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Things fall apart: Brexit and choice of law and jurisdiction clauses.

“Turning and turning in the widening gyre

The falcon cannot hear the falconer;

Things fall apart; the centre cannot hold;

Mere anarchy is loosed upon the world,

The blood-dimmed tide is loosed, and everywhere

The ceremony of innocence is drowned;

The best lack all conviction, while the worst

Are full of passionate intensity.”

The Second Coming by W.B. Yeats

Yeats may have had the passing of millennia in mind when he wrote the Second Coming but some phrases from this first stanza seem apposite in the light of the referendum in the UK where, by a small majority of those voting, the UK is set to abandon its EU membership after forty three years.

“ Brexit means Brexit” is the now famous statement by the Prime Minister of the UK, Theresa May referring to the national referendum that was decided in favour of the UK resigning its membership of the European Union. It will be some time before we have a complete understanding of what this statement means. Those who are against the proposal to leave the EU fear, amongst other things, loss of economic advantage, a closing of minds and regret for possible damage to the EU; those in favour of leaving the EU welcome amongst other things greater economic advantage, a closing of borders and an agnosticism about the fate of the EU.

Leaving the EU will have consequences for both the UK and the EU.

Leaving the EU will lead to changes in relationships in the various sectors of the economy notably for financial services and trade. In this article we propose to examine the latter with particular emphasis on transport.

Post Brexit the UK will act in its own best interest with regard to all aspects of independence. We are led to believe that for some British people key issues in the referendum were the regulation of immigration and the reinstatement of the pre eminence of law that applies in the different legal regimes that operate within the state that is the UK. For others a serious concern is how Brexit will affect trade and clearly transport is an essential element in international trade. The UK’s Brexit negotiation team will try to secure the best position that it can achieve and in this article we will try to look at what that will need to encompass.

Some powers will be repatriated but some will continue as they currently stand because they suit the UK and others because this will form part of wider negotiations.

How will this affect the core of an international trade transaction, the contract agreement itself? When any lawyer or business executive drafts a contract they may do so in a spirit of optimism but if they are prudent they also do so in the spirit of caution; what will happen if things go wrong? Provisions will be made for dispute resolution for arbitration and for litigation. Under which system of law or to put it another way what will be the proper law of the contract?

Commonly in international commercial contracts the proper law will be expressed to be the law of England and Wales with London the venue the arbitral tribunal or the court hearing.

As providers of transport outside the UK's borders for the facilitation of international trade UK companies play only a relatively small part in the provision of ships for the carrying of goods but the UK does play a major role in the provision of maritime services more generally. London remains a major centre for litigation and arbitration for all disputes arising from commercial contracts. This comes from the traditional willingness of the English courts to hear cases involving foreign parties and this is facilitated by English choice of law and jurisdiction clauses found in these contracts. These are sometimes inserted because of a desire by the parties to have the benefit of a mature, experienced legal system and sometimes because the contract form used in the agreement itself requires it. Examples of the latter are where the contract is of insurance and this is provided by the Lloyd's of London insurance market or perhaps because the subject matter of the contract is the sale of grain and the contract is a standard one from GAFTA (the Grain and Feed Trade Association).

The English courts, (the author is a Welshman but will bow to the inevitable and follow the usual shorthand convention of describing the courts applying the law of England and Wales as the English courts) unlike the courts of other countries, have long shown a willingness to hear the disputes of parties of whatever nationality. This can be illustrated by the case of the *Soya Margareta* [1960] 1 Lloyd's Rep 675, a shipping case where the dispute itself concerned the alleged breach of a charterparty for a vessel called the *Soya Lovisa* and where the parties to the charter were Italian charterers and Swedish owners and the purpose of the charter was the carriage of cargo from US ports to Venice in Italy. It was said in the charter that it would be governed by the laws of the flag of the vessel, which was Swedish, and that any dispute be settled in London. However, an action was commenced in Italy. The case was heard in an English Admiralty court on the basis that an associate ship, (a more common term for which is a sister ship) had been arrested in an English port. The 1952 Arrest Convention allows for the arrest of associate non-involved ships provided that the arrested ship is in the same beneficial ownership as the involved ship. On the face of it there may seem that there was a greater connection between the Italian court and the substantive issues of the dispute; yet the English court was prepared (and did) hear the case.

The traditional English position is clearly set out by

Sir George Jessel MR in *Printing and Numerical Registering Co v. Sampson* (1875) LR 19 Eq 462 where he said:

"[I]f there is one thing which more than another public policy requires it that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. Therefore you have this paramount public policy to consider- that you are not lightly to interfere with this freedom of contract."

This leading case indicates the nineteenth century view of freedom of contract. Party autonomy falls in line with this i.e. that the parties to a contract are entitled to agree whatever it is that they wish provided that they are of full age and ability and that the agreement is not unlawful and that the courts should uphold their agreement. Consequently, when the parties choose the law to govern their contract that law should not be disturbed. For the cases where another court is used in preference the chosen court the English courts have developed the

technique of the granting of anti suit injunctions. These issues were considered in depth in the House of Lords by

Lord Goff of Chieveley in *Airbus Industrie GIE v. Patel* [1999] 1 AC 119. In the course of his judgment he set out some of the underlying principles of English law and indicated the difference between England and Wales (and more generally the common law world) and the civil law.

“The underlying principles

This part of the law is concerned with the resolution of clashes between jurisdictions. Two different approaches to the problem have emerged in the world today, one associated with the civil law jurisdictions of continental Europe, and the other with the common law world. Each is the fruit of a distinctive legal history, and also reflects to some extent cultural differences which are beyond the scope of an opinion such as this. On the continent of Europe, in the early days of the European Community, the essential need was seen to be to avoid any such clash between member States of the same community. A system, developed by distinguished scholars, was embodied in the Brussels Convention, under which jurisdiction is allocated on the basis of well-defined rules. This system achieves its purpose, but at a price. The price is rigidity, and rigidity can be productive of injustice. The judges of this country, who loyally enforce this system, not only between United Kingdom jurisdictions and the jurisdictions of other member States, but also as between the three jurisdictions within the United Kingdom itself, have to accept the fact that the practical results are from time to time unwelcome. This is essentially because the primary purpose of the Convention is to ensure that there shall be no clash between the jurisdictions of member States of the Community.

In the common law world, the situation is precisely the opposite. There is, so to speak, a jungle of separate, broadly based, jurisdictions all over the world. In England, for example, jurisdiction is founded on the presence of the defendant within the jurisdiction, and in certain specified (but widely drawn) circumstances on a power to serve the defendant with process outside the jurisdiction. But the potential excesses of common law jurisdictions are generally curtailed by the adoption of the principle of forum non conveniens--a self-denying ordinance under which the court will stay (or dismiss) proceedings in favour of another clearly more appropriate forum. This principle, which has no application as between states which are parties to the Brussels Convention.”

Later he went on to say:

“It is at this point that, in the present context, the jurisdiction to grant an anti-suit injunction becomes relevant. This jurisdiction has a long history, finding its origin in the grant of common injunctions by the English Court of Chancery to restrain the pursuit of proceedings in the English courts of common law, thereby establishing the superiority of equity over the common law.”

Lord Goff of Chieveley later noted that similar principles had been upheld in the common law jurisdictions of Canada, Australia and India.

In *The Angelic Grace* [1995] 1 Lloyd's Rep 87 Millett LJ held that the same principles be applied to both litigation and arbitration when deciding whether or not to grant anti suit injunctions.

“In my judgment, the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution. There have been many statements of great authority warning of the danger of giving an appearance of undue interference with the proceedings of a foreign Court. Such sensitivity to the feelings of a foreign Court has much to commend it where the injunction is sought on the ground of forum non conveniens or on the general ground that the foreign proceedings are vexatious or oppressive but where no breach of contract is involved. In the former case, great care may be needed to avoid casting doubt on the fairness or adequacy of the procedures of the foreign Court. In the later case, the question whether proceedings are vexatious or oppressive is primarily a matter for the Court before which they are pending. But in my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them.

I cannot accept the proposition that any Court would be offended by the grant of an injunction to restrain a party from invoking a jurisdiction which he had promised not to invoke and which it was its own duty to decline.

*In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced. I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause as in *Continental Bank NA v Aeakos Compania Naviera SA*, [1994] 1WLR 588. The justification for the grant of the injunction in either case is that without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The jurisdiction is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case."*

In a more recent case the issue was again considered:

Compania Sud Americana de Vapores v. Hin-Pro International Logistics Ltd [2015] 1 Lloyd's Rep 301 and [2015] 2 Lloyd's Rep 1 C.A

The case was heard by three Judges of the Court of Appeal. There was an unanimous decision with the leading judgment being given by Christopher Clarke LJ

There is a transport law relevance to this case since it was a dispute about the terms found in a bill of lading.

Compania Sud Americana de Vapores's (CSAV) bills of lading contained the following clause:

"23 Law and jurisdiction

This Bill of Lading and any claim or dispute arising hereunder shall be subject to English law and the jurisdiction of the English High Court of Justice in London. If, notwithstanding the foregoing, any proceedings are commenced in another jurisdiction, such proceeding shall be referred to ordinary courts of law. In the case of Chile, arbitrators shall not be competent to deal with any such dispute and proceedings shall be referred to the Chilean Ordinary Courts".

It was said to be common ground that, as a matter of Chilean law, the third sentence was void.

In 2012 and 2013 Hin- Pro International Logistics Ltd commenced actions in China It was argued in the English courts that this was an incorrect venue and later it was argued that it was in contempt of the English court. The Court of Appeal addressed this issue but also looked at the status of the clause in the bills of lading. Was the effect to grant exclusive jurisdiction? It was held that it did. The Rt Hon Lord Justice Christopher Clarke said:

*"First, the words "shall be subject to" are imperative and directory. They are not words which are apt simply to provide an option. That is certainly the case in relation to the applicable law and, prima facie, the same should be so in relation to jurisdiction. In *Svendborg (Svendborg v Wansa* [1997] 2 Lloyd's Rep 183) the words "In all other cases this Bill of Lading is subject to English law and jurisdiction" were held to provide for exclusive jurisdiction. The phrase "This Bill of Lading and any claim or dispute arising hereunder shall be subject to English law and jurisdiction" is, for this purpose, stronger. This is not wording which does no more than indicate consent or agreement to English jurisdiction. It is transitive in the sense that the parties agree to submit all disputes to the English court, rather than submitting themselves to its jurisdiction if that jurisdiction is invoked: see, in this respect, *Continental Bank N.A. v Aeakos Compania Naviera S.A.* [1994] 1 Lloyd's Rep. 505, where such an approach was taken in respect of a clause which read "Each of the Borrowers ... irrevocably submits to the*

jurisdiction of the English Courts"; and where Steyn LJ (as he then was) said that "it would be a surrender to formalism to require a jurisdiction clause to provide in express terms that the chosen Court is to be the exclusive forum".

Consistently with this analysis, in Konkola Copper Mines plc v Coromin [2005] 2 Lloyd's Rep 55 Colman J interpreted the words "This policy is subject to Zambian law, practice and jurisdiction", if standing alone, as signifying that all parties were to refer all disputes to the Zambian courts and not merely to consent to such jurisdiction should it be invoked. See also Austrian Lloyd Steamship Co v Gresham Life Assurance Society Ltd [1903] 1 KB 249 where an agreement to submit all disputes arising out of a contract of insurance to the jurisdiction of the courts of Budapest having jurisdiction in such matters was held by Romer LJ to be an exclusive jurisdiction agreement. He pointed out that if there had been an agreement in similar terms to submit to the decision of a particular individual there could have been no doubt that it would have amounted to an agreement to submit any dispute to the arbitration of that person."

It is clear from this that an English court will claim the right to be seised of an action even if the case involves parties which are all foreign. It is also the case that English courts may refuse to be seised of the action where there are good reasons not to do so e.g. where there are multiple actions taking place elsewhere some with parties having English jurisdiction clauses and some without. See for example *Donohue v. Armco Inc* [2002] 1 Lloyd's Rep 425. As Lord Bingham said;

"If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word "ordinarily" to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case.....In my opinion, and subject to an important qualification, the ends of justice would be best served by a single composite trial in the only forum in which a single composite trial can be procured, which is New York".

A further consideration when deciding the venue for arbitration is the effect of international convention. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, (the New York Convention) is a rare thing; a convention with near universal acceptance. It is ratified by 156 countries. It makes the following points: parties are free to choose law and jurisdiction for litigation and arbitration, if they do so the choice should be given effect, no other arbitral tribunal should take jurisdiction.

So much for English courts claims to hear the action, but what happens when a decision is made, will it be respected by the courts of other countries? Will the courts of other countries subvert the autonomy of the parties when they made the contract?

In the early years of the twenty first century the English Court continued to rule that anti suit injunctions, (i.e. injunctions restraining foreign proceedings) were available where proceedings were commenced in another court or arbitration begun contrary to an exclusive jurisdiction clause e.g. *The Kribi* [2001] 1 Lloyd's Rep 76 and *The Ivan Zagubanski* [2001] 1 Lloyd's Rep 106 There were those who doubted whether this approach could be maintained with respect to litigation commenced in breach of the exclusive jurisdiction agreement where

that litigation was commenced in a state party to the Brussels Convention.

The clash of “approaches” to which Lord Goff of Chievely referred to in *Airbus Industrie GIE* was resolved in favour of the approach of the civil law by the European Court of Justice in *Erich Gasser GmbH v. Misat Srl* Case C-116/02 1 Lloyd’s Rep 222, where it was held as follows:

“In this case, it is claimed that the court second seised has jurisdiction under Article 17 of the (Brussels) Convention.

However, that fact is not such as to call in question the application of the procedural rule contained in Article 21 of the Convention, which is based clearly and solely on the chronological order in which the courts involved are seised.

Moreover, the court second seised is never in a better position than the court first seised to determine whether the latter has jurisdiction. That jurisdiction is determined directly by the rules of the Brussels Convention, which are common to both courts and may be interpreted and applied with the same authority by each of them.”

Later in the judgment it was said:

“Finally, the difficulties of the kind referred to by the United Kingdom Government, stemming from delaying tactics by parties who, with the intention of delaying settlement of the substantive dispute, commence proceedings before a court which they know to lack jurisdiction by reason of the existence of a jurisdiction clause are not such as to call in question the interpretation of any provision of the Brussels Convention, as deduced from its wording and its purpose. In view of the foregoing, the answer to the second question must be that Article 21 of the Brussels Convention must be interpreted as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction.”

This is a reference to the so- called “Italian Torpedo”. This expression is a colourful way of referring to the defensive litigation tactic, a sort of litigation filibuster, which finds its origin in patent litigation. It is based on the presumption that Italian litigation will inevitably involve delay. An alleged infringer might file quickly as soon as the dispute arises for a declaration by the Italian court, (or some other court where proceedings are thought to be slow moving e.g. Belgium or Greece) of patent non-infringement in order to prevent the other party from bringing the action in a faster court system in another member state. It is a delaying tactic and one not limited to patent issues. It has negative effects; firstly, it can lead to significant delay and long delay can sometimes remove an effective remedy. Secondly, if there is a fear that such a delaying tactic will be employed then a party might rush to litigation, in order to “get in first” and consequently make sufficient attempts to negotiate a settlement of the dispute; surely not a good outcome.

However, the position has changed since The *Erich Gasser* case and English choice of law clauses are less likely to be damaged by Italian torpedoes.

Today an English court when faced with issues of jurisdiction will do so by reference to European Union rules. These are now, since January 2015 found in the Recast Brussels Regulations and The Lugano Convention of 2007. This provides for jurisdiction, as to which law should apply if the subject matter is a contractual dispute then this is determined by the Rome Regulation and if it relates to issues of tort then it is covered by Rome II or if there are issues of bailment then either by Rome I or Rome II.

In the original Brussels Convention Article 23 underpinned the decision in *Erich Gasser*. However, the recast Regulation changes the position and effectively overturns the decision. This is as a consequence of the combination of Recast articles 25 and 31(2).

Interestingly Recast Recital 22 says:

“However, in order to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics, it is necessary to provide for an exception to the general lis

pendens rule in order to deal satisfactorily with a particular situation in which concurrent proceedings may arise. This is the situation where a court not designated in an exclusive choice-of-court agreement has been seised of proceedings and the designated court is seised subsequently of proceedings involving the same cause of action and between the same parties. In such a case, the court first seised should be required to stay its proceedings as soon as the designated court has been seised and until such time as the latter court declares that it has no jurisdiction under the exclusive choice-of-court agreement. This is to ensure that, in such a situation, the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it. The designated court should be able to proceed irrespective of whether the non-designated court has already decided on the stay of proceedings.”

So there is a direct intention to “enhance” choice of court agreements and to avoid litigation tactics that seek to evade their consequences.

Article 25:

1. *If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:
 1. (a) *in writing or evidenced in writing;*
 2. (b) *in a form which accords with practices which the parties have established between themselves; or*
 3. (c) *in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.**
2. *Any communication by electronic means which provides a durable record of the agreement shall be equivalent to ‘writing’.*
3. *The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved.*
4. *Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24.*
5. *An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.*

Article 31(2):

“...where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.”

The question of whether or not anti-suit injunctions are lawful was examined in *Allianz & Anor v West Tankers Inc, The Front Comor*. (Judgments Convention/Enforcement of judgments) [2009] EUECJ C-185/07. Here it was held that such injunctions were unlawful in that they ran counter to Regulation No 44/2001. This Regulation sets out uniform rules designed to deal with civil and commercial disputes that arise within the EU. The court chose to focus upon the policy nature of anti-suit injunctions and held that they:

“...also runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions and on which the system of jurisdiction under Regulation No 44/2001 is based.”

Despite this, following the changes made in Recast Brussels we suggest that presently the position is a good one for those who wish to see the use of English choice of law and jurisdiction clauses.

Much of the above naturally focuses upon the position under EU law but since it appears that the UK might be leaving that grouping it is as well to mention the position outside the EU. In a recent decision:

Ust- Kamenogorsk Hydropower Plant JSC v. AES Ust- Kamenogorsk Hydropower Plant LLP [2013] UKSC 35 Lord Mance set out the legal position:

“The power to stay domestic legal proceedings under section 9 (of the Arbitration Act 1996) and the power to determine that foreign proceedings are in breach of an arbitration agreement and to injunct their commencement or continuation are in truth opposite and complementary sides of a coin. Subject to the recent European inroad, that remains the position.”

So it seems that the interests of English purveyors of legal services; the law firms, sets of commercial barristers, the P and I clubs and insurers are all protected within the European system and with them the healthy benefit that they bring to the UK's balance of payments.

So what now for the future under a UK withdrawal from the EU?

Would Brexit change any of this? Other centres that provide arbitration and litigation such as Paris and Singapore must hope so.

The various conventions and regulations when taken together have provided an effective system. However, if the UK does indeed trigger article 50 of the Treaty of Lisbon 2009 then what will happen? We may well brush off the old Latin expression- *quo vadis?* Because following Brexit the future is uncertain as to which way we will go.

The Lisbon Treaty points the way. After giving notice of intention to leave under Article 50, Article 50(2) anticipates that the state wishing to leave the EU and the remainder of the EU itself will conclude a “withdrawal agreement”. Article 50(3) deals with what will happen thereafter. There may a withdrawal agreement or there maybe an extension of time if the leaving state and the European Council “unanimously decides to extend this period”. If no such agreements can be concluded then two years after triggering Article 50 important treaties will cease to apply to the UK. These are the Treaty on European Union 2007 (TEU) and the Treaty on the Functioning of the European Union (TFEU) In effect, the 1957 Treaty of Rome as renamed by the Lisbon Treaty in 2009). These two treaties, taken together, form the basis of European law. Particularly relevant here is Article 288 of the TFEU which states, a “regulation shall have general application. It shall be binding in its entirety and directly applicable to all Member States”.

As far as choice of law clauses are concerned, if there is no withdrawal agreement then the UK's involvement in the Treaties will lapse and with this will go the benefits that the UK enjoys by being a member of the EU. Also, the benefit of international treaties that the UK participates in via its EU membership will no longer be available to the now nonparticipant UK. Explicitly Brussels Regulation Recast, Lugano 2007 and Rome I and II will no longer have effect. This will be particularly damaging to the legal service providers in England and Wales and we might very well see the re-emergence of the “Italian Torpedo” as a tactic to hamper decision making and enforcement.

It seems likely that if Article 50 is triggered then the negotiations between the UK and the EU are likely to be robust. From a UK perspective it is sensible therefore to consider the options available. As we have observed, Brussels Recast made useful improvements on the Brussels I Regulations of 2001 and it would be in the UK's interests to participate in this if it were to be possible. This would require a treaty between the UK and the remaining EU. In UK terms this would require an amendment to the Civil Jurisdiction and Judgments Act 1982. This is simple

enough to say but as part of wider negotiations would the EU be prepared to agree? Possibly not. If however it were possible to achieve an agreement how would any future amendments be dealt with? The precedent is not an encouraging one; under Brussels I Denmark was not involved in the process of drafting but simply had to accept the convention as it stood and the Danish courts have to refer to the Court of Justice of the European Union on matters of interpretation; a position that a departing UK might find difficulty in accepting. Perhaps a return to the Revised Lugano Convention might be contemplated? It is a possibility, the UK would need to accede to the treaty in its own right but the benefits of Recast Brussels on choice of law clauses and also with regard to arbitration would be lost. Perhaps the UK could go a step further and seek to negotiate a Revised Lugano Convention to give it similar effect to the Recast Brussels, It would need the consent of all the existing parties and again this would include the EU. Politics might again enter into the decision making but it would be possible, Article 76 makes provision for revision and in the past discussions to this effect have taken place but without any progress being made. It is possible for the UK to resort to existing and future bilateral agreements on jurisdiction and the recognition and enforcement of judgments but the wide spread reciprocity of Recast Brussels would be hard to achieve.

Another possibility for the UK would be ratification of the Hague Convention on Choice of Court Agreements 2005, (the Choice of Court Convention) which has been in force since the 1st of October 2015. This has already been ratified by the EU. The convention shares much in terms of its underlying assumptions and approach to finding solutions with the Recast Regulation. However, it is not a provider of universal solutions; it is particularly weak with regard to shipping issues. This is not a minor defect.

Contracts of affreightment, a term open to more than one meaning but used here to refer to charterparties or bills of lading, give rise to a great deal of litigation and arbitration and particularly with regard to bills of lading there is often perceived to be lack of uniformity. Bill of lading disputes are likely to be the subject to the Hague Visby Rules, or possibly the unreformed Hague Rules or less likely the Hamburg Rules. Effectively the function of these conventions is to provide a mechanism for dealing with claims for lost or damaged cargo carried by sea under contracts included in bills of lading and are seen as limitation of liability regimes. Clearly where there is more than one convention covering the same ground there are going to be differences between them.

During the negotiations for the Choice of Court Convention it seemed to some that another new convention then in the course of development would deal directly with bill of lading and other shipping disputes and resolve these differences without the need for involvement by the Choice of Court Convention. Indeed shortly thereafter the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea was signed.

This was in 2009 and the convention became known as the Rotterdam Rules. There is surely no need to rehearse the arguments and history of that convention here but suffice it to say that the Rotterdam Rules have not been enthusiastically embraced. To date there are only three countries, Congo, Spain and Togo to have ratified. So we are left with a lacuna; the Choice of Court Convention excludes important shipping issues. Article 2(2)(f) excludes "the carriage of passengers and goods" and Article 2(2)(g) excludes "marine pollution, limitation of liability for maritime claims, general average and emergency towage and salvage." In any case not all of these shipping issues are within the remit of the Rotterdam Rules, leaving an obvious weakness.

However, in other respects the Choice of Court Convention is similar to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in that both conventions seek to protect the principle of party autonomy. However, its lack of relevance to major aspects of commercial shipping means that it provides only a partial solution to the needs of the UK.

The UK leaving the EU will have significant effect upon the conduct of private international trade, upon the content of contracts and how disputes are resolved. The legal issues may seem fiendishly complex but this is just the start; the shipping industry will need to overcome issues to do with short sea shipping, oil pollution from ships, bunker fuel pollution and the transport sector more generally will need to look closely at the effect that Brexit will have on

road haulage and all this without even considering the airlines. There is a lot to be done, let us hope that we find those with the ability and resolve to produce sensible and effective outcomes and that we are not left with Yeats saying:

“The best lack all conviction, while the worst

Are full of passionate intensity.”

Anthony Rogers

Senior Lecturer, LLM in Maritime Law Course Director

The City Law School

City, University of London