THE DENNING LECTURE **24 November 2017**

The Rt. Hon. Sir Christopher Clarke

1 Madam President, My Lords, Ladies and Gentlemen. I much appreciate being asked to give this year's Denning lecture honouring that great and good man. Since it does that I am, I believe, entitled to express a personal recollection of him.

2 After he retired Lord Denning undertook some arbitral work. I appeared in front of him one cold February afternoon. The hearing took place in his flat in Lincoln's Inn. It was on the top floor, without a lift. I, only in my late 30s, was puffing by the time I got there. The great man, although he used a stick, appeared to suffer no such discomfiture.

3 The décor did not seem to have changed since the late 1950s; and the light and heat were minimal. Eventually at about 3.30, when I could scarcely see my papers, and was getting rather cold, a single standard lamp was turned on; and somewhat later a single 15 kw bar of an electric fire. Towards the end of our submissions he told us, in relation to an arbitration that he had conducted before he became a judge (so in about 1938 I assume), in his familiar accent which I will not attempt to imitate:

> "*Ah, I had that Mr Onassis before me once. Awarded him $ 90,000 – a lot of money in those days*".

4 $ 90,000 <u>was</u> a lot of money in those days. It might be worth (say) $ 3 million now. But that pales into insignificance with some of the sums that are litigated or

arbitrated about in this country week by week. The importance of our court system for commerce, finance and industry (to coin a phrase) at all levels and to national wellbeing and prosperity is manifest (although sometimes unappreciated or given only token recognition). But nothing is certain or permanent. What I want to do tonight is to examine how good our system is for the determination of business disputes; how attractive it is, or ought to be, to potential litigants, particularly foreign litigants; whether we can be assured of that for the future; and whether we ought to be doing things differently: a sort of SWOT exercise.

English law

5 The first great benefit of our system for business is English law itself. English is the *lingua franca* of the commercial world. English law is the gold standard. It is well developed, pretty predictable (not least because of a proper doctrine of precedent), flexible and fit for business purposes. It is the most commonly used law in international business and dispute resolution. A 2016 survey of 500 commercial law practitioners and in-house counsel conducted by the Singapore Academy of Law found that 48% of respondents identified English law as their preferred choice of governing law in contracts, often in transactions with little or no other link to the UK.

6 In their development of English law, the English courts have shown themselves to be business friendly in the sense that they have fashioned the law so as to be fit for commercial purposes. The common law seeks to achieve practical justice by applying and, if necessary. adapting basic principles to novel situations. Contracts are to be interpreted in the light of the information available to the parties when

they were made but not their subjective intentions. The expressions "business like" or "business common sense" permeate judgments. In relation to commercial contracts the basic principle is to give effect to the commercial bargain made (whatever it may have been) with a tight restriction on the implication of terms (which must be such as a reasonable businessman must have intended). An interpretation which accords with commercial common sense is to be favoured if the wording is ambiguous. If the wording is clear the parties will be held to it even if the result is harsh. Exemption clauses need to be clear but, if they are, they will, subject to statutory exception, take effect – the doctrine of fundamental breach having died a death. (Lord Denning would not approve). The parties can agree a particular state of affairs, or a particular fact, as the basis of their contract and, if they do, they will not, fraud apart, be allowed to depart from it even if the true position is different. The doctrine of penalties is not dead but it is very ill. Contracts will not usually be held to be frustrated. Damages are compensatory and not punitive (save in very exceptional circumstances).

7 I put forward this Nutshell summary of parts of the law of England to indicate the solid basis for regarding English law as suitable for the resolution of business disputes.

Judiciary

8 The second virtue of our system is that we have an independent, impartial, and fair minded judiciary, whose members, particularly in the Commercial Court and Chancery Division, have usually been highly competent practitioners with experience in the application of law in practically every business field. Our

system has, thus, a justifiably strong worldwide reputation. As a result, it enjoys a dominant position in the international legal services and dispute resolution market.

9 That our judges are independent of the government and of the parties and impartial may be thought to be no great insight. It is taken as a given. But it makes us the envy of less happy lands. There are several jurisdictions where these virtues are not universal or even common, and are sometimes spasmodic. That does not mean that money necessarily changes hands, although sometimes it does. A recent survey of some 11,712 judges in 18 EU countries revealed that more than 10% of judges thought that some of their number were taking bribes or were not sure whether they were. In some countries over 50% of the judges thought that.

10 The independence of the judiciary is assured by their method of appointment and the difficulty of their removal. As to the first, appointment is in the hands of the Judicial Appointment Commission, a nongovernmental public body which has done and continues to do sterling work in organising and improving the selection process and in producing a more diverse judiciary. As to the second, judges at High Court level and above have since the Act of Settlement of 1701 been irremovable save by an address from both Houses.

11 I desire in this connection to express a view on the suggestion made by Lady Hale in her thoughtful recent lecture on the constitutional implications of judicial selection. Whilst recognising that many members of the judiciary would be very uncomfortable with increasing the involvement of politicians she offered her own "*humble suggestion*" – her words not mine – that for the Supreme Court, the Lord Chief Justice and the Heads of Division the appointment commission could be

enlarged by a senior politician from the Government and the Opposition, in order to introduce an element of democratic involvement while preserving party political neutrality.

12 I appreciate the concerns that gave rise to this suggestion and, in particular, the increasing tendency for judges to have to make judgments which appear to impinge on the political sphere. I am, however, with respect, in the very uncomfortable lobby for a number of reasons.

13 First, I have grave doubts as to the utility of the proposal. To work at all it would require appointees of relevant ability and rectitude. Whilst there are some such persons in the House it is all too possible that one or other, or both, appointees might be wholly unsuitable. I also have doubts as to the insight that they could usefully offer as to which candidate should be preferred. Second, whilst the merit requirement is clear, what criteria the political duo would apply is not. Third, the innovation would place the appointee at risk of the suggestion that her or his appointment was in part attributable to her or his position, or the lack of it, on a particular topic. Fourth, I perceive the thin end of what might become a growing wedge– the Supreme Court today, lower courts later. Lastly, I think that it would cloud the clear perception - rightly held by those who use our courts - as to their independence. In this field chinks in the armour may be very wounding.

14 Our judges have a high reputation. But you cannot be loved all the time. As the *Miller* case has shown newspapers can seek to stoke up anti-judicial fervour, which politicians may do nothing to quench, or may purport to dampen but with breath-taking pusillanimity. When one looks back at the Daily Mail's abusive

headline "*Enemies of the People*" it seems ever more fatuous. A referendum result was premised on Parliament taking back control from Europe, a restitution of complete Parliamentary sovereignty, and the overriding application of UK law. A decision as to whether or not the law of the United Kingdom required the Article 50 decision to be assessed by Parliament was wholly congruent with these aims. The furore seems all the more absurd given that we have now moved towards the position that Parliament must have a vote on the terms of departure, if there are any.

15 But, as an example of the fact that that which does not kill you makes you stronger, the reputation of the UK judiciary was, in my view, greatly enhanced by the decision-making process in the *Miller* case. The argument before the entire Supreme Court was there for all to see; the process was patent; and the decision clear. But there remains a risk that public obloquy of this type may, together with other considerations, put off those who might be minded to seek or accept judicial office from doing so.

16 As we all know the High Court judiciary is several (about 8) short of its complement at a time when the courts are very overladen. The circuit and district judiciary (but not recorders) have a similar problem. That has arisen because the number of suitable applicants has reduced and the JAC has, quite rightly and laudably, declined to fill up vacancies just because there are vacancies.

17 The reasons for this situation are probably a mixture of four things:

(i) a progressive reduction in the real value of the salary, and, in the case of High Court judges and above, a salary which although good in civil service terms is grossly less than that earned by many barristers and solicitors in private practice;

(ii) a change in the pension terms, which, coupled with a change in the tax system, rendered the pension arrangements markedly less attractive and in some cases meant there was no advantage in taking the pension at all;

(iii) an unremitting workload; and

(iv) a perception of lack of real support for the work of the judges.

It was, if anything, the pension change which attracted the greatest anger, consisting as it did for some of the judiciary of a change of the terms upon which they had already entered service – a provision presently held to amount to unlawful age discrimination, and which, if it had been attempted by a business, would have attracted the strongest judicial condemnation.

18 Fortunately, there is, and I hope there always will be, a body of high calibre individuals who seek to exercise the judicial function, following in the wake of Lord Denning who had a stellar practice and then devoted himself for decades to being a judge. It is the most rewarding and fulfilling of experiences. To determine the applicable law and the relevant facts and apply the one to the other is extremely satisfying to the intellect; as is the absence of any client or employer (save Her Majesty); and to perform a real public service is indeed a privilege. I hope and believe that the tradition of private success followed by the fulfilment of public duty will not lapse.

19 What then can be done to avert the risks of a dearth of real talent? One solution is to increase the remuneration of the judiciary. The matter has been referred to the Senior Salaries Review Board. I very much hope that the Board grasps the nettle because as the Lord Chief Justice said in his 2017 report "*any failure to address the problems of pay and pension will have a serious impact on morale and recruitment*". But, even if it does, I fear a response which in one form or another makes reference to the absence of any magic money tree from which an increase sizeable enough to make any difference can be funded. Even though that may starve the geese that lay the golden eggs.

20 The next matter for consideration is the retirement age. It was probably a mistake to reduce it to 70. This appears to have been done in order to reduce the number of bed blockers thought to be inhibiting the progress of younger, and more diverse, aspirants. Lord Denning, who was said to possess all the Christian virtues save resignation, would not have approved. It has had the result that there is a leakage at the top with insufficient input at the bottom. And it is salutary to observe that had the 70 rule been in place earlier we would have been deprived of the great benefit of having the President of BACFI as President of the Supreme Court.

21 Another possibility is the abolition of the convention whereby a judge should not, upon retirement, return to practice, although he or she may continue as some other form of judge or as an arbitrator or consultant. I have, heretofore, been a believer in this rule upon the basis, firstly, that it would render untenable the suggestion that a judge had restrained himself from adverse findings in a case in which prominent solicitors in his field were involved because of the desirability of

keeping in reserve the possibility of future instruction; and *secondly* because of a feeling that the judicial function is a journey along a path from advocacy to judgment on which you should aim to stay for the rest of your professional life. But it may be that we should take account of the practice of other jurisdictions such as Singapore where passage from practice to the Bench and back to practice, or to other public office, is recognised. The House of Lords Select Committee has invited the Lord Chancellor and the Lord Chief Justice to consider the continuing value of this convention.

22 We may also need to establish a form of full time Judicial Commissioner who would sit for a renewable period of x years and could then revert to his or her previous position or, alternatively, who could sit for x months a year. This might well serve to attract candidates from diverse sectors, in particular solicitors and academics, and government lawyers. That will or may require something of a cultural shift in solicitors, who - for understandable business reasons - have not shown, so far, much collective enthusiasm for encouraging judicial aspirations. At the same time, as the age at which partners in many firms have to retire progressively decreases, there ought to be some scope for a follow on into the judiciary with many years to look forward to. In the case of government lawyers, it will also require care in enabling them to sit in courts or tribunals where there should be no public perception of a want of independence.

Disclosure and cross examination

23 The third benefit for business is that our system involves (a) disclosure of documents; (b) oral cross examination; (c) the loser usually paying the costs; and

(d) no automatic right of appeal. All of these characteristics, properly handled, are valuable.

Court structure

24 The fourth benefit of our system is the Court structure, by which I mean the range of Courts. We have a court fit for every business need, all now brought under the umbrella of the Business and Property Courts of England and Wales, sitting in London and Bristol, Birmingham, Cardiff, Leeds, and Manchester (with the aim of adding Liverpool and Newcastle later).

25 The recently established Financial List deals with claims relating to the financial markets and takes cases from both the Commercial Court and the Chancery Division. It has 12 nominated judges with expertise in financial markets, be they in shares, stocks, foreign exchange dealings or commodities. There have been some 36 cases since it was established in October 2015, with judgment given in 8. The average time for appeals has been about 6 months from filing the appeal notice to the hearing date. The Financial Markets Test Scheme enables issues to be put before a court by interested parties without the need for an underlying dispute - a facility which may be important in the future.

26 The Commercial Court has for over 120 years been the world's leading forum for the resolution of trade, shipping and insurance disputes. The Chancery Division has immense experience in corporate and other disputes. The Technology and Construction Court has regained its rightful place as a leading court for the determination of construction and engineering disputes, with an admirable

procedure for speedy dispute resolution by adjudication. The Intellectual Property List and the Patents Court deals with disputes of the highest value and complication; and the Companies Court with some of the most sizeable insolvencies and reconstructions in the world.

27 Another addition to the armoury of tools for the swift and efficient resolution of disputes is the Shorter and Flexible Trials Scheme, launched in October 2015 as a 3-year pilot operating for courts sitting in the Rolls Building. It is suitable for business and commercial cases which do not involve determination of detailed factual issues, or extensive witness or expert evidence, or involve multiple issues or parties. It has a streamlined procedure with a limited pre-action protocol; a limit of 20 pages on pleadings and 25 pages on statements; a single judge running the docket; and no provision for standard disclosure. You produce the documents on which you rely and the specific documents you are asked for and agree to provide, or the court requires you to provide. The aim is to bring suitable cases to trial within 10 months of issue; the hearing is to be for no more than 4 days, including reading time; judgment in six weeks; no costs budgeting; and the trial judge summarily assesses costs. This has proved very popular – with some 35 cases - and expeditious. In *National Bank of Abu Dhabi v BP Oil International* [2016] EWHC 2892 (Comm) a $ 68 million claim by a bank was dealt with at a one-day hearing with limited disclosure, no witnesses or oral evidence, with judgement handed down within 2 weeks and total costs on each side of $ 350 K.

28 Most of all of this takes place, so far as London is concerned in the Rolls Building, which is the biggest dedicated business court in the world and around four times bigger than its nearest competitor.

Procedure/Disclosure

29 There is a *leitmotif* running through the history of our courts from earlier times, namely a complaint that their procedure is or has become antiquated, cumbersome, out of date etc. There are in this field two laws as immutable as those of the Medes and Persians.

30 The first is that there is a perennial tension between thoroughness and fairness on the one hand and efficiency on the other, such that – this is the second law - each improvement in civil procedure brings with it the risk of at least one unintended and unwelcome disadvantage. One example was the requirement to provide witness statements, which led originally to massive overloading of statements with irrelevant material, such as expressions of opinion and commentary on documents or argumentation.

31 Immense improvements have been made over the years in the despatch of commercial business - a process which began with the establishment of the Commercial List and then the Commercial Court. We have come forward in leaps and bounds to develop a speedy and efficient system of determining business disputes. The focus of practitioners and judges alike is on identification of the relevant issues and the efficient resolution of them by astute case management. There are exceptions to this rule when, in some cases, even experienced litigators

appear to adopt the rule of thumb beloved of many litigants in person, namely that the more you produce and the more you say the more likely you are to succeed – whereas if anything the reverse is true.

32 We are getting there. Much of the problems thought to be inherent in witness statements would evaporate or at least be reduced if parties complied with the Chancery and Commercial Court guides. These require statements to be as concise as the circumstances of the case allow; not to contain lengthy quotations from documents; not to exhibit documents unless really necessary or provide a commentary on documents in the trial bundle; not to engage in legal or other argument, express opinions or make submissions about issues; and, in the Commercial Court, unless the Court directs otherwise, not (without permission) to be no more than 30 pages in length.

33 In relation to disclosure – the subject of perpetual angst - the Rolls Building Disclosure Working Group chaired by Gloster LJ, whose final report was published a week or so ago, proposes an entirely new disclosure regime for the Business and Property Courts which she heralded in her lecture here two years ago. The gist of the proposals is that (a) standard disclosure should not be ordered in every case and should not be the default option; (b) the rules should provide express duties on the parties and their advisers to cooperate with each other and assist the court in relation to disclosure, particularly with regard to the processing and review of electronic data; and to disclose known adverse documents whether or not any order to do so is made; and (c) that basic disclosure should be the default position. That means disclosure of key documents - not exceeding 500 -

which are relied on by the disclosing party or are necessary for the other party to understand the case they have to meet. These are to be given with the statements of case.

34 Before the first CMC the parties are to produce a Disclosure Review Document which will focus, in particular, on the use of technology assisted review software. At the CMC the court will consider five models of disclosure ranging from none at all to full *Peruvian Guano*, with the possibility of different models for different issues. The test is what is appropriate to resolve the issues fairly. The scheme is expected to be submitted to the Civil Procedure Rules Committee in March/April 2018 and then piloted for a two-year period in London and the other five centres of the Business and Property Courts.

Legal talent

35 A further draw for London and other cities is the copious supply of practitioners of outstanding ability, both in independent practice and in-house, who have experience in dealing with the realities of international commerce and finance. It is no surprise that London has many of the world's leading firms and advocates and that more than 200 overseas law firms from some 40 jurisdictions practice here. The legal service industry is one of Britain's largest exporters with, according to the City UK Survey of the Legal Sectors, published yesterday, an estimated trade surplus in 2016 in excess of £ 4 bn, with around 311,000 employees, two-thirds of whom work outside London, and gross revenue of £ 31.5 billion. The contribution of the legal service sector to the economy in 2015 of £ 24.1 bn, represented 1.5% of total GVA. The UK accounts for some 7% of

global legal services revenue. The UK is by far the largest market for legal services in Europe. Net exports of UK legal services stood at £3,978m in 2016.

36 All these considerations show that English courts are one of the best places possible in which to determine disputes. The same applies to arbitrations since, broadly speaking, we have got the relationship between the courts and arbitration – supportive but where justified correctional - right. London is the preferred seat of arbitration, favoured by 47% of respondents in the 2015 International Arbitration Survey undertaken by Queen Mary University of London and White & Case. In the year to end of September 2017, 30% of claims commenced in the Commercial Court related to arbitration. clearly illustrating the value of the courts in underpinning arbitration enforcement.

Brexit

37 There are certain words which in polite society can only be referenced by identifying the number of letters that they contain. One of them is a six-letter word beginning with B. Brexit. We have all, of course, been enlightened by being told that it means what it says; but are left unsure where we are because it does not say what it means. What we do know is that, whilst over 40 years ago Lord Denning, in the famous *Bollinger* case, said that "*the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back.*", someone has reversed the current and the tide is, for the moment, going out.

38 We cannot now tell what the position will be on 29 March 2019. The possibilities would appear to be

(i) no deal at all;

(ii) a withdrawal agreement which takes "*account of the framework for [the UK's] future relationship with the Union*" (whatever that means);

(iii) a withdrawal agreement and a future trade deal;

(iv) an extension of the notice period and

(v) a withdrawal of the 2017 notice.

The likelihood of any of these events happening would increasingly seem to be in descending order of magnitude.

39 As to the last, it is, of course, debatable whether the Treaty permits a withdrawal of the notice. Now is not the time for any elaborate discussion of that question. But one may, perhaps, be permitted to observe that Article 50 seems to have been written as a problem for a moot. The question has never arisen before. There is no authority. The Article requires notification of a State's intention to withdraw (and intentions may change), but then provides that the Treaties shall cease to apply two years after the notification of that intention, unless the European Council in agreement with the Member State concerned unanimously decides to extend the period. It does not describe the notice as either revocable or irrevocable.

40 One of the draftsmen (Lord Kerr) is recorded as saying that a notice can be withdrawn and that he never thought that the UK would want to give one. In May 2016 the European Union Committee of the House of Lords recorded the views of two very distinguished academics, one a former judge of the ECJ, that the law was, er, clear that withdrawal of the notice was possible until it expired.

41 In January 2017 the Supreme Court in *Miller*, on the invitation of the Attorney General, assumed, without deciding, that the notice was irrevocable, although the proposition was described by Lord Carnwath as "*possibly controversial*": [261]. On 12 July 2017 the European Commission issued a "Fact sheet" which said that the notice could not be unilaterally reversed. A more recent statement (13 October 2017) from Donald Tusk, President of the European Council, and similar statements from other European grandees suggest the opposite.

42 I suspect that, in one way or the other, if the UK sought to withdraw the notice – a course against which the Government has for the moment set its face - and all the other Member States agreed, as they probably would, withdrawal would be allowed; hopefully without reference to the CJEU. If the UK sought to withdraw and not all the States agreed, the Court could reach a conclusion that withdrawal in such circumstances was possible on one or more parts of a cocktail of bases.

43 These could include (i) the intentions of the draftsman, or one of them, who keeps telling us that he did not intend the notice to be irrevocable; (ii) the fact that the notice is not said in Article 50 to be irrevocable, nor required to be such; (iii) the proposition that the treaty must be interpreted in the light of the objectives and purposes of the Community which are that the Member States should stay together in ever closer union, so that a right of voluntary withdrawal by a notice of intention should not be converted into a means of expulsion. Further it would seem odd if the notice was irrevocable even if, for instance, in the two-year period there had been a change of government or a new referendum rejecting a previous decision to exit the Union.

44 The Court might also derive assistance from Articles 67 and 68 of the Vienna Convention, to which neither the EU, nor France and Romania, are parties but which the CJEU has said may be relevant insofar as its provisions reflect customary international law. These articles, as I read them, treat any act withdrawing from a treaty pursuant to its provisions as revocable at any time before it takes effect.

45 Meanwhile before that and subject to any express provision inserted into the Great Repeal/European Withdrawal Bill, the Courts may have to decide whether the Executive, having been authorised to give a notice of intention to withdraw, can, in the absence of Parliamentary approval, give legal effect in the UK to any new treaty with the EU or allow the UK actually to withdraw from the EU without any agreement. On one view of *Miller* it cannot. The need for such a ruling may arise if the Government decides to press ahead with the deal even it was rejected by Parliament, or if there was no deal to put before Parliament.

46 We must assume, however, for planning purposes, that there will be no deal such that on 30 March 2019 the EU Regulations will cease to have effect in the UK otherwise than pursuant to the Great Repeal/European Withdrawal Act, and will have no effect in the EU in respect of the UK.

47 Unsurprisingly a secession from the EU gives rise to concerns among businessmen about (a) where and when their counterparties (and their own companies) can sue or be sued; (b) by reference to what law their disputes will be determined; and (c) what are the prospects for recognition and enforcement of any

resulting judgment. Matters have not been helped by the undisguised glee of some commentators at the prospect of the UK losing its place at the pinnacle of the international firmament. The President of the Frankfurt Appeals Court was recently reported as saying that "*London is stepping into the shadows*".

48 One thing we should not belittle or doubt is the continued role of the English courts as the major centre for the resolution of business disputes and their attractiveness for that purpose. This will remain the position. Whatever happens on Brexit the EU Member States will be important trading partners. Counterparties based in EU countries are still likely to sue and be sued here.

49 Further, many litigants come here who have no relevant European connection particularly in the shipping, oil and gas and financial fields. For many years a large majority of cases in the Commercial Court have involved at least one foreign party and often two - as often as not non-European. In the year to July 2017 there were over 700 claims, with 71% being international in nature and over 49% of those being cases where all parties were international. The pervasive use of English law and its attraction to the business community mean that our courts will continue to have plenty of work to do. The City will remain a global finance centre. The enforcement of agreements to arbitrate and of arbitration awards – governed by the New York Convention – will be unaffected by Brexit.

Applicable law

50 There are, however, complications. First, what is to happen to the rules as to applicable law which, within the Union, are now established by the *Rome 1* and

Rome 2 Regulations (Regulations EC 593/2008 and EC 864/2007) in respect of contractual and non-contractual obligations. It is the universal view of those who have any useful view to express that the UK should retain these Regulations and, fortunately, the Government has declared an intention to incorporate them into our domestic law by statute.

Brussels 1 Recast

51 The next concern is as to the future non-applicability of *Brussels 1 Recast* (Regulation 1215/2012), the instrument which replaced and improved *Brussels 1* (Regulation 44/2001) and which deals with which country shall have jurisdiction and the recognition of judgments by courts of the EU states.

52 A galaxy of commentators has examined the options available to the UK for the replacement of that Regulation or its predecessor. There seems to be broad/universal agreement that there are four options (other than to do nothing).

53 Option 1 – as a starter - is to sign and ratify the Hague Convention 2005 on Choice of Court Agreements to which the EU, Singapore and Mexico are parties. This would recognize and give effect to a judgement given by a court of a Contracting State specified in an exclusive jurisdiction agreement entered into after October 2015 whether not the parties were domiciled in a Contracting State. The UK is not a party to this Convention in its own right. Becoming one would not require EU assent and should be done in any event.

54 But its reach is limited. It does not apply to a wide range of claims – including claims by consumers, and carriage of goods claims. It only applies to exclusive

choice of court agreements concluded after its entry into force in the State of the chosen court and only to proceedings instituted after that entry into force; and it will only come into force in the UK 3 months after the deposit of the instrument of ratification.

55 Option 2 is to reach an agreement akin to that between the EU and Denmark reached in 2005 - [2005] OJ L/ 299/62 - whereby Denmark, which had opted out of the *Brussels 1* Regulation, agreed to apply *Brussels 1* with an option to adopt any amendments - an option which Denmark exercised so as to give effect to the *Brussels 1 Recast* Regulation - but with a provision that, if it chose not to adopt the amendments, the whole Agreement would fall away unless the parties decided otherwise. That proviso might be improved if it was simply an option whether to not to adopt the relevant amendments, as the UK could be expected to do. Such a treaty would require to be enacted in the UK by legislation in order to take effect as a matter of English law. It would be desirable also to enter into a treaty such as that between the EU and Denmark in respect of the service of proceedings.

56 However, the Denmark Agreement requires reference to the CJEU of disputes about its validity or interpretation in circumstances where a court of a Member State would be required to do so in respect of the *Brussels 1* Regulation; and permits the Commission to make complaints to the CJEU about non-compliance with it. It also requires the Danish courts to take *due account* of the rulings of the CJEU in respect of *Brussels I* and *Brussels 1 Recast*. That latter obligation ought to be liveable with, since, even without it, the English courts would be likely to

take account of such rulings, and the wording is similar to that of section 2 (1) (a) of the *Human Rights Act 1968*.

57 However, here we have the potential stumbling block, which applies not only to the Denmark Agreement but potentially to any new agreement with the EU. Ardent Brexiteers seem to be less prepared for the CJEU to have any role in relation to the UK after Brexit than Protestants were prepared to accept the jurisdiction of the Pope after the Reformation. But any instrument prescribing rules regulating choices of court and recognition of judgments compulsorily applicable across several nations might be thought to need some transnational body to determine what it means, or at least some corpus of law not restricted to a single nation.

58 The Government has stated in its August 2017 Future Partnership paper - "*Providing a cross-border civil judicial cooperation framework*" – that:

> "*where appropriate the UK and the EU will need to ensure future civil judicial cooperation* ***takes into account regional legal arrangements, including*** *the fact that the CJEU will remain the ultimate arbiter of EU law within the EU*". [20]

What in practice this Delphic passage means, if anything, is unclear but given the Government's current view that there is no room at all for the jurisdiction of the CJEU it appears, on one view, to be no more than a statement of the obvious fact that the CJEU is the ultimate court for the EU.

59 Option 3 is for the UK to sign and ratify the Lugano II Convention of 2007, to which the EU, Iceland, Norway and Switzerland are parties, and by which the UK is currently bound only by reason of its membership of the EU. The Government has said [22] that it will seek continued participation in this Convention which would require the agreement of all the existing signatories. It would preserve the position in relation to Norway, Ireland, and Switzerland, who are not parties to *Brussels 1 Recast*, and it would mean that rules substantially similar to *Brussels 1* applied in relation to EU Member States. This is far from a perfect result, since it would mean a return to *Brussels 1* without any of the improvements of *Brussels 1 Recast.*

60 Protocol 2 to the Lugano Convention contains a requirement for national courts to "*pay due account*" to the principles laid down by any relevant decision rendered by courts of the other Contracting States concerning the provisions of the Lugano Convention, the *Brussels 1* Regulation and the Brussels Convention and by the European Court. The non-EU parties are entitled to submit observations to the CJEU on references concerning the Lugano Convention or *Brussels 1*; without accepting the direct jurisdiction of the CJEU.

61 Option 4 is a bespoke treaty with the EU on the lines of, or simply adopting, *Brussels 1 Recast*, which ought to be easy to draw up.

62 The August 2017 Paper says that the UK will seek a "*deep and special relationship*" with the EU and:

"a close and comprehensive framework of civil judicial cooperation with the EU … on a reciprocal basis which would ***mirror closely the current EU situation*** *and would provide a clear legal basis to support cross-border activities after the UK's withdrawal*" [25].

63 These are warm words. But, although the paper contains a number of perfectly sensible proposals about events occurring before the withdrawal date, it leaves unclear what exactly the Government intends or hopes to do, if anything, in relation to *Brussels 1 Recast* in relation to cases arising after withdrawal.

64 We thus reach the position that there is broad agreement that it would be desirable to have something as close to *Brussels 1 Recast* as we can get. But the position of the Government is opaque. The real stumbling block appears to be the position of the European Court.

65 It appears to me that the example provided by the Lugano Convention, to which the Government wishes to subscribe, is the route out of the difficulty at any rate in this context. Those who voted Leave cannot sensibly be regarded as having done so because of concerns about cross border civil judicial cooperation, or, if they are of sound mind, as likely to faint at the idea of taking account of (but not being bound by) principles laid down by the Courts of the States with whom that cooperation is intended to exist, and of the EU of which they are a member, including those laid down after any agreement/treaty was made. And it would be an advantage not to be bound by the CJEU but entitled to submit observations to the Court. Being subject to an EFTA court might produce a similar result.

66 That this may be acceptable to the Government appears from paragraphs 46-51 of the Government's Position Paper - *Enforcement and Dispute Resolution* - which contemplates such an arrangement "*where there is a shared interest in reducing or eliminating divergence in how specific aspects of an agreement with the EU are implemented in the EU and the third country respectively*". This would be an apt description of any agreement based on *Brussels 1 Recast*.

67 Assume, however, that *Brussels 1 Recast* falls away and nothing else happens. Member States will then no longer have automatically to stay proceedings commenced in breach of an exclusive jurisdiction clause (or a clause which does not say it is non-exclusive) in favour of the UK courts (Article 25 & 31: cp Articles 33 & 34); and UK judgments will not enjoy automatic recognition in the courts of the Member States. Enforceability would depend on the law of the Member State concerned. Enforceable interim measures will not be available in Member States as they currently are under Article 35 of *Brussels 1 Recast*. UK domiciled defendants will not enjoy the protection afforded by the Regulation of being, subject to significant exceptions, entitled to be sued in their own domestic court (section 1). Nor will the provisions relating to consumer contracts (section 4), employment contracts (section 5) and insurance (section 3) apply.

68 These, and particularly the absence of automatic recognition, are disadvantages which point in favour of agreeing a new treaty which replicates in large measure *Brussels 1 Recast*.

69 But if we do not reach some new agreement, will litigants who would otherwise litigate in London cease doing so because of the potential difficulty of enforcement in countries of the European Union? This is, to my mind, a great unknown. I do not know what proportion of English judgments actually need to be enforced in other EU States. Many commercial parties in the EU are likely to have assets of one kind or another in England, including debts owed to them by banks or other third parties, and the powers of the English courts to enforce judgments, directly or indirectly, and to discover by disclosure orders where assets are, are strong.

70 The UK has existing bilateral treaties in relation to enforcement with Austria, Belgium, France, Germany, Italy and the Netherlands. If they remain in force, the detriment attributable to an inability to enforce in the other 21 Member States would appear to be limited. Whether, in the light of Article 59 of the Vienna Convention, they will remain in force is debatable. That Article provides for a treaty to be terminated if the parties enter into a new treaty relating to the same subject matter and the parties intended the later treaty to govern that matter, unless the intention is that it shall only be suspended. The distinction between supersession and suspension must be for other minds to determine.

71 The non-applicability of *Brussels 1* or *Brussels 1 Recast* would mean that the English court's rules of jurisdiction, which catch a wide range of potential defendants and which used to be described as extravagant, are restored. These allow, subject to *forum conveniens* considerations, claims to be brought here against all those present or carrying on business here, and those whose contracts

were made in England or are governed by English law (as so many commercial contracts are), or which provide for payment in England (as so many do). Their reintroduction would seem likely to increase the number of cases determined here, since the entitlement to be sued, subject to exceptions, in your own domicile, will fall away – a consideration which may encourage the EU to accept the continuation of *Brussels 1 Recast* or something like it. The EU may also be keen to secure that judgments given in EU States are readily enforceable in England. This increase in cases is unlikely to be greatly reduced by the number of UK domiciled persons who will now find themselves sued elsewhere.

72 Further the need to await and abide by the decision of the court first seized on jurisdiction (and not to grant an anti-suit injunction) will cease; and the ability to decline jurisdiction on *forum non conveniens* grounds will resurrect itself (contrary to *Owusu* [2005] QB 801).

73 Whatever trade agreements are or are not made with the EU, trade with the remaining Member States will continue. The City will continue to be a major financial centre. English law is likely to retain its dominant position, which is not dependent on EU membership, in commerce; and disputes under it are likely to be litigated here.

74 Whatever the outcome of Brexit: hard, soft, or stodgy certain things that matter will not change: the beauty of English law; the quality of our judicial and court system; and the plentiful supply of highly talented lawyers, both in private practice and as general counsel or in-house lawyers. Whilst we should never rest on our laurels, an uncomfortable position at the best of times, we should not allow

our English reserve to prevent us from declaiming from the rooftops, particularly in the presence and hearing of the merchants of doom and rumour mongers, the solid virtues of our courts.

75 To that end the judiciary in conjunction with others has produced an admirable booklet entitled "*The strength of English law and the UK jurisdiction"* and another one, particularly for use overseas, entitled "*English Law, UK Courts and UK Legal Services after Brexit - the view beyond 2019*". These should be read and widely distributed, particularly to recipients of a brochure produced by the German Bar and others entitled "Made in Germany" with an introduction by the Federal Justice Minister.

76 Last but by no means least the complexities of the Withdrawal Act, not to mention the legion of instruments to be made under it offer the prospect of years of litigation. I look forward with a frisson of excitement to a UK court disapplying an existing Act of the UK Parliament under section 5 (2) of the Bill on the ground that it is incompatible with EU law as incorporated in UK law by reason of the Bill.

77 I wish you all litigious joy.

78 Thank you.