Act makes provision for this), but to continue this arrangement might be politically difficult. A compromise arrangement that better respected national sovereignty, of the kind discussed in Section II.ii. ‘Maintain the status quo by transposing Rome I and Rome II into domestic UK law’, supra, might be achievable but it would of course require negotiation and agreement between the UK and the EU.

As regards non-contractual obligations, the issues are more legally (as opposed to constitutionally) substantive. There are important differences between Rome II and the 1995 Act. Two are particularly significant, and it is not clear that the position under the 1995 Act is preferable, at least when set against the benefits of continuity, structure and certainty that the more prescriptive approach of Rome II has brought about over the past seven years:

a Under the 1995 Act, the applicable law is that of the place where the event constituting the tort occurred, whereas under Rome II it is the law of the place where the damage occurred – the two will often be different.

b Under Rome II, the parties can choose, after the event, which law they wish to govern their dispute. That is not possible under the 1995 Act.
iii Practical implications

An English choice of law clause in a contract will be as valid post-Brexit as it is today. Courts of the remaining EU states will continue to apply Rome I which, as already noted, generally respects the choice of law made by the parties. Even where other rules in Rome I are engaged, they are blind to the country the laws of which their application prescribes. In short, whether or not the UK is in or outside the EU will make no difference to the operation of Rome I.

Meanwhile, an English court is very likely to continue to uphold an English choice of law clause. It will do so either because the current EU law is domesticated (as the government has said is its intention, via a Great Repeal Act) or because the UK reverts to the pre-EU legal position (which is in key respects the same as now).

Moreover, the reasons for choosing English law will remain powerful. It is a highly sophisticated, commercially-aware, flexible system of laws used regularly in international business relations.

III JURISDICTION

i The current position

EU law underpins the current position. The principal instrument relating to jurisdiction in civil and commercial matters (as well as the enforcement of resulting judgments) is the Recast Brussels Regulation (Brussels Recast). It applies to proceedings started on or after 10 January 2015 in EU Member States. Where proceedings began before that date (but after 1 March 2002), the original Brussels Regulation (Brussels I) applies. A near-duplicate of Brussels I, called the Lugano Convention, applies as between the EU and three of the EFTA states: Norway, Iceland and Switzerland.

The basic rule under these instruments is that a defendant should be sued in the European state in which he or she is domiciled. This basic rule is subject to various exceptions, the most significant of which for present purposes is found only in Brussels Recast: where the parties have reached an agreement to confer jurisdiction on a specific Member State court (or courts), only that court (or courts) may entertain proceedings; any other Member State court in which proceedings are sought to be brought must decline to hear them.

Where the European regime does not apply (e.g., because the claim in question does not relate to a civil or commercial matter; is, like arbitration, specifically excluded from its scope; or because the defendant is resident in a state not a party to the European regime), the common law rules apply. According to these rules, jurisdiction is conferred on the English court by service of process. If a person can be served (either as of right where a person is within the jurisdiction, or with the permission of the court where the person is outside the jurisdiction), then the court may (not must – cf. the European regime) hear a claim against them.

ii Post-Brexit options

Continuation of the current regime

This could only happen by agreement between the EU and the UK (and, separately, between the UK and the parties to the Lugano Convention). Of course, the UK could unilaterally domesticate the current European regime by transposing its text into UK law, but this would be of limited effect: while the English courts would continue to accept and decline
jurisdiction (and enforce judgments) as they do now, the courts of other European states would no longer be bound to respect and uphold English jurisdiction and judgments. This is because the regime is built on reciprocity that extends only to other members of the club.

The current regime is undoubtedly of great value to litigants; at a practical level, there are compelling reasons for the various parties to come to an agreement that would allow its continuation as regards the UK (although it is accepted that political considerations will also weigh in the balance). There is a precedent of sorts for such an agreement. Denmark has, since the Treaty of Maastricht, enjoyed an opt-out from EU measures in the field of justice and home affairs; where it wishes to participate in those measures, it enters into freestanding agreements with the EU. In 2005, Denmark and the EU entered into such an agreement in order to extend the effect of Brussels I to Denmark; by operation of the same agreement, Brussels Recast now also applies to Denmark. The 2005 agreement is in the nature of an international agreement, not an EU instrument. To that extent, it could provide a template for a future international agreement between the UK and the EU.

Accede to the 2005 Hague Convention on Choice of Court Agreements
The Hague Convention is a multilateral instrument pursuant to which the courts of contracting states agree to: (1) uphold exclusive jurisdiction agreements made by parties, provided the nominated court is in one of the contracting states and the agreement otherwise complies with prescribed requirements; and (2) reciprocally enforce judgments given in disputes resulting from qualifying exclusive jurisdiction agreements.

The UK is currently bound by the Hague Convention by virtue of its membership of the EU (which signed in its own right and for the Member States in 2015). When the UK ceases to be a member of the EU, it will cease to have the benefit of the Hague Convention unless the UK accedes in its own right through a relatively straightforward process that would not require the consent of the other contracting parties.

However, the Hague Convention is very different from the current European regime, and much more limited in its scope. It does not impose a comprehensive framework for the determination of jurisdiction and the enforcement of judgments: it applies only where parties have entered into a qualifying exclusive jurisdiction agreement (which probably excludes hybrid arbitration clauses and other one-sided jurisdiction clauses). It also does not extend to ‘interim measures of protection’. That means that, for example, emergency steps taken in the court of one contracting state to freeze a defendant’s assets in another contracting state pending a final judgment would not, at least under the Hague Convention, be enforceable in the state where the assets are located. Finally, it should be noted that the Hague Convention provides a defendant with more potential grounds for resisting overseas enforcement than are available under the current European regime; that could introduce an additional layer of cost and delay into cross-border enforcement proceedings.

The Convention’s geographical and temporal coverage is also limited. At present, it applies only in the Member States of the EU (excluding Denmark), Mexico and Singapore and only in respect of exclusive jurisdiction agreements entered into from 1 October 2015 (1 October 2016 for Singapore). It is not clear whether accession by the UK in its own right would give rise to a coverage ‘gap’; that might lead to different treatment of agreements relating to the UK depending on whether they were entered into during the period when the UK was a Member State or after its individual accession to the Convention.
**Accede to the 2007 Lugano Convention**

Accession to the Lugano Convention, an international agreement between the EU and three of the four EFTA states, would preserve the essentials of the current regime – in other words, a reciprocal arrangement under which English and other European courts would apply a common set of jurisdictional rules.

The Lugano Convention permits a non-EU, non-EFTA state to accede to the Convention but only where it has the unanimous consent of all the other contracting parties. Obtaining that consent could be easier said than done. Even if no objection was raised by another party, as a pure matter of logistics obtaining consents could take some time.

In addition, from a substantive point of view, the Lugano Convention is a less sophisticated instrument than Brussels Recast. This is because its terms mirror Brussels Recast’s immediate predecessor, Brussels I. Most significantly, that means Lugano does not accord exclusive jurisdiction agreements the primacy they now enjoy under Brussels Recast. Under Brussels I and Lugano, the rule is that the court before which a claim is first brought has the right to rule on its own jurisdiction, even where the parties had agreed that they wanted another court to have jurisdiction. That rule facilitated a litigation tactic whereby one party could frustrate or delay the claims of their counterparty by issuing proceedings pre-emptively in a court in which cases are known to move slowly. That tactic was commonly referred to as the ‘Italian torpedo’. The most reliable way to thwart it was to issue proceedings in the desired court before a would-be opponent had a chance to issue in a slower jurisdiction. One unfortunate side effect of this race between the parties to issue a claim in their preferred court was to limit the scope for ADR and early settlement.

**Revert to the 1967 Brussels Convention or the pre-existing common law position**

Before Brussels Recast, Brussels I and Lugano, the relevant UK statute was the Civil Jurisdiction and Judgments Act 1982 (the 1982 Act). The 1982 Act transposed into UK law the 1968 Brussels Convention and its associated instruments. Like the Rome Convention referred to above in the context of governing law, the Brussels Convention was a multilateral treaty made among members of the EU, but it was not an EU instrument per se (meaning for these purposes that it did not have direct effect – hence the need for implementation via the 1982 Act).

The 1982 Act is still in force, albeit its effect at the moment is circumscribed by the extant European regime. When the UK leaves the EU, that regime will cease to apply and, some argue, the 1982 Act will fill the gap. However, this is far from clear: others argue that the Brussels Convention was legally killed by the EU instruments that succeeded it and cannot now be revived. Alternatively or additionally, reliance on the Brussels Convention may be conditional on membership of the EU, which the UK would, of course, no longer have. If the UK were to try to revert to reliance on the Brussels Convention, disagreement on these points of interpretation could result in a reference to the CJEU. That possibility may tend to reduce the chances of the UK seeking to revive the Convention.

In any event, the Brussels Convention is a less developed and sophisticated precursor to the current regime. Renewed reliance on a regime that is commonly agreed to be inferior in its scope and operation might be considered undesirable.

A final option could be to revert to the pre-European, common law position (described in Section III.1, *supra*). The rules for effecting service are very detailed and in places archaic. Accordingly, serving a claim on a defendant can be a lengthy or difficult process, and the
complexity of the rules in this area make the issue of whether service has been validly effected prone to challenge and dispute. If service can be validly challenged then under this option so would the jurisdiction of the court.

iii Practical implications

Should parties still be agreeing English jurisdiction clauses?
The UK’s exit from the EU gives rise to two particular issues in the context of jurisdiction clauses:

a the risk that courts in remaining EU states will not respect the parties’ choice of the English courts as the forum for their disputes; and

b the risk of not being able to enforce an English court judgment in one or more of the remaining EU states.

Although these risks deserve appropriate consideration, and particular cases will turn on their own facts, there are now and will continue to be strong reasons for adopting English jurisdiction clauses.

It should be noted that the UK government’s current timetable for notification of withdrawal means the current regime will continue to apply in and to the UK until at least March 2019.

Thereafter, for the reasons noted above, any unilateral move by the UK to seek to preserve the current regime in UK law will be of limited effect, because the essence of the jurisdiction and enforcement regime is its reciprocity. Continuation of the status quo, or an approximation of it, would therefore need some kind of agreement. That would plainly be in the interests of all parties. Litigants in all Member States, not just the UK, benefit from the current regime of mutual respect for jurisdiction and enforcement, including through the ability it offers to enforce local judgments in England easily.

However, even if the UK and the EU are not able to reach agreement on such a regime (or there are delays in its agreement) there are steps the UK could take unilaterally relatively quickly that would preserve at least some of the benefits of the current system. Some or all of these steps might be pursued in parallel with negotiations with the EU in order to seek maximum stability and continuity for commercial parties. Accession to the Hague Convention is the most straightforward of these options, because it does not require the UK to secure the consent of any other party. Accession to the Lugano Convention would preserve more of the benefits of the current regime, but would require the consent of those states that are already party to the Convention.

Is there any benefit in adopting a non-exclusive jurisdiction clause?
One option for parties entering into contracts now is to consider giving the English court non-exclusive jurisdiction over disputes. That would allow each party the flexibility to choose at the appropriate time whether to sue in England or to try to sue in the courts of one of the continuing Member States of the EU. The ability to sue in an EU court instead of in England might, in theory, be useful in the event that the UK is not immediately able, post-Brexit, to secure a continuation of the current regime whereby English judgments are easily enforceable across the EU.

However, a non-exclusive jurisdiction agreement carries its own risks, which might negate its perceived benefits. Such a clause should be drafted carefully by reference to the
circumstances of the case and a clear understanding of what each party wishes to achieve. Particular issues relevant in the context of the EU and Brexit, pending certainty on the shape of a post-Brexit arrangement, are as follows:

\( a \) First of all, a party can only sue in a Member State court if that court has jurisdiction under the EU rules. In other words, a jurisdiction clause that merely confers non-exclusive jurisdiction on the English courts does not, in and of itself, automatically confer a right to sue in another Member State court.

\( b \) Second, it is in the nature of a non-exclusive jurisdiction clause that parties have a choice where to start a claim. The result might be that a party is obliged to defend proceedings in a jurisdiction it might rather have avoided – the EU rules require Member State courts to defer (in the first instance, at least) to the court first seised. With the UK outside the EU, there might be greater potential to enlist the help of the English court in resisting litigation overseas, but that would also involve extra time and cost (with no guarantee of success).

\( c \) Third, in the event that a party chose to sue in England (or was unable to sue elsewhere), the fact of the non-exclusive jurisdiction clause might impair its ability to enforce the resulting judgment outside England. That is because non-exclusive jurisdiction clauses fall outside the scope of the Hague Convention. Signatories to the Hague Convention (which include the EU and which the UK could easily and unilaterally accede to post-Brexit) agree to permit mutual enforcement of in-scope judgments. It is likely that the UK will wish to accede to the Hague Convention, if only to provide litigants with a jurisdictional safety net pending a fuller cooperation agreement with the EU.

In short, parties considering adopting a non-exclusive jurisdiction clause should consider carefully in which country the particular circumstances of their contract indicate they might need or be able to sue. Is the apparent flexibility enough to compensate for the risk of jurisdictional disputes and the possibility of not being able to sue in England (or another preferred jurisdiction)?

IV ENFORCEMENT

i Current position

EU law underpins the current position. The regime for enforcement is contained in the instruments relating to jurisdiction, which are considered in Section III, supra.

Under Brussels Recast, the judgments of Member State courts can be exported relatively quickly and easily to other Member States. Assuming certain basic conditions are met, Member State courts will recognise and enforce each other’s judgments as if they had been made domestically.

The process for enforcing a Member State court judgment in another Member State is essentially administrative. A judgment creditor obtains a standard form certificate from the court that gave the judgment and then serves this certificate, along with the judgment itself and translations, on the judgment debtor in another Member State. The judgment creditor can then enforce his or her judgment using all the tools available in the Member State of enforcement. The process is slightly more long-winded under the Lugano Convention, but nevertheless represents a considerable saving of time over the pre-existing position.
ii  Post-Brexit options

*Preserve the effect of Brussels Recast and/or accede to the Lugano Convention and/or accede to the Hague Convention*

The UK could seek to replicate, to a greater or lesser extent, the existing regime. The points made in respect of these options in Section III, *supra*, apply equally to enforcement.

*Revert to reliance on pre-existing network of bilateral treaties*

The UK has entered into bilateral treaties for the mutual recognition and enforcement of judgments with Austria, Belgium, France, Germany, Italy, the Netherlands and Norway. These treaties (and those with certain other non-European states, mostly Commonwealth territories) are given legal effect in the UK by the Foreign Judgments (Reciprocal Enforcement Act) 1933 (the 1933 Act) and related statutory instruments.

Insofar as it relates to the European countries listed above, the 1933 Act has been superseded for nearly all purposes by the current European regime. It continues to have a residual application in respect of judgments that fall outside the scope of the European regime (for instance, where a judgment is given in a claim which is not a civil and commercial matter).

In the UK, at least, a renewed wholesale reliance on the 1933 Act to enforce judgments from the European countries mentioned above should be feasible. However, ensuring reciprocal treatment of English judgments could be more problematic. The European regime was intended to supersede previous arrangements and it is not clear whether and how other European states would enforce those historic arrangements with the UK.

There are also considerable limitations to the scope and operation of the old bilateral arrangements. As well as applying only to seven of the 31 other EU and EFTA states, the regime only applies to money judgments. It is also less creditor-friendly: before a qualifying judgment can be enforced, it must first be registered in the enforcing state's courts. Even then, there is considerable scope for a judgment's registration and enforcement to be set aside, for instance on the ground that the foreign court did not, according to the rules of the enforcing court, have jurisdiction over the judgment debtor.

iii  Practical implications

*Will European courts enforce English court judgments? What steps can be taken to reduce uncertainty?*

For the moment, of course, the UK is a full member of the EU and will remain so for two years at least. Judgments obtained during that period will be fully enforceable in accordance with the current European regime. As noted in Section III.ii, *supra*, there is also considerable incentive for EU Member States to maintain the current regime post-Brexit so that their local judgments continue to be easily enforceable in the UK.

Further and in any event, the Hague Convention, should the UK become a party to it, would provide another post-Brexit means by which English judgments in disputes arising from qualifying exclusive jurisdiction agreements would continue to be enforceable in Member States.
V INTERNATIONAL ARBITRATION

i The current position
The legal framework governing international arbitrations seated in England is largely British or multilateral in derivation; the role of EU law is small.

Jurisdiction and governing law
The procedural law that governs English-seated arbitrations is the Arbitration Act 1996 (AA 1996). Section 30(1) AA 1996 provides that, unless the parties agree otherwise, an arbitral tribunal may rule on its own substantive jurisdiction.

There are three distinct areas in which governing law will fall to be determined:

a The law of the arbitration agreement. In most cases, unless the parties have expressly provided for a particular law to apply to the arbitration agreement, the governing law will be that of the contract containing the arbitration clause. Where the contract is silent on this, the law will be that of the jurisdiction most closely connected to the seat of the place where the arbitration is to be held. (Note that the Rome I Regulation – although it might dictate the same result as the close connection test – does not apply to arbitration.)

b The law of the arbitral process. This will be the law of the seat, and where the parties have not expressly identified a seat the court will determine it on the basis of the parties’ agreement and all the relevant circumstances.

c The law of the substance of the dispute. In most cases, this will be the law that the parties have by their contract selected to govern their obligations. Where the parties have adopted institutional rules, these will guide the tribunal in the event that there is no express choice of law. In the absence of a set of institutional rules or other agreement between the parties, Section 46 AA 1996 is a statutory enactment of the same principle. It states that where the parties have not made a choice, the tribunal shall apply the law determined by the conflicts of laws rules which it considers appropriate. This affords a tribunal a wide discretion, although in most cases where the seat is London it is likely that a tribunal will apply English rules. These are in the Rome I Regulation and can be applied by a tribunal in these circumstances notwithstanding the arbitration exclusion in the Regulation.

Enforcement
The UK is a party in its own right to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Sections 101 and 102 AA 1996 provide that awards made in states which are a party to the New York Convention shall be recognised in the UK as binding on the parties and shall be enforceable by means of the mechanism set out at Section 66 AA 1996.

ii The effect of Brexit
The impact of Brexit on international arbitrations seated in England and London’s position as a major international arbitration centre is likely to be minimal. The AA 1996 is a UK statute not dependent on or linked to the UK’s EU membership. The New York Convention, the mechanism for cross-border enforcement of arbitral awards, is a multilateral instrument not
linked to the EU; the UK and the other Member States are signatories to the Convention in their own right. The European regime applicable to jurisdiction and enforcement expressly excludes arbitrations from its scope.

Some argue that the legislative uncertainty that could arise in some areas of the dispute resolution framework post-Brexit should make arbitration a more popular choice for commercial parties.

### iii Practical implications

**A return of the anti-suit injunction in Europe?**

An anti-suit injunction is a device by which the English court can restrain a person over whom it has jurisdiction from bringing or continuing proceedings in a foreign court. They were classically used to prevent a party who had agreed to settle a dispute in England from breaking that promise by bringing proceedings in another country.

Anti-suit injunctions to restrain proceedings in another EU state (or signatory to the Lugano Convention) have been prohibited since 2004, when the ECJ ruled that they were inconsistent with the scheme and provisions of the Brussels Convention. Under the Convention, the ECJ explained, the courts of Member States owe each other obligations of trust; it is not for the English court to seek to deprive another state’s court of its right to decide whether or not to accept jurisdiction over a claim. That is properly a decision for the courts of each state to make in accordance with the requirements of the Convention.

All other things being equal, when the UK ceases to be a member of the EU, decisions of the CJEU will cease to bind its courts. In theory, an English court could, where it had jurisdiction over a respondent, make an order restraining him from pursuing proceedings in an EU member state where that would constitute a breach of some prior agreement.

However, in practice, there are several reasons why the English court may remain reluctant to grant this kind of relief:

**a** It is likely that the UK will wish to reach an agreement with the EU that substantially replicates the provisions of the European regime, or otherwise (and perhaps in addition) accede to the Lugano Convention or the Hague Convention. Although it is unlikely that any such agreement would place the UK under the direct jurisdiction of the CJEU, the exercise of the anti-suit jurisdiction would be inconsistent with case law and might conceivably place the UK in direct breach of whatever arrangement it negotiated with the EU.

**b** The English court’s jurisdiction to grant an anti-suit injunction is exercised *in personam*; that is to say, it is not a direct interference with a foreign court’s process, but rather a restraint on a person who is already within the English court’s jurisdiction. Where that person is abroad, jurisdiction might be contingent on obtaining permission from the English court to serve that person outside England. It may be difficult to persuade a court to exercise its discretion to permit service out in circumstances where that could be perceived by an EU court as an unwarranted interference with its jurisdiction. In other words, principles of comity might take the place of formerly applicable CJEU jurisprudence.
Should arbitration be the default dispute resolution choice for cross border contracts and transactions?

The regime governing cross-border enforcement of arbitral awards is not linked to the EU and will be unaffected by Brexit. In some circumstances, then, arbitration could offer a more certain and more appropriate dispute resolution process.

However, it is important to recognise that an arbitration clause is not a universal panacea. Parties thinking of incorporating an arbitration clause in contracts should still weigh up the relative pros and cons of choosing arbitration, both generally and for the type of disputes that may materialise under the specific contract in question. Relevant considerations might include the limited rights of appeal generally available in arbitrations, and the ability of parties to an arbitration agreement to obtain urgent relief. Parties should also consider carefully the different arbitral institutions and rules that are available to determine which may be appropriate for their circumstances.

Should parties consider including hybrid clauses providing for arbitration as well as litigation in the English courts?

A hybrid jurisdiction clause can provide for the English courts to have jurisdiction over disputes, while also giving one party the right to elect for arbitration. (Giving both parties such a right would be impracticable and would likely lead to further disputes.)

Although superficially attractive for their apparent flexibility, such clauses may in fact do little to mitigate the risks they are designed to guard against. This is because hybrid clauses are a type of one-sided jurisdiction clause: although the English courts have upheld such clauses, courts in certain EU Member States, most notably France, have found them to be unenforceable in some circumstances.

As a result, entering into such a clause creates not only the risk that the enforcement benefit of an arbitral award will be removed, as the clause underpinning the arbitration will itself be unenforceable, but also raises the prospect of additional challenges at the jurisdiction stage by competing tribunals within the EU. In the absence of a clear indication that the courts of all potentially relevant jurisdictions will uphold such a clause, they are unlikely to be suitable.