

New Uncertainty for Choice of Court Agreements in this Brexit Period

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Le choc initial provoqué par le référendum consultatif du 23 juin 2016 en faveur de la sortie du Royaume-Uni de l'Union européenne ('Brexit') doit désormais laisser place à une attitude raisonnée sur la meilleure façon d'appréhender une situation encore incertaine. L'une des questions qui demeure sans réponse concerne les conséquences du Brexit sur les clauses d'élection de for désignant les tribunaux anglais. Si le Brexit n'a pour l'instant pas encore modifié l'état du droit,¹ les praticiens projetant de rédiger des clauses d'élection de for peuvent s'interroger sur ses répercussions en droit international privé.

Le présent article vise à clarifier les conséquences du Brexit en matière de clause d'élection de for désignant les juridictions anglaises, et envisage les alternatives plausibles en la matière.

Introduction

Brexit² is on its way. On 29 March 2017, in accordance with Article 50 para. 2 of the Treaty on the European Union ('TEU'),³ the United Kingdom ('UK') notified the European Council of its intention to leave the European Union ('EU'). The clock is now ticking. The UK and the EU have two years to reach an agreement on the terms of the UK's withdrawal.⁴ Should

1 En application de l'article 50 para. 3 du Traité de l'Union européenne ('TUE'), les Traités européens demeurent applicables au Royaume-Uni jusqu'à l'entrée en vigueur de l'accord de retrait ou, à défaut, deux ans après la notification au Conseil européen de l'intention de se retirer de l'Union européenne, sauf si le Conseil européen, en accord avec le Royaume-Uni décide de proroger ce délai.

2 The term 'Brexit' is incontestably the most commonly used qualification to describe the departure of the UK from the EU. While not perfectly accurate since etymologically it refers to 'Britain' exiting the EU when it is effectively the UK as a whole which will be leaving the EU (England and Wales, Scotland and Northern Ireland), this expression has the advantage of being concise and will therefore be used throughout this article. It is worth mentioning however that other expressions have been used including the term 'secession'. See Adrian Briggs, "Secession from the European Union and private international law: the cloud with the silver lining", Commercial Bar Association, 24 January 2017, available at: <https://app.pelorous.com/media_manager/public/260/Prof%20Adrian%20Briggs%20QC%20Brexit%20lecture%2024.1.17.pdf>.

3 A consolidated version may be found at (2012) OJ C326/13.

4 For a developed analysis on the constitutional implications of Brexit see Holger P Hestermeyer, "How Brexit will happen: A Brief Primer on European Union Law and

negotiations exceed this two-year period, Article 50 para. 3 TEU provides that the EU Treaties shall cease to apply to the UK, unless the European Council and the UK decide to extend this period.⁵

Attention is now shifting to the impact of Brexit on technical legal issues which received little public attention during the referendum campaign (and subsequently)⁶ but which are critical in governing daily social and commercial interactions within the EU legal framework. One of these issues is the impact of Brexit on choice of court agreements⁷ in favour of English courts.⁸

Brexit has unfortunately engendered uncertainty surrounding the enforceability in the EU of choice of court agreements designating English courts and, to some extent, the recognition and enforcement of English

Constitutional Law Questions Raised by Brexit”, *Journal of International Arbitration*, 2016, Vol 33, Issue 7, pp. 429-450.

⁵ The inconclusive UK general election on 8 June 2017 has not called Brexit into question for now. It has however reopened the debate within the UK as to the alternatives to a ‘hard Brexit’, adding more uncertainties to an already very uncertain situation. The prudent assumption for business and lawyers advising clients is to assume that Brexit is on its way and may be hard. This article therefore envisions the consequences of a hard Brexit on choice of court agreements.

⁶ The Minister, the Rt Hon Sir Oliver Heald QC, stated that these ‘important issues’ were ‘very high in the minds of Government’ (see Q 38 available at: <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-civil-justice-cooperation/oral/46539.html>>). However, apart from a brief reference to potential cooperation on civil justice, international private law issues triggered by Brexit were mostly ignored in the Government White Paper on the Repeal Bill, the UK Government chosen means for severing legal ties with the EU.

The Repeal Bill White Paper sets out the UK Government proposals for ensuring a functioning statute book once the UK leaves the EU and is available at: <<https://www.gov.uk/government/publications/the-great-repeal-bill-white-paper>>.

⁷ A choice of court agreement, or jurisdiction clause, is an agreement between two or more parties as to where litigation will take place. It may specify a particular court or simply refer to the courts of a particular country. Choice of court agreements are of critical importance in cross-border disputes. The choice of a particular forum can impact not only the cost, length and result of the proceedings but also, the reliability and enforceability of the resulting judgment.

⁸ The United Kingdom of Great Britain and Northern Ireland (‘UK’) is composed of three separate and distinct legal systems: (i) England and Wales, (ii) Scotland and, (iii) Northern Ireland. Without detailing the functioning of these three different judicial systems, for the purpose of this article, it is important to note that it is mostly the courts of England and Wales which have acquired a significant place in international and commercial contracts, and which will be the object of the present contribution. To facilitate the reading, this article will refer to the courts of England and Wales as the ‘English’ courts.

judgments in the EU. Inevitably, it calls into question London's future as one of the most popular fora⁹ for resolving international disputes.¹⁰

This article shall focus on Brexit's ramifications for choice of court agreements.¹¹ It will first provide a succinct description of the regime applicable in the UK until the entry into force of the withdrawal agreement, or the expiration of the two years time period (I). This article will then consider the three possible options the UK might choose to follow post-Brexit, and will assess them critically. First, there has been speculation as to whether various multilateral and bilateral conventions might 'revive' post-Brexit. This article will demonstrate that even if these conventions (or at least some of them) could theoretically be revived, any revival would create an undesirable and outdated legal patchwork in Europe (II). Second, this article will expose the shortcomings of the approach favoured by the UK government in the (no

⁹ For the advantages offered by the English courts see Law Society of England and Wales, *Dispute Resolution – England and Wales: the jurisdiction of choice*, 2007, available at: <www.lawsociety.org.uk>. See also Ministry of Justice, *Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London Based Courts* (Eva Lein et al., BIIICL), Ministry of Justice Analytical Series, 2015, available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/396343/factors-influencing-international-litigants-with-commercial-claims.pdf>.

For a general view of the impact on Brexit on London as a popular dispute resolution choice in Europe see Michael McIlwrath, "An Unamicable Separation: Brexit Consequences for London as a Premier Seat of International Dispute Resolution in Europe", *Journal of International Arbitration*, 2016, Vol 33, Issue 7, pp. 451-462.

¹⁰ See Michael McIlwrath, "An Unamicable Separation: Brexit Consequences for London as a Premier Seat of International Dispute in Europe *Journal of International Arbitration*", 2016, Vol 33, Issue 7, pp. 451-462. See also Marta Requejo, "Brexit: Immediate Consequences on the London Judicial Market" available at: <<http://conflictoflaws.net/2016/brexit-immediate-consequences-on-the-london-judicial-market/>>. For a more nuanced and optimistic view see Adrian Briggs, "Secession from the European Union and Private International Law: the Cloud with the Silver Lining", Commercial Bar Association, 2017, available at: <<http://www.combar.com/news/brexit-lecture-by-professor-adrian-briggs-qc-hon/>>.

¹¹ This paper excludes from its scope the question of choice of law clauses and the possibility of reduced certainty and predictability in the field of contractual and non-contractual obligations if the Rome I (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2012, L 351, 1) and Rome II (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ 2008, L 177, 6) Regulations on choice of law were no longer to apply in the UK. On the issue of the consequences of Brexit on choice of law clauses see Mohamad Salahudine, Abdel Wahab, "Brexit's Chilling Effect on Choice of Law and Arbitration in the United Kingdom: Practical Reflections Between Aggravation and Alleviation", *Journal of International Arbitration*, 2016, Volume 33, Issue 7, pp. 463 - 482.

longer Great) Repeal Bill¹² (formerly known as the ‘European Union (Withdrawal) Bill’).¹³ This approach favours the conversion of the existing direct EU law (including the Brussels I Recast Regulation)¹⁴ into English domestic law (III). Finally, this article will seek to identify a more satisfying alternative for both the UK and the EU. This alternative involves negotiating the continued application of the existing regime through the adoption of conventions with the EU, and the European Free Trade Association (‘EFTA’), and ratifying the Hague Convention on choice of court agreements (‘Hague Convention’). This approach would have the advantage not only of predictability and continuity, but also of reciprocity, an essential element when it comes to choice of court agreements and recognition and enforcement of judgments (IV).¹⁵

¹² The Bill was originally labelled the ‘Great Repeal Bill’ by the Prime Minister in her speech to the Conservative Party conference in October 2016. It will now be known under the less grandiose title of ‘Repeal Bill’ as indicated in the Queen’s speech of 21 June 2017.

¹³ See European Union (Withdrawal) Bill (‘Repeal Bill’), 13 July 2017, available at: <<https://www.gov.uk/government/publications/information-about-the-repeal-bill>>.

¹⁴ Council Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1. (‘Brussels I Recast Regulation’).

¹⁵ This article does not address the broader question of the implications of Brexit in the broader field of private international law. See in this regard Adrian Briggs, “Secession from the European Union and Private International Law: the Cloud with a Silver Lining”, Commercial Bar Association, January 2017, available at: <<http://www.combar.com/news/brexit-lecture-by-professor-adrian-briggs-qc-hon/>>; Andrew Dickinson, “Back to the future: the UK’s Exit and the conflict of laws”, *Journal of Private International Law*, 2016, 12:2, pp. 195-210; Sara Masters and Belinda McRae, “What Does Brexit Mean for the Brussels Regime?”, *Journal of International Arbitration*, 2016, Vol 33, Issue 7, pp. 483-500; Michael McIlwrath, “An Unamicable Separation: Brexit Consequences for London as a Premier Seat of International Dispute Resolution in Europe”, *Journal of International Arbitration*, 2016, Vol 33, Issue 7, pp. 451-462; Mohamad Salahudine Abdel What, “Brexit’s Chilling Effect on Choice of Law and Arbitration in the United Kingdom: Practical Reflections Between Aggravation and Alleviation”, *Journal of International Arbitration*, 2016, Vol 33, Issue 7, pp. 463-482.

For a general view in French see Guillaume Croissant, “Fog in the Channel - Continent Cut Off. Les conséquences du Brexit pour le droit international privé et l’arbitrage international”, *JT*, 2017/2, pp. 24-33; Horatia Muir Watt, Loïc Azoulai, Régis Bismuth, “Rapport sur les Implications du Brexit dans le domaine de la coopération judiciaire en matière civile et commerciale du Haut Comité Juridique de la Place Financière de Paris”, 30 janvier 2017 available at: <<http://www.sciencespo.fr/ecole-de-droit/sites/sciencespo.fr.ecole-de-droit/files/>>. For an interesting comparative study between Member State (here French) and English litigants post-Brexit see Horatia Muir Watt, Loïc Azoulai, Régis

I. The International Instruments Currently Applicable to Choice of Court Agreements in the UK

As a result of the UK membership of the EU, three main legal instruments are applicable to the question of choice of court agreements: the Brussels I Recast Regulation, the 2007 Lugano Convention,¹⁶ and the Hague Convention.¹⁷ These three instruments have the status of EU law in the UK which means that they override English domestic law.¹⁸ The harmonisation achieved by these private international law instruments has enabled parties to assess litigation risk more accurately and has also reduced the risk of having to litigate in multiple jurisdictions when disputes arise. This section provides a general overview of these instruments, including the benefits they currently confer on English choice of court agreements in the EU; benefits which will be (mostly) lost after Brexit if an agreement with the EU and the EFTA States is not negotiated.

A. Brussels I Recast Regulation: Harmonised Rules Between Member States¹⁹

The current jurisdictional rules of English and other Member State courts²⁰ (with the exception of Denmark), including the recognition and enforcement of judgments, are governed by the Brussels I Recast Regulation. The Brussels I Recast Regulation, which entered into force on 10 January 2015,

Bismuth, “Report on the implications of Brexit on judicial cooperation in civil and commercial matters”, *RTDF*, 2017, Vol 1, p. 2.

¹⁶ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 339/3, 21.12.2007, OJ 2009, L 147/5 (‘2007 Lugano Convention’). It was preceded by the Lugano Convention (OJ 1988, L 319/25).

¹⁷ The Hague Convention on choice of court agreements (‘Hague Convention’) was concluded during the 20th Session of the Hague Conference on Private International Law, The Hague, 30 June 2005. On 10 December 2014, it was approved by Council decision on behalf of the EU (2014/887/EU, [2014] OJ L353/5). It is the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) Regulations 2015 (SI 2015/1644) which brought the Hague Convention into force in the UK.

¹⁸ On the principle of direct effect see *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) Case 26/62, ECLI:EU:C/1963:1; *Flaminio Costa v ENEL* (1964) Case 6/64, ECR 585.

¹⁹ Except Denmark. See Brussels I Recast Regulation, Recitals (8) and (41).

²⁰ ‘Member States’ refers to the 28 member countries of the European Union. When referring to ‘Member States’ in a post-Brexit context it refers to the 27 remaining member countries of the European Union excluding the UK.

is directly applicable in the UK. It is the latest EU legislative instrument on this subject, following the Brussels I Regulation,²¹ and the Brussels Convention.²²

The substantive provisions of the Brussels I Recast Regulation require that, where parties, whether domiciled or not in the EU,²³ have included a choice of court agreement in their contract in favour of a specific Member State court, that court will take jurisdiction over those proceedings (subject to a series of exclusive jurisdiction scenarios laid down by the Regulation).²⁴ The courts of other Member States will respect that agreement and decline jurisdiction. Further, Member States also agreed that, if the same or related proceedings are commenced before the courts of different Member States, any court other than the one first seised shall stay its proceedings until the court first seised determines whether it has jurisdiction. This provision was controversially interpreted by the European Court of Justice ('ECJ') in the *Gasser* case²⁵ as meaning that any court that is not first seised *must* stay its proceedings even where there is a choice of court agreement conferring jurisdiction on the court that was not first seised. This jurisprudence encouraged potential defendants to commence proceedings in slow-moving jurisdictions, regardless of the jurisdiction agreement, effectively blocking the proceedings before the contractually agreed court. This popular litigation strategy was also known as an 'Italian torpedo' action. Article 31 of the Brussels I Recast Regulation now addresses this issue and enhances the effectiveness of choice of court agreements by avoiding abusive litigation tactics. It provides that if a court which is not first seised has jurisdiction pursuant to an exclusive choice of court agreement, that court may continue to hear the case.

The Brussels I Recast Regulation also simplifies the process for recognising and enforcing judgments between Member States. Recognition and enforcement can now be obtained through a simple administrative

²¹ Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001, L 12/1, which came into force on 1 March 2002. ('Brussels I Regulation').

²² Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968. The original text may be found in OJ 1972, L 299/32. It came into force for the original Contracting States on 1 February 1973 and in the United Kingdom on 1 January 1987. For a consolidated text, see OJ 1998, C 27/1.

²³ Brussels I Recast Regulation, Article 25. This is one of the principal change introduced by the Brussels I Recast Regulation. It abolishes the previous requirement of Article 23 of the Brussels I Regulation pursuant to which a choice of court agreement would only confer jurisdiction to the designated court if at least one of the parties was domiciled in the EU.

²⁴ In such case, the clause will be enforceable and deemed valid '*unless the agreement conferring jurisdiction is null and void as to its substantive validity under the law of the Member State*' of the chosen court (emphasis added). Recast Regulation, Article 25(1).

²⁵ *Erich Gasser GmbH v MISAT Srl*, Case C-116/02, ECLI:EU:C:2003:657.

process,²⁶ subject to limited exceptions.²⁷ These reciprocal, simplified and harmonised rules founded on mutual trust between Member States facilitate the free circulation of judgments in the EU and save significant time and costs to parties as a result.

Without a Brussels I Recast Regulation alternative in place, Brexit will create uncertainty and diminish predictability for those parties with an English choice of court agreement in their contract. The agreement might not be recognised in the remaining Member States. This could potentially result in parallel proceedings before English and Member State courts, which could produce inconsistent results. Besides, an English judgment obtained via a choice of court agreement (or without, for that matter) would not be as readily enforceable in the post-Brexit EU as it is now.

B. The 2007 Lugano Convention: Applicable Rules Between EU Member States and EFTA States²⁸

The UK is also currently bound by the 2007 Lugano Convention,²⁹ which was entered into by the EU on behalf of the Member States³⁰ (except Denmark) and ratified on 30 October 2007.³¹ The Convention creates common rules regarding jurisdiction, and the enforcement and recognition of judgments across a single legal space consisting of the EU Member States (including Denmark)³² and three of the four EFTA States (i.e. Iceland, Norway

²⁶ Brussels I Recast Regulation, Articles 36 and 39. One of the significant improvement of the Brussels I Regulation compared to the Brussels I Regulation is the abolition of the *exequatur* ('declaration of enforceability') requirement.

²⁷ Brussels I Recast Regulation, Article 45.

²⁸ Except Liechtenstein.

²⁹ The Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters signed in Lugano on 30 October 2007 (OJ 2007, L 339/3) ('2007 Lugano Convention') was preceded by the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed in Lugano on 16 September 1988 (OJ 1988, L 319/25) ('1988 Lugano Convention').

³⁰ Pursuant to Articles 216 and 217 TFEU, the EU has the competence to conclude agreements with third states and international agreements.

'TFEU' refers to Treaty on the Functioning of the European Union (consolidated version C 326/47, 2012). The TFEU was given its name and amended by the Treaty of Lisbon amending the treaty establishing the European Community, signed at Lisbon, 13 December 2007. The TFEU sets out organisational and functional details about the EU.

³¹ The 2007 Lugano Convention entered into force on 1 January 2010 and was incorporated into English domestic law by the Civil Jurisdiction and Judgments Regulation 2009 (SI 2009/ 3131).

³² Denmark became party of the 2007 Lugano Convention as a separate signatory because of its particular status as regards to the EU Treaties and the Brussels I Regulation.

and Switzerland).³³ The 2007 Lugano Convention follows closely (often identically) the Brussels model anterior to the Brussels I Recast Regulation. Therefore, some substantial improvements brought by the Brussels I Recast Regulation have not (yet) been implemented in the Lugano system. For choice of court agreements, this means that the 2007 Lugano Convention does not yet reflect the clarification on the ECJ decision in *Gasser*.

The Convention applies when a choice of court agreement designates a Member State court or the courts of Iceland, Norway and Switzerland, and when at least one of the parties is domiciled in one of those States.³⁴ It also facilitates the recognition and enforcement of judgments resulting from these agreements.

Without alternative reciprocal arrangements, the 2007 Lugano Convention will cease to apply between the UK and Iceland, Norway and Switzerland post-Brexit. This will cause uncertainty in enforcing an English choice of court agreement in these countries and may hurt London as a popular forum for resolving disputes.

C. The Hague Convention on Choice of Court Agreements: International Initiative on Exclusive Choice of Court Agreements

Finally, there is the Hague Convention which was adopted on 30 June 2005 by the EU on behalf of Member States (except Denmark) and, so far, Mexico³⁵ and Singapore.³⁶ The Hague Convention covers only one ground of jurisdiction: exclusive choice of court agreements.³⁷ It provides a mechanism for allocating jurisdiction where the parties have agreed to an exclusive choice of court agreement in favour of one of the Contracting State,³⁸ and for the recognition and enforcement of the judgment rendered in application to this agreement in the Contracting States.³⁹ To summarise, the Hague Convention requires the court designated in an exclusive choice of court agreement to hear the case, precludes courts of other Contracting States from entertaining parallel proceedings, and obliges other Contracting States to recognise and enforce the

³³ Liechtenstein is not a party to the 2007 Lugano Convention.

³⁴ 2007 Lugano Convention, Article 23.

³⁵ Mexico was the first state to accede to the Hague Convention on 26 September 2007.

³⁶ Singapore ratified the Hague Convention on 2 June 2016 and it entered into force between Singapore, the EU (except Denmark) and Mexico on 1 October 2016.

³⁷ However, Article 22 of the Hague Convention makes provision for the extension of the recognition of judgments given pursuant to non-exclusive choice of court agreements between Contracting States which have made a declaration to that effect. The EU has however not made such a declaration (yet).

³⁸ Hague Convention, Article 6.

³⁹ Hague Convention, Article 9.

judgment given under the jurisdiction clause.⁴⁰ It is worth noting that for entirely intra-EU matters, the Brussels I Recast Regulation prevails over the Hague Convention.⁴¹

II. Revival of Bilateral and Multilateral Conventions: an Unlikely Outcome

The starting assumption for an analysis on the potential impact of Brexit on the current regime for choice of court agreements is that, after the entry into force of the withdrawal agreement, or failing that, after the expiration of the two-year negotiation period, neither of the EU founding Treaties, the TEU or the TFEU,⁴² will apply to the UK,⁴³ and the European Communities Act ('1972 EC Act') will be repealed.⁴⁴ As a direct consequence, the Brussels I Recast Regulation will cease to be directly applicable in the UK,⁴⁵ and so will the 2007 Lugano Convention and the Hague Convention.⁴⁶ It will also mean

⁴⁰ Brussels I Recast Regulation, Article 69.

⁴¹ Hague Convention, Article 26(6).

⁴² Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O.J. C 115/47.

⁴³ TEU, Article 50(3) states that '[t]he Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period'. TEU, Article 1 and TFEU, Article 1(2) clarify that the TEU and TFEU shall be referred to as 'the Treaties' in both instruments.

For an analysis of the constitutional issues raised by Brexit see Holger P Hestermeyer, "How Brexit Will Happen: A Brief Primer on European Union Law Questions Raised by Brexit", *Journal of International Arbitration*, 2016, Vol 33, Issue 7, pp. 429-450.

⁴⁴ Repeal Bill, Clause 1.

⁴⁵ This article refers here only to the Brussels I Recast Regulation since it is the only EU instrument relevant to the issue of choice of court agreements between Member States. However other EU instruments such as Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ([2003] OJ L338/1) (Brussels II(bis)); Regulation (EC) No. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations ([2008] OJ L177/6), as applied to the UK by Commission Decision 2009/26/EC ([2009] OJ L10/22) ('Rome I'); Regulation (EC) No. 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations ([2007] OJ L199/40) ('Rome II') which are outside of the scope of this article, will also cease to be directly applicable in the UK as a direct consequence of Brexit.

⁴⁶ The 2007 Lugano Convention and the Hague Convention are only indirectly applicable in the UK since they were concluded by the EU on behalf of its Member

that the English courts will cease to be bound by Court of Justice of the European Union (“CJEU”) rulings.⁴⁷

There has been speculation however as to whether the Brussels Convention, the 1988 Lugano Convention,⁴⁸ or the seven bilateral enforcement conventions between the UK and six of the twenty-seven Member States plus Norway⁴⁹ might ‘revive’ after the UK’s withdrawal from the EU without the need for reconstruction or replication.⁵⁰ Considering the potential revival of these conventions raises two underlying questions. First, is the UK still bound by those conventions despite the Brussels Convention being ‘superseded’ by the Brussels I Regulation (and now by the Brussels I Recast Regulation),⁵¹ the 1988 Lugano Convention being ‘replaced’ by the 2007 Lugano Convention,⁵² and the different bilateral conventions being also ‘superseded’?⁵³ Secondly, can the UK benefit from these conventions when it will no longer be a member of the EU? These interrogations trigger questions

States (TFEU, Article 316(2)). See Andrew Dickinson, “Back to the future: the UK’s Exit and the conflict of laws”, *Journal of Private International Law*, 2016, 12:2, p. 198.

⁴⁷ Article 267 TFEU gives the CJEU jurisdiction to interpret the EU Treaties and the acts of the institutions of the EU. Under Article 267 TFEU, any court or tribunal of a Member State may make a preliminary reference to the CJEU when it has to interpret the Brussels I Recast Regulation, the 2007 Lugano Convention or the Hague Convention, in order to decide the case before it.

⁴⁸ The question arises since, before the transfer of legislative competence to the EU following the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed in Amsterdam on 2 October 1997 (“Treaty of Amsterdam”), the UK, as a member of the European Economic Community (“EEC”), participated to several conventions on private international law, notably to the Brussels Convention and the 1988 Lugano Convention.

⁴⁹ These bilateral conventions were concluded between the UK and six Member States (i.e. France; Belgium; the Federal Republic of Germany, Austria, Italy, and the Netherlands). Another bilateral convention was concluded between the UK and Norway. These bilateral conventions were given effect in the UK by the Foreign Judgments (Reciprocal Enforcement) Act 1933 (23 GEO 5 CH 13).

⁵⁰ For a detailed analysis of the issue regarding the Brussels Convention and the 1988 Lugano Convention, see Andrew Dickinson, “Back to the Future: the UK’s EU Exit and the Conflict of Laws”, *Journal of Private International Law*, 2016, 12:2, p. 195.

⁵¹ See Brussels I Regulation, Article 68(1), which provided that it ‘superseded’ the Brussels Convention, ‘except as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 299 of the [EC] Treaty’. See also TFEU, Article 355; Brussels Convention, Article 60; Brussels I Regulation, Recital 23; Brussels Recast Regulation, Recital 9.

⁵² 2007 Lugano Convention, Article 69 (6).

⁵³ Recast Regulation, Article 69; Brussels I Regulation, Article 69; Brussels Convention, Article 55.

on the interpretation of treaties and the status of these conventions as a matter of public international law.⁵⁴

A. Re-Expansion of the Scope of Application of the Brussels Convention

There is little doubt that the Brussels Convention⁵⁵ remains (residually) in force in the UK, at least until its withdrawal from the EU. Recital 9 of the Brussels I Recast Regulation provides that the Brussels Convention ‘continues to apply’,⁵⁶ and Article 68(1) of the Brussels I Recast Regulation⁵⁷ states that the Brussels I Regulation ‘shall, as between the Member States, supersede the Brussels Convention’ which however remains residually applicable as regards to the territories of the Member States falling within the territorial scope of the Brussels Convention but excluded from the EU Treaties.⁵⁸ The real issue is therefore whether, following Brexit, the Brussels Convention’s scope could be re-expanded to apply once more to the UK and the other 14 Contracting Member States,⁵⁹ or whether the scope of application of the Brussels Convention is now strictly limited to the territories of the Member States which fall within the territorial scope of the Brussels Convention but which are excluded from the Brussels Regulations pursuant to Article 299 of the TFEU. Without entering an in-depth analysis of this issue as a matter of public

⁵⁴ For a supplementary technical analysis see Andrew Dickinson “Back to the Future: the UK’s EU Exit and the Conflict of Laws”, *Journal of Private International Law*, 2016, 12:2, p. 195; Sara Masters and Belinda McRae, “What Does Brexit Mean for the Brussels Regime?”, *Journal of International Arbitration*, 2016, Vol 33, Issue 7, pp. 483-500.

⁵⁵ Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L 299/32, as amended including by the Convention on the accession of the Kingdom of Denmark, Ireland and the UK of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (Luxembourg, 9 October 1978) (consolidated version) [1998] OJ C 27/1.

⁵⁶ See also Brussels I Regulation, Recital (23).

⁵⁷ See also Brussels I Regulation, Article 68(1).

⁵⁸ See Brussels I Recast Regulation, Recital (9) and Article 68(1) (same Articles for Brussels I Regulation). These territories are Aruba and the French Overseas Collectives (including Mayotte).

⁵⁹ The 1978 Accession Convention came into force between the six original Contracting States, Denmark and the UK on 1 January 1987. It was implemented in domestic English law by the Civil Jurisdiction and Judgments Act 1982. The UK also became party to three other conventions: the Luxembourg Convention of 25 October 1982 relative to the accession of Greece (1982) OJ L388/1; the San Sebastian Convention on the accession of Spain and Portugal (1989) OJ L285/1; and the updated and consolidated Brussels Convention upon the accession of Austria, Finland and Sweden (1997) OJ C15/1.

international law,⁶⁰ (see the very thorough analysis of Andrew Dickinson on this question),⁶¹ a few remarks can be made both in favour and against the ‘re-expansion’ of the scope of the Brussels Convention.

The main argument in favour of the application of the Brussels Convention post-Brexit is that it is an international instrument which does not qualify as EU legislation and would therefore still be applicable after the UK withdrawal. If it is true that the UK membership to the European Economic Community (‘EEC’) provided the reason at the time to its accession to the Brussels Convention, this accession was however not conditional upon the continued membership to the EEC. Indeed, the Brussels Convention was given force of law in the UK not through the 1972 EC Act but through a separate enactment: the Civil Jurisdiction and Judgment Act 1982 (‘1982 Act’).⁶² This separation from the EU treaties is confirmed by the creation of a separate protocol on the interpretation by the CJEU of the Brussels Convention (‘1971 Protocol’),⁶³ without recourse to the procedure for amending the treaties themselves.⁶⁴ Therefore, the Treaties which would become inapplicable as a result of Article 50(3) TEU would be the TFEU and the TEU, but not the Brussels Convention. Further, an argument could be made that the wording of Article 68(1) of the Brussels I Regulation, ‘shall

⁶⁰ See Vienna Convention on the Law of Treaties concluded in Vienna on 23 May 1969 (which entered in force on 27 January 1980) 1155 U.N.T.S. 331 (‘Vienna Convention’), Articles 54, 56, 59 and 62. The UK (as many other Member States) is party to this Treaty but the EU is not. This has not prevented the CJEU from applying the Vienna Convention as rules of customary international law. See for instance Case C-162/96 *Racke GmbH & Co v. Hauptzollamt Mainz* (1998) E.C.R. I-3655, paras 24, 45, 46; Case C-386/08, *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen* (2010) ECR I-01289, para 42.

For a commentary on the Vienna Convention see Olivier Corten and Pierre Klein, *The Vienna Conventions on the Law of Treaties: A Commentary*, Corten & Klein eds., Oxford University Press, 2011; Oliver Dörr and Kirsten Schmalenbach, *The Vienna Convention on the Law of Treaties: A Commentary*, Dörr & Schmalenbach eds., Springer, 2012; Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Villiger eds., Martinus Nijhoff, 2009.

⁶¹ Andrew Dickinson, ‘Back to the Future: the UK’s EU Exit and the Conflict of Laws’, *Journal of Private International Law*, 2016, 12:2, p. 195.

⁶² 1982 Act, s 2(1): ‘(t)he Brussels Conventions shall have the force of law in the United Kingdom and judicial notice shall be taken of them.’

⁶³ Protocol on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, signed in Luxembourg on 3 June 1971, Consolidated version CF 498Y0126(02).

⁶⁴ See Jenard, P. (1979) Report on the protocols on the interpretation by the Court of Justice of the Convention of 29 February 1968 on the mutual recognition of companies and legal persons and of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Luxembourg 3 June 1971. OJ C 59, 5 March 1979, 4 (‘Jenard Report’).

supersede the Brussels Convention (...) as between the Member States', read in combination with Recital 9 of the Brussels I Regulation, 'a defendant domiciled in a Member State not bound by this Regulation must remain subject to the Brussels Convention', should be interpreted as suppressing the Brussels Convention provisions only between Member States.

However, there are also some strong arguments against this reasoning. It could be argued that authenticated languages of the Brussels I Recast Regulation appear to conflict. The French version of Article 68 provides that 'this Regulation shall, as between Member States *replace* the 1968 Brussels Convention'.⁶⁵ It could be argued that the verb 'replace' has a stronger and less controversial meaning than 'supersede'. French and English being two authentic languages of the Regulation, it is ultimately a question of treaty interpretation⁶⁶ which could be resolved by looking at the object and purpose of the Regulation,⁶⁷ or the circumstances of its conclusion.⁶⁸ The analysis in the previous paragraph undeniably overlooked the strong connection between the Brussels Convention and the EEC Treaty.⁶⁹ Resurrecting the Brussels Convention post-Brexit undermines the intent of the Contracting States, since it was originally concluded to 'implement the provisions of Article 220 of that Treaty by virtue of which they undertook to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals'.⁷⁰ As a result, the UK withdrawal from the EU could be analysed as a 'fundamental change of circumstances' which could be relied upon by the other Contracting States as a justification for terminating or withdrawing from the Brussels Convention.⁷¹ Besides, it could be argued that Article 68(1) of the Brussels I Regulation has permanently limited the

⁶⁵ Emphasis added. The French version provides: 'Le présent règlement *remplace*, entre les États membres, la convention de Bruxelles de 1968 ...'.

⁶⁶ Vienna Convention, Article 33.

⁶⁷ Vienna Convention, Article 31.

⁶⁸ Vienna Convention, Article 32.

⁶⁹ Vienna Convention, Article 63:

"The Contracting States recognise that any State which becomes a member of the European Economic Community shall be required to accept this Convention as a basis for the negotiations between the Contracting States and that State necessary to ensure the implementation of the last paragraph of Article 220 of the Treaty establishing the European Economic Community".

⁷⁰ Brussels Convention, Preamble.

⁷¹ See 1969 Vienna Convention, Article 62(1):

A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

geographical scope of application of the Brussels Convention which is now only applicable to Member States territories overseas. The ECJ's view on this issue, whether acting in exercise of its power under the TFEU or in application of the 1971 Protocol, will be determinative.

This framework might not however be fully satisfying given its limited geographical reach (15 Contracting States), and the outdated system of the Brussels Convention which would be a reversion to the law as it existed before 1 March 2002, date of entry into force of the Brussels I Regulation. Besides, if this solution was envisioned after failing to negotiate a new agreement with the EU, there would undoubtedly be little political will in favour of it, and it could possibly face considerable opposition in both the UK and the remaining Member States.

B. 'Revival' of the 1988 Lugano Convention

The 1988 Lugano Convention,⁷² which was signed and ratified (or acceded to, as appropriate) by 16 Member States⁷³ in their own right, and Iceland, Norway and Switzerland, adds an extra layer of complexity. The analysis has a similar starting point: the accession and participation of the UK to the 1988 Lugano Convention was only conditioned on it being a member of the European Communities at the time of the opening of the Convention to signature.⁷⁴ Therefore, it could *a priori* mean that the UK's withdrawal from the EU would not affect its participation to the 1988 Lugano Convention. However, as pointed out by Sara Masters and Belinda McRae,⁷⁵ there is a strong argument to be made that the 2007 Lugano Convention impliedly terminated the 1988 Lugano Convention. Indeed, pursuant to Article 59 of the Vienna Convention, which has a customary status,⁷⁶ a treaty is terminated if

⁷² Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Lugano, 16 September 1988) ([1988] OJ L319/9). The 1988 Lugano Convention was given force of law in the UK through the Civil Jurisdiction and Judgments Act 1991. S 3A(1) of the 1982 Act, as amended, provided '(t)he Lugano Convention shall have the force of law in the United Kingdom and judicial notice shall be taken of it.'

⁷³ It is worth noting that Poland is the only Member State which acceded to the 1988 Lugano Convention after 2004.

⁷⁴ 1988 Lugano Convention, Articles 60(a) and 64.

⁷⁵ Sara Masters and Belinda McRae, "What Does Brexit Mean for the Brussels Regime?", *Journal of International Arbitration*, 2016, Vol 33, Issue 7, p. 493.

⁷⁶ The EU, however, is not. Nevertheless, the CJEU has held that it will apply the Vienna Convention to the extent that it reflects rules of customary international law (see for instance Case C-162/96 *Racke v. Hauptzollamt* (1998) ECR I-3655). On the customary status of the Vienna Convention, particularly Article 59, see *The Vienna Convention on the Law of Treaties; A Commentary*, Corten & Klein eds., Oxford University Press, 2011, p. 1328.

‘all the parties to it conclude a later treaty relating to the same subject matter’. Considering the binding nature of the agreements concluded by the EU upon its Member States,⁷⁷ the better view is that the accession of the EU to the 2007 Lugano Convention affected the rights of the Member States under the 1988 Lugano Convention. Since, the UK was a Member State at the time, its rights were also affected, and will continue to be affected even after its withdrawal from the EU. This analysis is confirmed first by the clear language of Article 69(6) of the 2007 Lugano Convention which reads: ‘this Convention shall *replace* the (Lugano Convention)’,⁷⁸ and second by the fact that contrary to the Brussels Convention, the 1988 Lugano Convention has no residual territorial application. Besides, even in English law, the references to the 1988 Lugano Convention were replaced by references to the 2007 Lugano Convention in the Civil Jurisdiction and Judgments Act 1982.⁷⁹

A revival of the 1988 Lugano Convention seems therefore very unlikely as there might be nothing left to revive.

C. *Revival of the Bilateral Conventions on Enforcement of Judgments*

The third possibility would be a revival of the seven bilateral enforcement conventions ratified between the UK and six of the 27 Member States (i.e. in chronological order of ratification: France,⁸⁰ Belgium,⁸¹

⁷⁷ TFEU, Article 216(2).

⁷⁸ Emphasis added. See further Opinion ECJ, 7 February 2006, *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, 03/1, ECR 2006 I-01145 para. 136 (‘The purpose of the agreement envisaged is to replace the Lugano Convention’).

⁷⁹ See 1982 Act, s. 1(1). The reference to the 2007 Lugano Convention was inserted by the Civil Jurisdiction and Judgments Order 2009 (SI 2009/3131), reg. 3(2), Sch. 2, para. 1(c).

⁸⁰ Convention providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters, with a Protocol, 18 January 1934, Cmnd 5235.

⁸¹ Convention providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters, with a Protocol, 2 May 1934, Cmnd 5321.

Germany,⁸² Austria,⁸³ Italy,⁸⁴ and the Netherlands),⁸⁵ and Norway.⁸⁶ These bilateral conventions were given effect via the Foreign Judgments (Reciprocal Enforcement) Act 1933 at a time when there was no European harmonisation. The Brussels and Lugano Conventions, as well as the Brussels I Recast Regulation have ‘superseded’ these bilateral conventions.⁸⁷ They are therefore presently inapplicable,⁸⁸ but does it mean that they have been terminated or could they be revived?⁸⁹

The analysis developed previously regarding the terms ‘supersede’ in the English version of the Brussels Convention and ‘replace’ in the French one remains relevant as regards to the bilateral Conventions. Therefore, the same uncertainty as that concerning the implied termination of the Brussels Convention following the adoption of the Brussels I Regulation remains concerning the implied termination of the bilateral conventions following the ratification of the Brussels Convention. However, each of the bilateral Conventions provides for a specific termination regime,⁹⁰ which does not seem to have been invoked. The revival of the bilateral conventions is far from being

⁸² Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, 14 July 1960, Cm 1525.

⁸³ Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, 14 July 1961, Cm 1868, with a Protocol, 6 March 1970, Cmnd 4902

⁸⁴ Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, 7 February 1964, with a Protocol, 14 July 1970, Cmnd 5512

⁸⁵ Convention providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, 17 November 1967, Cm 4148

⁸⁶ Convention providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, 12 June 1961, Cm 1761, with a Protocol, 13 Oct. 1971, Cmnd 4990.

⁸⁷ For the bilateral conventions between the UK and the six Member States see Brussels Convention, Article 55 and Brussels I Recast Regulation, Articles 69 and 76. For the bilateral convention between the UK and Norway see 2007 Lugano Convention, Article 65.

⁸⁸ Pursuant to Article 76 of the Brussels I Regulation, the UK has listed the six bilateral Conventions to the European Commission which means that these six Conventions are inoperative. The same is true of the UK-Norway bilateral Convention which is listed as ‘superseded’ in Annex VII of the 2007 Lugano Convention.

⁸⁹ The arguments previously developed regarding the interpretation of treaties, the difference of language between the French and the English version, as well as taking into account the context of the adoption of the posterior EU instruments are also relevant to evaluate whether the bilateral Conventions could be revived or have been indirectly terminated. These points are therefore not discussed again in this Section.

⁹⁰ See for instance UK-France bilateral Convention, Article 10: ‘it (the Convention) shall remain in force until the expiration of six months from the day on which either of the High Contracting Parties shall have given notice to terminate it’. See also (with similar wording) UK-Belgium bilateral Convention, Article 10; UK-Netherlands bilateral Convention, Article 11; UK-Italy bilateral Convention, Article 11.

straightforward even if it cannot be completely excluded from a legal standpoint.⁹¹

To conclude, the above analysis reveals first that if the revival of the 1988 Lugano Convention does not seem to be an option since it appears to have been replaced by the 2007 Lugano Convention. The conclusion differs as regard to the Brussels Convention and the six bilateral treaties which could possibly be revived, even if it appears very unlikely.⁹² However, another question to ask is whether these revivals are even desirable. Just as Professor Briggs, we can doubt it.⁹³ The revival of the bilateral Conventions would have a rather limited territorial⁹⁴ and material scope of application,⁹⁵ and would provide for mostly outdated rules.⁹⁶ As to the ‘re-expansion’ of the Brussels Convention, it would significantly limit the territorial reach of judicial co-operation and would not cover the most up-to-date version of the legislation, retaining the inherent shortcomings of the Brussels Convention. For these reasons, even if the revival of the bilateral Conventions and the Brussels Convention was an option, it does not appear beneficial, whether for the UK or the Contracting States, for these instruments to be revived.

III. The Shortcomings of the Repeal Bill regarding choice of court agreements

If none of the conventions or bilateral treaties is revived, and as seen previously there are many reasons why this option should not be privileged, the current position of the UK government is to convert the Brussels I Recast Regulation into domestic law by operation of Clause 3 of the Great Repeal Bill. It is a more nuanced approach than a simple return to the common law⁹⁷ but

⁹¹ Professor Briggs considers that the bilateral Conventions are still in force (“They are still in force”), Adrian Briggs, “Secession from the European Union and Private International Law: the Cloud with a Silver Lining”, Commercial Bar Association, January 2017, available at: <<http://www.combar.com/news/brexit-lecture-by-professor-adrian-briggs-qc-hon/>>, p. 16, footnote 48.

⁹² *Ibid* p. 3: ‘the idea is not credible’.

⁹³ *Ibid* p. 26: ‘arguments proposing revival are unlikely to be fruitful: the arguments are complex and unattractive and will only ever cause difficulty.’

⁹⁴ As explained previously, the bilateral Conventions only apply to six of the twenty-seven Member States, and one of the four EFTA State.

⁹⁵ These bilateral Conventions do not apply to the issue of choice of court agreement but only provide for a legal regime of recognition and enforcement of money judgments.

⁹⁶ A. Gridel, *The consequences of the withdrawal from the European Union on the English conflict of laws (Brexit and the conflict of laws)*, this review.

⁹⁷ A return to the common law would entail the expansion of the territorial scope of application of the common law rules found under Pt 6 of the Civil Procedure Rules

still an unsatisfying one when it comes to choice of court agreements, as it will be exposed in this section.

On 13 July 2017, the UK government introduced the Repeal Bill to the House of Commons. The stated objective is to ‘ensure that the same rules and laws will apply on the day after exit as on the day before’,⁹⁸ in order to ‘provide the maximum possible certainty and continuity to businesses, workers and consumers across the UK’. The proposed method is to convert existing EU law into a body of English domestic law to be known as a ‘retained EU law’.⁹⁹ The retained EU law will benefit from the EU supremacy principle regarding pre-Brexit domestic English law but not regarding post-Brexit domestic English law.¹⁰⁰ Concretely, it means that pre-Brexit Act of Parliament will be disregarded if they conflict with retained EU law. However, if post-Brexit Act of Parliament conflict with retained EU law, the principle of supremacy of EU law will cease to apply and the Act of Parliament will take priority over retained EU law. The goal being to maximise certainty and stability while ensuring the sovereignty of the Parliament.¹⁰¹ The Repeal Bill also explains the status of the case law of the CJEU after Brexit.¹⁰² CJEU decisions made post-Brexit will not be binding on English courts and tribunals which will not be able to refer cases to the CJEU.¹⁰³ The pre-Brexit jurisprudence will continue to be binding on UK courts with some exceptions. The main exception is that the Supreme Court will be able to depart from the pre-Brexit CJEU case law, but only in the same conditions as it does when departing from its own case law.

The system set out in the Repeal Bill has different flaws regarding the question of choice of court agreements. First, the Brussels I Recast Regulation, which promotes the respect of choice of court agreements and the resulting judgments in Member States, is based on reciprocity. Reciprocity cannot be replicated unilaterally in domestic legislation. It necessitates supportive action from other Member States. The unilateral enactment of these rules by the UK would therefore deceive their purpose.¹⁰⁴ Second, as a result of this unilateral

(‘CPR’). These rules are already applicable to international private law issues arising between the UK and third States.

⁹⁸ Department for Exiting the European Union, The Repeal Bill, Factsheet 1: General p 1 (‘Factsheet 1’), available at: <<https://www.gov.uk/government/publications/information-about-the-repeal-bill>>.

⁹⁹ Repeal Bill, Clause 6(7).

¹⁰⁰ Repeal Bill, Clause 5.

¹⁰¹ Factsheet 1, p. 2.

¹⁰² Repeal Bill, Clause 6.

¹⁰³ However, English courts will be able to take CJEU judgments. It will however only be a possibility, not a mandatory requirement (Repeal Bill, Clause 6).

¹⁰⁴ Sara Masters and Belinda McRae, “What Does Brexit Mean for the Brussels Regime?”, *Journal of International Arbitration*, 2016, Vol 33, Issue 7, p. 184; Adrian Briggs, “Secession from the European Union and Private International Law: the Cloud with

conversion of the Brussels I Recast Regulation into English domestic law, from the perspective of the remaining Member States, English courts will be in the same position as any other court outside the EU. Subject to any contrary arrangements with the EU, the English courts will therefore not retain the many advantages that the Brussels I Recast Regulation affords them. However, English proceedings may still be conferred protection by Member State courts, which retain a discretionary power under the Brussels I Recast Regulation to stay proceedings, in specified circumstances, where the courts of a third State are seised first.¹⁰⁵ This system is undoubtedly less protective and more unpredictable than the one currently enjoyed by the UK.

There is also a great level of uncertainty as to the approach that Member State courts will take in respect of English choice of court agreements following Brexit.¹⁰⁶ This uncertainty has been generated by two elements.¹⁰⁷ First, it is triggered by the absence of any express reference in the Brussels I Recast Regulation as to what Member State courts should do if proceedings are brought before the courts of a Member State which has jurisdiction under the Brussels I Recast Regulation,¹⁰⁸ but in the presence of a choice of court agreement in favour of a third State court. Secondly, uncertainty also stems from the ECJ view that a choice of court agreement in favour of a third State court would have no effect in these circumstances (at least without an international convention justifying the competence of the chosen jurisdiction, such as the Hague Convention).¹⁰⁹ Therefore, Member State courts may consider that they have no power to stay proceedings in favour of an English court post-Brexit despite the presence of an exclusive choice of court

a Silver Lining”, Commercial Bar Association, January 2017, available at: <<http://www.combar.com/news/brexit-lecture-by-professor-adrian-briggs-qc-hon/>>, p. 5.

¹⁰⁵ See Brussels I Recast Regulation, Articles 33 and 34. More precisely, under Article 33, Member State courts may stay proceedings in favour of a court outside of the EU if three conditions are met: (i) the non-EU court was seised first, (ii) the non-EU court can give a judgment capable of enforcement in the Member State in question, and (iii) a stay is necessary for the proper administration of justice.

¹⁰⁶ Ultimately, it will be for the CJEU to elaborate the most appropriate approach in these circumstances.

¹⁰⁷ For a detailed analysis on transitional issues in conflict of laws post-Brexit see Andrew Dickinson, “Back to the future: the UK’s Exit and the conflict of laws”, *Journal of Private International Law*, 2016, 12:2, p. 207 and “Report on the Implication of Brexit”, RTDF, 2016, p. 3.

¹⁰⁸ For instance because the defendant is domiciled in that Member State (Brussels I Recast Regulation, Article 4).

¹⁰⁹ Opinion 1/03, ECLI:E.U.:C:2006:81, [2006] ECR I-1145, 153. See also Case C-281/02 *Onusu v Jackson*, 2005, ECR I-1383, para 37 where the ECJ held that jurisdiction within the EU on the basis of domicile ‘is mandatory and (...) there can be no derogation from [this] principle (...) except in cases expressly provided for by the [Regulation].’

agreement in favour of the English courts. However, if a jurisdiction clause in favour of the English courts may not mandate EU Member State courts to defer to the English courts in quite the same way as it does now under the Brussels I Recast Regulation, the English courts will be able to grant anti-suit injunctions again¹¹⁰ to restrain a party from pursuing proceedings before a Member State courts. Any party with a business or assets in the UK could not ignore such an injunction considering how drastic the sanctions for non-compliance are.¹¹¹

What must also be considered is how complex the domestic recognition and enforcement procedures in the different Member States are in comparison to the procedure set in the Brussels I Recast Regulation.¹¹² As a result, if recognition and enforcement of an English judgment, whether granted under a choice of court agreement or not, may still be achieved under the different national laws of the Member States post-Brexit, the procedures may be inconsistent, making enforcement more complex, time consuming and costly.

The shortcomings of the conversion of the Brussels I Recast Regulation into English domestic law highlight the need for finding more satisfying alternatives, to which I now turn.

IV. Alternatives to the Proposed Repeal Bill

As explained in the previous section, the Brussels I Recast Regulation is based on reciprocity between Member States. This reciprocity cannot be replicated unilaterally by converting the Regulation into English domestic law.

¹¹⁰ Those powers have been previously declared contrary to the principles of mutual trust between Member State courts by the CJEU in C-185/07 *West Tankers*, 2009, I-00663. See also Case C-159/02 *Turner v Grovit*, 2004, ECR I-03565; Case C-116/02 *Erich Gasser Gmbh v MIS-AT Srl*, 2003, ECR I-14693. For a complete review on anti-suit injunctions post Brexit see Kate Davies and Valeriya Kirsey, “Anti-Suit Injunctions in Support of London Seated Arbitrations Post- Brexit: Are All Things New Just Well- Forgotten Past?”, *Journal of International Arbitration*, 2016, Volume 33, Issue 7, pp. 501-520. See also Mukarrum Ahmed, “The Enforcement of Settlement and Jurisdiction Agreements and Parallel Proceedings in the European Union: The Alexandros T Litigation in the English Courts” *Journal of Private International Law*, 2015, pp. 412-415.

¹¹¹ See Contempt of Court Act 1981, s.v 14(1).

¹¹² Under the Brussels I Recast Regulation, the enforcement of a judgment originating from a Member State in another Member State is procedurally straightforward and simplified. The judgment creditor is no longer required to apply for a declaration of enforceability (‘exequatur’) which was previously the case under Article 38(1) of the Brussels I Regulation. Instead, the judgement creditor only needs to present to the enforcing court a copy of the judgment (Brussels I Recast Regulation, Article 42). The burden of proof is on the judgment debtor who will have to demonstrate that one of the limited grounds to oppose enforcement is met (Brussels I Recast Regulation, Article 45).

It will on the contrary necessitate supportive actions from the remaining Member States. An agreement between the UK and the EU (and the three EFTA States for that matter) is therefore advisable. The following analysis identifies the different European and international instruments the UK could implement post-Brexit regarding choice of court agreements in the context of cross-border litigation in Europe.

A. Continued Application of the Brussels I Recast Regulation: Best Alternative, Unlikely to Prevail

The UK Government made clear its intention¹¹³ ‘to make a new agreement, a new relationship, with the EU for the future that is constructive and tackles these important issues’, and its preference ‘to reach (an) agreement within the two-year period and for it to be implemented thereafter’.¹¹⁴ If in theory, the UK could negotiate a new treaty with the EU, in the light of the time-consuming nature of treaty-drafting, especially in a very restricted time frame when many other pressing issues will have to be negotiated, the better alternative could be to negotiate the continued application of an existing regime, such as the Brussels I Recast Regulation. The agreement could specify that for the purpose of the Brussels I Recast Regulation, the UK is to be treated as if it was still a Member State. Conveniently, there is a precedent in the area of EU civil law with the 2005 Denmark Agreement with the European Community (‘EC-Denmark Agreement’).¹¹⁵ Indeed, since the Maastricht Treaty allows Denmark the right to opt out in the area of EU civil law,¹¹⁶ Denmark is not bound by the Brussels I Recast Regulation. Therefore, Denmark had to sign an international agreement with the then European

¹¹³ See answers of the Minister of State for Courts and Justice’s, Rt Hon Sir Oliver Heald QC MP, to the questions of the EU Committee of the House of Lords, available at:

<<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-civil-justice-cooperation/oral/46539.html>>.

¹¹⁴ *Ibid*, question Q38.

¹¹⁵ Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2005) OJ L299/62.

¹¹⁶ The position of Denmark in the EU became different from the one of the other Member States after it failed to ratify the Maastricht Treaty by referendum on 2 June 1992. Denmark had concerns about four specific areas, including justice and home affairs. On the basis that it would be able to opt out from these areas, Denmark finally ratified the Maastricht Treaty after a second referendum on 18 May 1993 (see the Edinburgh Agreement (1992) OJ C348/1). A specific protocol now governs the relationship between Denmark and the EU (see Protocol (No. 22) on the position of Denmark (2012) OJ C326/299).

Community to participate to the Brussels I Regulation¹¹⁷ and, now, the Brussels I Recast Regulation.¹¹⁸

Were this treaty relationship to be replicated between the UK and the EU, it would have a number of significant advantages. It would enhance legal certainty and preserve the continuity of the rules on allocation of jurisdiction between Member States and the UK and the recognition and enforcement of their judgments even after the UK withdrawal. The UK would then continue to benefit from the system, and the innovations, of the Brussels I Recast Regulation, which would not be the case should the UK seek to simply convert the Brussels I Recast Regulation as it stands on the day of Brexit into domestic. The most important benefits conferred on Member States by the Brussels I Recast Regulation in relation to choice of court agreement would also be upheld. Where a contract is governed by an exclusive choice of court agreement, the courts of the Member States would still be precluded from hearing the case and the judgment rendered by the English courts would continue to be enforceable in the Member States through a simple and effective procedure.

As appealing as the possibility of an agreement between the EU¹¹⁹ and the UK might appear, it raises a number of difficulties which cast doubts on its practical realisation. First, the remaining Member States and the European Commission might refuse to negotiate an agreement establishing close links with the UK legal system and take the view that the participation to the single market is a pre-condition to the application of the Brussels I Recast Regulation. Indeed, one of the central feature of the Brussels I Recast Regulation is the principle of mutual trust which justifies the almost automatic recognition of Member State judgments. The free movement of judgments is itself conditioned on the free movement of goods, capital, services and people.

Secondly, the UK Government could be averse to such a solution for political reasons. Indeed, if the agreement between the EU and the UK was to

¹¹⁷ Council Decision 2005/790/EC of 20 September 2005 on signing, on behalf of the Community, of the Agreement between the European community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 299/61, 16 November 2005.

¹¹⁸ Denmark notified the Commission of its decision to implement the content of the Brussels I Recast Regulation by letter of 20 December 2012. The agreement between the EU and Denmark indicates that the Brussels I Recast Regulation will be applied to relations between the EU and Denmark, and that Denmark will notify the Commission of the date of entry into force of the legislation (see (2013) OJ L79/4). On Denmark implementation of the amendments of the Recast Regulation see also (2014) OJ L240/1.

¹¹⁹ The EU has exclusive competence in this area (TFEU, Articles 2(1) and 3(2)). It would therefore conclude this agreement on behalf of the Member States (except Denmark). The UK would need to negotiate a separate agreement with Denmark in order for the Brussels I Recast Regulation to apply between them.

replicate some of the features of the EC-Denmark Agreement, the UK would have no right to participate to the amending process of the Brussels I Recast Regulation,¹²⁰ but would still be bound to implement the new amendments, risking otherwise the termination of the agreement.¹²¹ These features seem in direct contradiction with what the Prime Minister promised in her speech on 17 January 2017, when she said “(l)eaving the European Union will mean that our laws will be made in Westminster, Edinburgh, Cardiff and Belfast. (...) Because we will not have truly left the European Union if we are not in control of our own laws.”¹²²

Thirdly, the role of the CJEU in this context is likely to cause considerable difficulties. Under the EC-Denmark Agreement, Denmark is obliged to refer EU law questions¹²³ to the CJEU in the same conditions as the any other Member State¹²⁴ and is required to ‘take due account of’¹²⁵ decisions of the CJEU in respect of the Brussels Convention and the Brussels I Regulation.¹²⁶ However, since the UK post-Brexit will no longer be a Member State, it will lose its right to make a preliminary reference,¹²⁷ and the CJEU will have sovereign authority over the EU. In such circumstances, without the supervision of the CJEU, the EU might be reluctant to agree to the application of the Brussels I Recast Regulation. An agreement of the contrary would be technically possible but unlikely considering the current position of the UK Government.¹²⁸

The UK Government’s stated desire to bring an end to the CJEU’s jurisdiction in the UK post-Brexit¹²⁹ appears to rule out the suggestion that the

¹²⁰ Denmark-EC Agreement, Article 3(1): ‘Denmark shall not take part in the adoption of amendments to the Brussels I Regulation.’

¹²¹ Denmark-EC Agreement, Article 3(7)(a).

¹²² Theresa May MP, Speech on The Government’s negotiation objectives for exiting the EU, 17 January 2017, available at:

<<https://www.gov.uk/government/speeches/thegovernmentsnegotiatingobjectivesforexitingtheeuupmspeech>>.

¹²³ TFEU, Article 267.

¹²⁴ Denmark-EC Agreement, Article 6(1).

¹²⁵ Denmark-EC Agreement, Art. 6(1).

¹²⁶ Denmark-EC Agreement, Article 6(2). Presumably, this extends to decisions in respect of the Recast Regulation.

¹²⁷ See TEU, Article 19(3)(b) according to which preliminary rulings are limited to Member State courts and tribunals. See also TFEU, Article 267.

¹²⁸ Repeal Bill, Clause 6.

¹²⁹ Theresa May MP, Speech on The Government’s negotiation objectives for exiting the EU, 17 January 2017, available at:

<<https://www.gov.uk/government/speeches/thegovernmentsnegotiatingobjectivesforexitingtheeuupmspeech>>:

(w)e will take back control of our laws and bring an end to the jurisdiction of the European Court of Justice in Britain. Leaving the European Union will mean that

UK could seek to emulate the Danish model. What is clear in any event is that, the Government's promise that the Repeal Bill will 'ensure that all EU laws which are directly applicable in the UK (such as Regulations) ... remain part of domestic law on the day we leave the EU'¹³⁰ would have very limited utility without EU's consent. The Brussels I Recast Regulation requires reciprocal actions from the EU Member States which would be lacking if these rules were simply converted into domestic law. A post-Brexit agreement between the EU and the UK on the application of this legislation would therefore be desirable.¹³¹

B. *Accession to the 2007 Lugano Convention: an Imperfect but Plausible Alternative*

The second solution would be for the UK to sign and ratify the 2007 Lugano Convention,¹³² and its three separate Protocols.¹³³ Presently, the UK is not a party to the 2007 Lugano Convention but is bound by it as a Member State.¹³⁴ Therefore, after the UK withdrawal from the EU, it will no longer be bound by the 2007 Lugano Convention. The UK could then accede to it either by becoming a member of the EFTA,¹³⁵ or, by joining the Convention by unanimous consent of the Contracting Parties, namely the EU, Denmark, Iceland, Norway and Switzerland.¹³⁶ The accession to the EFTA would require the UK to be bound to the EU on economic, commercial and legal relations

our laws (...) be interpreted by judges not in Luxembourg but in courts across the country.

¹³⁰ HM Government, The United Kingdom's exit from and new partnership with the European Union, Cm 9417, February 2017, p. 10, available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf>.

See Repeal Bill, Clauses 3 and 5.

¹³¹ Reaching the same conclusion see Sara Masters and Belinda McRae, "What Does Brexit Mean for the Brussels Regime?" *Journal of International Arbitration*, 2016, Vol 33, Issue 7, p. 483.

¹³² Or as Professor Briggs puts it a 'Lugano-ish option' which he considers to be 'a perfectly reasonable aim'. Adrian Briggs, "Secession from the European Union and Private International Law: the Cloud with a Silver Lining", Commercial Bar Association, January 2017, available at: <<http://www.combar.com/news/brexit-lecture-by-professor-adrian-briggs-qc-hon/>> p. 25.

¹³³ See (2007) OJL 339/3. The three Protocols are: (i) Protocol No.1 on certain questions of jurisdiction, procedure, and enforcement, (ii) Protocol No. 2 on the uniform interpretation of the Convention and on the Standing Committee, and (iii) Protocol No. 3 on the application of Art. 67 of the Convention.

¹³⁴ See TFEU, Article 216(2): 'Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.'

¹³⁵ 2007 Lugano Convention, Article 71. See also 2007 Lugano Convention, Article 70(1)(a).

¹³⁶ 2007 Lugano Convention, Article 72(3).

in the same conditions as the other EFTA Contracting States. It appears unlikely in the current tensed political context. Therefore, if the UK decided to become a party to the 2007 Lugano Convention, it is more plausible that the second route would be prioritised (i.e. joining the 2007 Lugano Convention by unanimous consent of the Contracting Parties).

There would be a number of advantages for the UK to sign and ratify the 2007 Lugano Convention (i.e. predictability and certainty). The Convention covers the same subject matter as the Brussels I Regulation and is theoretically capable of immediate signature and ratification after the UK withdrawal.¹³⁷ The UK would then be able to continue to apply harmonised rules on jurisdiction and judgments with the EU (including Denmark), Iceland, Norway and Switzerland.

The principal drawback of the 2007 Lugano Convention, however, is that it is based on the Brussels I Regulation. This means that it does not reflect (yet)¹³⁸ the most recent improvements introduced by the Brussels I Recast Regulation. In the field of choice of court agreements, some of the crucial innovations would therefore be lost to the UK, notably (i) the conferral of jurisdiction to the Member State court designated by a choice of court agreement regardless of the domicile of the parties (whether outside or inside the EU),¹³⁹ and (ii) the provisions designed to make the jurisdictional ‘torpedo’ ineffective.¹⁴⁰

As part of its accession to the 2007 Lugano Convention, the UK would be bound by Protocol 2,¹⁴¹ which seeks to ‘prevent divergent interpretations’ between the Brussels I Regulation and the Convention.¹⁴² Under this Protocol, the final authority for interpreting the 2007 Lugano Convention would be the

¹³⁷ The UK would not be able to conclude a treaty before its formal withdrawal from the EU since the EU has exclusive competence for the Member States in this area. However, the UK could potentially negotiate a treaty in advance, before its withdrawal. It would then be allowed to sign and ratify it immediately after its withdrawal (See TEU, Article 50(3)).

¹³⁸ The Treaty could be amended to bring it in line with the Recast Regulation (see 2007 Lugano Convention, Article 76 and Protocol No. 2, Article 4). However, it does not seem to be in the agenda. The Standing Committee ‘discussed the possible modification of the revised Lugano Convention ... to bring it in line with the new version of the Brussels I Regulation’ but ‘made no recommendation ... and did not decide any further steps’, see Swiss Federal Office of Justice, Lugano Convention 2007, available at: <www.bj.admin.ch/bj/en/home/wirtschaft/privatrecht/lugue-2007.html>.

¹³⁹ Recast Regulation, Article 25(1).

¹⁴⁰ Recast Regulation, Article 31(2)–(4) and Preamble, Recital 22. See also Case C-116/02 *Erich Gasser GmbH v. MIS-AT* (2005) Q.B.1.

¹⁴¹ Protocol No. 2 is annexed to the 2007 Lugano Convention pursuant to Article 75 of the 2007 Lugano Convention.

¹⁴² 2007 Lugano Convention, Protocol No. 2, Preamble.

CJEU for EU Member States, and the Supreme Courts of the other Contracting Parties. As a result, ‘any court applying and interpreting this Convention *shall pay due account to ... any relevant decision ... rendered by the courts of the States bound by this Convention and by the Court of Justice*¹⁴³ of the European Union.¹⁴⁴ The UK Government might see this option as politically acceptable. It would not be directly beholden to the CJEU decisions but would only need to have regard to the CJEU case law, which is not that different from what is currently suggested under Clause 6 of the Repeal Bill.

The accession of the UK to the 2007 Lugano Convention appears as a solution which would have the advantage of predictability, certainty and reciprocity despite retaining some of the inherent shortcomings of the Brussels I Regulation, and the CJEU maintaining some authority which might still meet political resistance.

C. The Hague Convention: a Limited Material Scope of Application

The UK could also consider becoming a party to the Hague Convention in its own right in order to guarantee that a judgment given by an English court that has taken jurisdiction under an exclusive choice of court agreement would still be enforceable through the EU (except Denmark). At present, the EU is a party to the Hague Convention, which applies to the UK by virtue of EU law.¹⁴⁵ Post-Brexit, the Hague Convention will therefore cease to apply in the UK.

This solution presents certain advantages. First, since the EU is a Contracting Party to the Convention, the regime of the Hague Convention was already brought into force in the Member States (except Denmark).¹⁴⁶ Secondly, the regime of the Convention being already applicable in the UK, the UK’s accession to the Convention post-Brexit would guarantee the continuity of the law for exclusive choice of court agreements. Thirdly, the accession of the UK to the Hague Convention would be pretty straightforward since the Convention is open for signature by all States. It could therefore become a Contracting Party to the Hague Convention without negotiating with the EU or the other Contracting States.¹⁴⁷ Finally, the Hague Convention is

¹⁴³ Emphasis added.

¹⁴⁴ 2007 Lugano Convention, Protocol No. 2, Article 1(1).

¹⁴⁵ The Hague Convention entered into force in Mexico and in the Member States (excluding Denmark) on 1 October 2015. Pursuant to Article 16 of the Hague Convention on transitional provisions, the Convention will only apply to exclusive choice of court agreements in favour of a Member State or Mexico concluded on or after 1 October 2015.

¹⁴⁶ TFEU, Article 216(2).

¹⁴⁷ Hague Convention, Article 27.

compatible with the Repeal Bill as introduced to the House of Commons on 13 July 2017.

The Hague Convention however also has disadvantages. It has a narrow material scope of application as it only applies to exclusive choice of court agreements,¹⁴⁸ and the transitional period could create uncertainty. Indeed, Article 16 of the Hague Convention states that the Convention only applies to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court and does not apply to proceedings instituted before its entry into force in the state of the court seised. The Convention could only come into force in the UK on the first day of the month following the expiration of three months after the deposit of the UK instrument of ratification.¹⁴⁹ This three months window could be problematic. The gap would be limited if the UK was able to deposit the instruments of ratification exactly three months before leaving the EU.¹⁵⁰

There is a great probability that the UK will decide to remain party to the Hague Convention considering the political support of both the Labour Government when it was being negotiated and concluded between 2003 and 2005, and of the Conservative/Liberal Democrat coalition Government when the EU approved the Convention in 2014.¹⁵¹ However, the Hague Convention does not offer a comprehensive solution in term of judicial cooperation with the EU as it only applies when the parties have agreed to an exclusive choice of court agreement. It could not therefore replace the adoption of a more comprehensive regime on jurisdiction clauses and recognition and enforcement of judgments. Nevertheless, it may be a useful partial measure until a more exhaustive framework is negotiated with the EU.

Conclusion

The objective of this article is to draw attention to the mutual loss of advantages which may be experienced by courts and litigants in the UK and Member States post-Brexit in respect of court agreements, and the recognition

¹⁴⁸ Hague Convention, Articles 5, 6 and 8.

¹⁴⁹ Hague Convention, Article 31(2)(a).

¹⁵⁰ See Sara Masters and Belinda McRae, “What Does Brexit Mean for the Brussels Regime?”, *Journal of International Arbitration*, 2016, Vol 33, Issue 7, p. 494.

¹⁵¹ See Mukarrum Ahmed and Paul Beaumont, “Exclusive Choice of Court Agreements: Some Issues on the Hague Convention on Choice of Court Agreements and Its Relationship with the Brussels I Recast Especially Anti-Suit Injunctions, Concurrent Proceedings and the Implications of BREXIT”, *Centre for Private International Law Aberdeen Working Paper Series*, 2016, Working Paper No. 2016/5, p. 24, available at:

<http://www.abdn.ac.uk/law/documents/CPIIL_Working_Paper_2016_5.pdf>.

and enforcement of judgments resulting from these agreements. The preceding analysis identified the instruments which could offer plausible alternatives to the loss of the Brussels I Recast Regulation, the 2007 Lugano Convention, and the Hague Convention, as an indirect consequence of the repeal of the 1972 EC Act.

This article considers that the best option would be for the UK to consider a system which would exactly balance the loss of these three fundamental instruments. It could (i) negotiate a new treaty with the EU under which the Brussels I Recast Regulation would continue to apply to the UK after it leaves the EU, (ii) become a party to the 2007 Lugano Convention, and (iii) ratify the Hague Convention. This solution would guarantee the application of modernised, coherent and harmonised jurisdiction rules between the UK and the EU, three of the EFTA Contracting States, and the signatories to the Hague Convention. The adoption of those three instruments would guarantee the certainty, continuity and reciprocity of the law on choice of court agreements between the Member States and the UK. Some effort however will have to be made to ensure that there is no gap between the UK being bound by these instruments as a Member State and being bound by them under the new arrangements. Nevertheless, considering the UK Government stance on the jurisdiction of the CJEU, it seems politically unlikely that the Government will agree to be part of a system which defers power to, or ‘pay(s) due account’ to the decisions of, the CJEU. If the UK Government decided to maintain a too rigid position, it may simply be left with the Hague Convention, with its limited scope of application.

Some English commentators have anecdotally already observed fewer choice of court agreements naming ‘England and Wales’ as the jurisdiction of their choice in commercial contracts.¹⁵² Any uncertainty ultimately benefit other Member State courts,¹⁵³ and arbitrations seated in London.¹⁵⁴ Regardless

¹⁵² See, along these lines, ‘Appendix 1: Survey of likely responses to English jurisdiction clauses in EU Member States’, in The Bar Council Brexit Working Group, *The Brexit Papers*, December 2016, pp. 11, 16-17, available at : <http://www.barcouncil.org.uk/media/508513/the_brexit_papers.pdf>.

¹⁵³ This would be the case when the recognition and enforceability of a judgment in the continuing EU is an important factor for the parties (for instance when the accessible assets of a party are located in the EU).

¹⁵⁴ Brexit will have very limited consequences on international arbitration since this field of law is expressly excluded from the scope of application of the Brussels I Recast Regulation (see Brussels I Recast Regulation, Recital 12, Articles 1(2)(d) and 73(2)). The New York Convention (United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 4739) will continue to ensure the recognition and enforcement of English seated arbitration in the 157 Contracting States (including the UK and all of the remaining Member States). For an analysis of the phenomenon see Guillaume Croissant, “Towards the Uncertainties of a Hard Brexit: An Opportunity for International Arbitration”, *Kluwer*

of the position which will prevail, the UK Government needs to take proactive steps to mitigate the uncertainty for those parties entering into cross-border civil and commercial contracts in the post-referendum legal landscape.

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Arbitration Blog, 27 January 2017, available at: <<http://kluwerarbitrationblog.com/2017/01/27/towards-the-uncertainties-of-a-hard-brex-it-an-opportunity-for-international-arbitration/>>; Kate Davies and Valeriya Kirsey, "Anti-Suit Injunctions in Support of London Seated Arbitrations Post-Brexit: Are All Things New Just Well-Forgotten Past?", *Journal of International Arbitration*, 2016, Vol 33, Issue 7, pp. 501-520.