

Brexit – Legal considerations on contracts and regulations

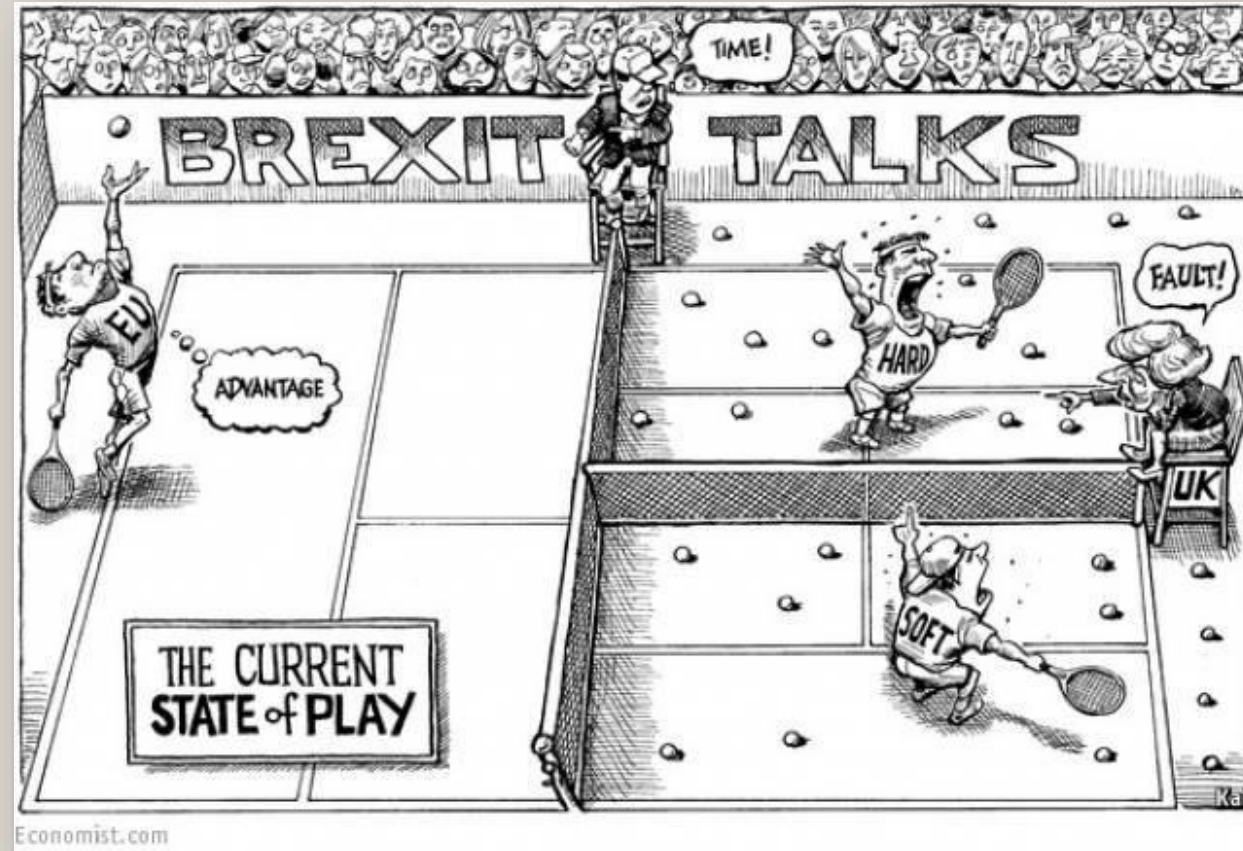
Xavier Taton

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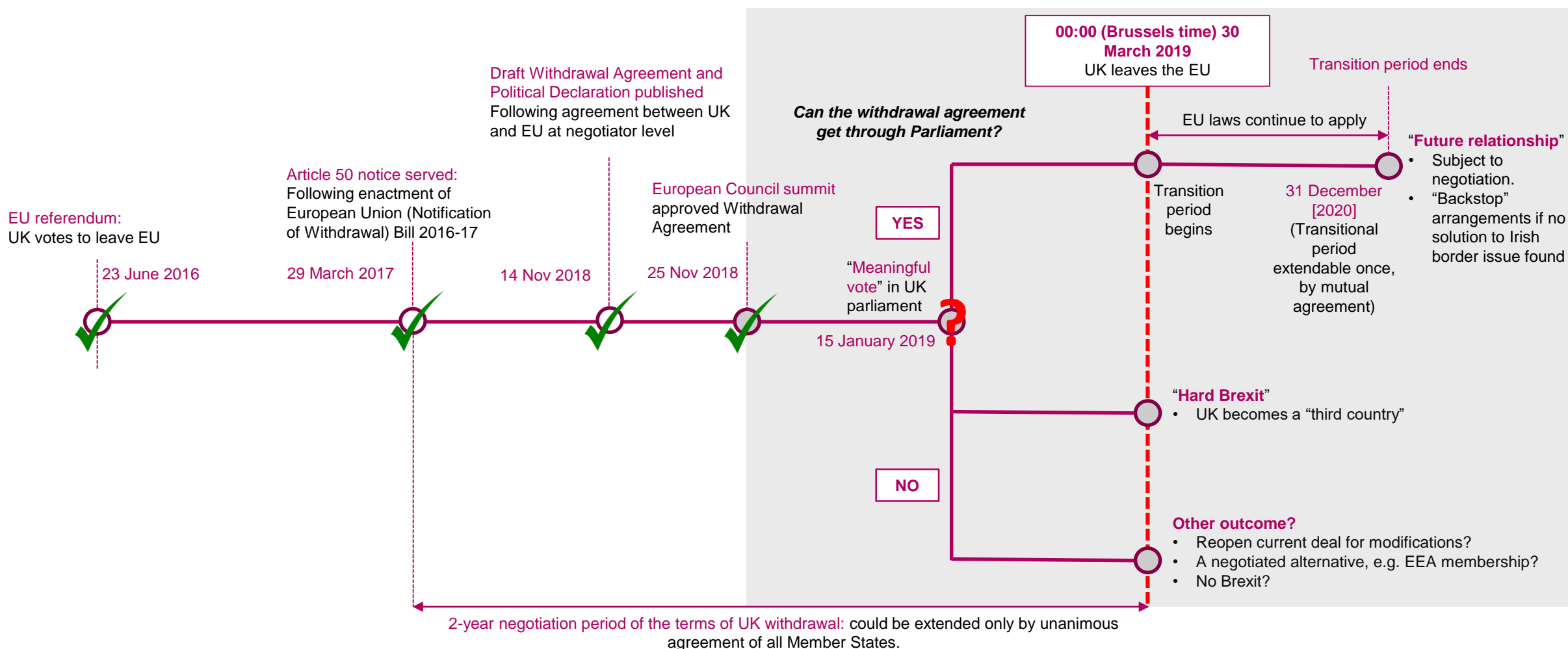


"Political and economic uncertainty make long term planning difficult. Let's stick to ordering lunch."

State of play

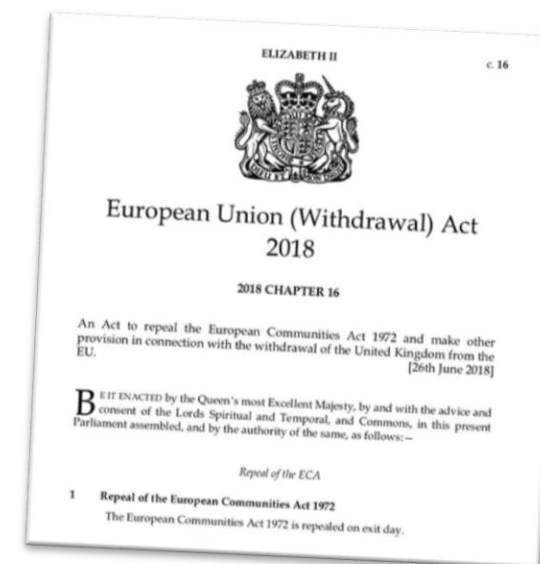


Withdrawal timeline: where are we and what might happen next?



European Union (Withdrawal) Act 2018 adopted by the UK Parliament

- > 26 June 2018
- > Repeals the European Communities Act 1972 (which provides legal authority for EU law to have effect as national law in the UK)
- > Incorporates EU legislations onto UK domestic law unless expressly provided otherwise
- > Grants broad delegated power to the UK Government/Ministers to adapt retained EU law for up to two years after Brexit
- > The UK Supreme Court will not be bound by the CJEU's case law on retained EU law (>< lower UK courts)



Draft Withdrawal Agreement

- > Transition period set to end on 31 December 2020 whereby the entire Union acquis will continue to apply to and in the UK as if it were a Member State (potentially extended once)
- > Irish border backstop (basis for future customs relationship?)
 - “Level playing field” on competition (including state aid), employment, environment and tax law
 - No special treatment for services (including financial services)
- > Citizens' rights



Political declaration

- > Not legally binding
- > Free trade agreements in goods and services
 - British access to EU markets will depend on the UK respecting EU standards on competition, tax, environment, as well as social and employment protection
 - UK “will consider aligning” with relevant EU rules on goods to “ease” trade
- > Financial services: equivalence rather than passporting
- > Enhanced cooperation under institutional framework to be defined
- > Alternative arrangements for the Irish border backstop

European Commission's no-deal Contingency Action Plan

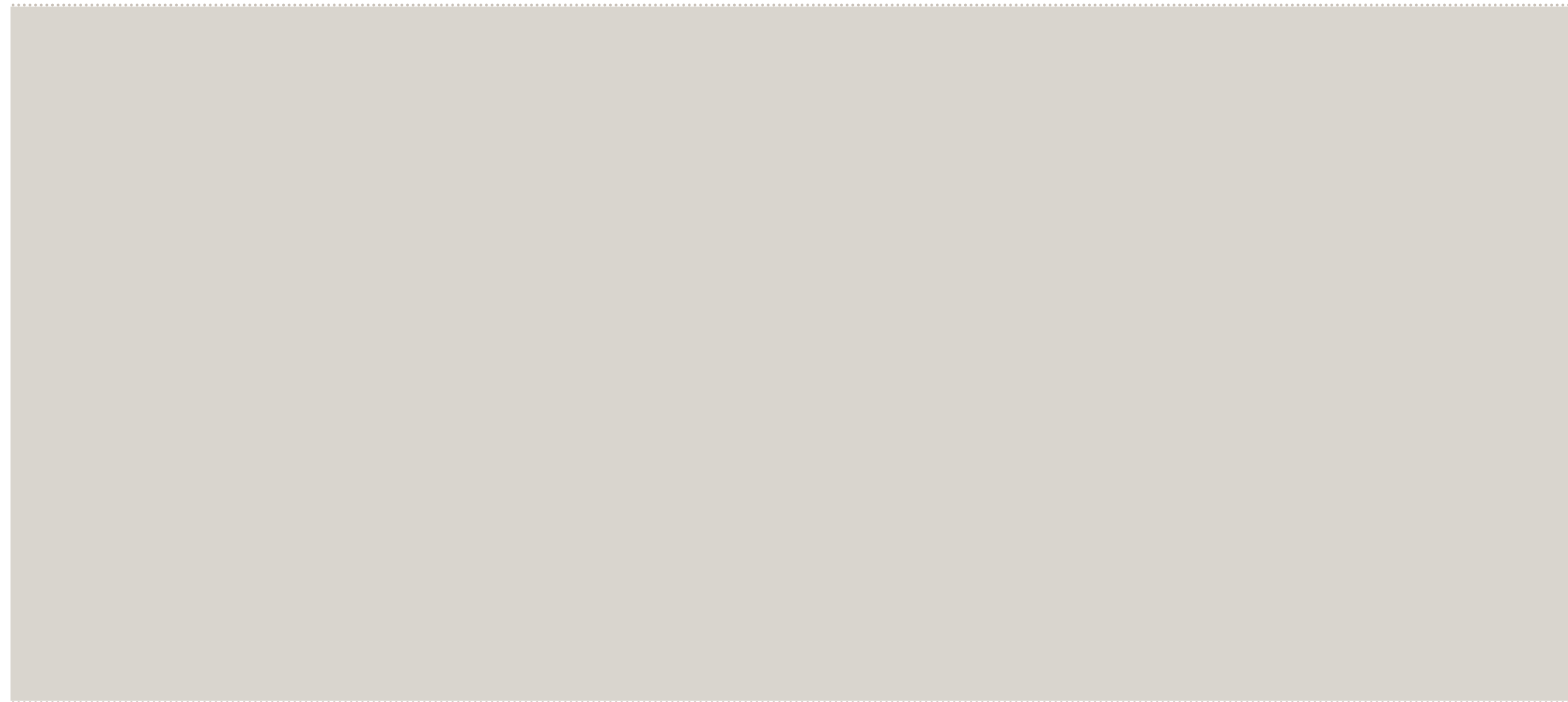


- > *“These measures will not – and cannot – mitigate the overall impact of a "no-deal" scenario, nor do they in any way compensate for the lack of stakeholder preparedness. As a rule, they will be temporary in nature, limited in scope and adopted unilaterally by the EU”*
- > Customs and the export of goods
 - All relevant EU legislation on the importation and exportation of goods will apply to goods moving between the EU and the UK
 - Include the seas surrounding the UK in the provisions on time-limits within which entry summary declarations and pre-departure declarations have to be lodged prior to leaving or entering the Union's customs territory
 - Add the UK to the list of countries for which a general authorisation to export dual use items is valid throughout the EU
- > Publication of Brexit “preparedness” notices

UK's no deal preparations

- > £2bn contingency fund (to be allocated to the Home Office, the Department for Environment, Food and Rural Affairs and the Department for International Trade)
- > Publication of 107 technical notices setting out how government bodies, businesses and individuals would need to prepare for a no deal scenario
- > Statutory instruments to be adopted under the EU Withdrawal Act

Regulatory aspects



Increased burden and uncertainty (i)

- > Risk of diverging rules
- > No guarantee of mutual recognition
- > Sector by sector analysis – official notices
- > Financial services
 - From passporting to equivalence?
- > Other services
 - Case by case analysis
 - WTO rules and domestic laws

Increased burden and uncertainty (ii)

- > Goods
 - WTO rules/negotiated custom union?
 - Customs formalities for goods crossing the Channel?
 - Standards and certifications (end of the principle of mutual recognition)
- > Company law
- > Competition law
- > Employment
 - Broad agreement on citizens' rights does not guarantee the status of workers.
 - Relocation? Fly-in-fly-out more difficult?
- > Data protection
 - Adequacy decision in respect of the UK?

Contractual aspects



No one size fits all approach (i)

- > Review of existing and future major contracts to see whether they remain fit for purpose
- > Form
 - Would references to the EU need to be amended to make it clear whether the UK falls in or out of scope?
 - Do standard form contracts need to be updated?
- > Substance
 - Do parties have the necessary regulatory approvals?
 - Would the substance of the contract remain appropriate given the other changes brought by Brexit?
 - Which party carries the risk of increased costs or delays?
- > Termination/renegotiation/assignment
 - Could your contracts be terminated by your counterparty? Could you terminate them?
 - Would a renegotiation or an assignment of the contract be possible?

Force majeure / hardship

- > Force majeure theory under Belgian law:
 - occurrence of an event after the conclusion of the agreement
 - no shortcoming of the debtor
 - the event was unforeseeable
 - the event makes the performance of the contract *impossible* (>< *excessively onerous* for hardship)
- > Hardship
 - Unknown as such under Belgian law (apprehended through good faith by the case law)
 - Draft new civil code (Art. 5.77)
 - May be provided contractually
- > For new contracts, does more flexibility serve best your interest?



DR clauses – key role of EU law for private international law

- > Applicable law
 - Rome I and Rome II regulations
- > Judicial cooperation
 - Regulations on taking of evidence, service of judicial and extra-judicial documents, specific procedures (uncontested claims, small claims, payment procedure, preservation order), etc.
- > Conflicts of jurisdiction (recognition and enforcement of choice of court agreements, competent courts in the absence thereof, recognition and enforcement of judgments)
 - Brussels I recast regulation



DR clauses – uncertainties post-Brexit (i)

- > Withdrawal Agreement?
 - Transition period
 - Transitory provisions
- > Future ad hoc agreement? Not mentioned in the Political Declaration >< UK's White Paper
- > Applicable law
 - Rome I and Rome II regulations' rules will continue to apply, as they do not rely on reciprocity
- > Judicial cooperation
 - 1965 Hague Service Convention
 - 1970 Hague Evidence Convention

DR clauses – uncertainties post-Brexit (ii)

> Conflicts of jurisdiction

- 2005 Hague Convention on Choice of Court Agreements?
- 2007 Lugano Convention?
- Judgment Project?
- Domestic law of the Member States?



DR clauses – how to prepare?

- > International arbitration is mostly unaffected (1958 New York Convention)
- > Conclusion of exclusive jurisdiction clause after the ratification of the 2005 Hague Convention by the UK
- > Tactical choices of jurisdiction and applicable law in new contracts
- > EU English speaking commercial courts as an alternative to English courts (Germany, France, the Netherlands, Belgium (?))
- > Beware of EU financial instruments imposing that certain disputes can only be heard by EU courts/arbitral tribunals (e.g. Art. 45(6) MIFIR)

Questions?



Speaker



Xavier Taton

Partner, Dispute Resolution
Linklaters LLP Brussels
Tel: +32 2 501 94 72
xavier.taton@linklaters.com