Draft – 20 April 2017

Close the Door on Your Way Out

Free Movement of Judgments in Civil Matters - A 'Brexit' Case Study

Professor Andrew Dickinson, St Catherine's College, Oxford *

A. Introduction

On 29 March 2017, the United Kingdom gave formal notice under Art 50(2) of the Treaty on European Union (TEU) of its decision to leave the European Union, a decision taken following the referendum held on 23 June 2016.[1] In that referendum, just over 17.4 million members of the qualified electorate in the United Kingdom and Gibraltar voted to "Leave" the European Union. They constituted 51.9% of those who chose to vote, outnumbering the minority "Remain" voters by around 1.27 million.[2]

Absent an unexpected turn of political events,[3] the negotiations contemplated by Art 50(2) between the UK and the Union/the remaining Member States ("**EU27**") will commence in the Autumn and will end either with a withdrawal agreement (whether or not accompanied by a

---

* Fellow and Tutor, St Catherine's College and Professor of Law, University of Oxford.

Unless otherwise attributed, the opinions expressed in this paper are personal opinions only. This paper is based in part upon a presentation to the members of the Max Planck Institute for Foreign and International Private Law in Hamburg on 1 March 2017. I am grateful to the participants on that occasion, and in particular to Professors Reinhard Zimmermann and Jürgen Basedow, for their questions and comments.

1 Letter from the Prime Minister, the Rt Hon Theresa May MP, to the President of the European Union, Donald Tusk, dated 29 March 2017 ("**Article 50 Notice**").

2 Source: The Electoral Commission, http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information.

3 On 18 April 2017, the Prime Minister called a UK general election, which will be held on 8 June. The exact make-up of the new Parliament and Government will plainly shape the negotiating objectives and overall approach of the UK (and the EU/EU27) in the forthcoming negotiations, which may have implications for some or all of the factors addressed in Section D below. In particular, it must be noted that the opposition parties are generally more supportive than others of the UK's continued participation in the single market than the Conservative Party of the Prime Minister.

Whatever the strict legal position may be, there appears little prospect of the withdrawal decision being reversed politically. Both the Conservative Party of the Prime Minister and the main opposition Labour Party appear committed to implementing that decision in accordance with the referendum vote.

Nevertheless, in today's complex political ecosystem, it would be unwise to rule out any eventuality.

more detailed relationship agreement) or by the automatic termination of the treaties on 29 March 2017 or on such later date as the parties may unanimously agree.[4]

The negotiators will be in uncharted territory, and the scale of the task facing them should not be underestimated. Sir Ivan Rogers, who resigned ostentatiously at the UK's ambassador to the EU shortly before the Prime Minister's January speech, described the task of the negotiators as "humungous", an "unprecedentedly large negotiation on the scale we haven't experienced probably ever and certainly not since the Second World War".[5] Discussions concerning the parties' future relationship will need to address hundreds of topics, and a multitude of different issues within those topics. A comprehensive assessment of the state of play and likely outcomes at this stage would be fool's errand. Instead, this article focusses on a single issue from the author's own area of expertise (private international law) and seeks both to examine the factors likely to influence the forthcoming negotiations and the possible direction and outcome of the process, recognising that similar factors will bear upon other issues to be negotiated.

There are, of course, too many variables to be able to predict how, even on a single issue, the negotiations will conclude or what shape the future relationship of the UK and the EU/EU27 will take. Nevertheless, as I have commented elsewhere "the events of 23 June 2016 have turned lawyers into end of the pier fortune tellers"[6] and the following attempt at divination may serve to highlight some of the main incentives and obstacles to a viable agreement in many of the areas to be discussed.

B. A Case Study in Civil Justice Cooperation

This article addresses the future relationship of the UK and the EU with respect to matters of jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Similar questions will arise in other areas involving the mutual recognition of laws, rulings or judgments, including within the sphere of civil justice (for example, the mutual recognition of

---

4 TEU, Art. 50(2).

5 https://www.ft.com/content/39f240b2-77f1-3022-9af7-490a068eb70f. For a detailed appraisal of the challenges facing the UK Government in the negotiations, see Centre for European Reform, 'Mrs May's emerging deal on Brexit: Not just hard, but also difficult' (February 2017), https://www.cer.org.uk/sites/default/files/pb_grant_May_20feb17.pdf?utm_source=POLITICO.EU&utm_campaign=4e4df11e4a-EMAIL_CAMPAIGN_2017_02_22&utm_medium=email&utm_term=0_10959edeb5-4e4df11e4a-190024913.

6 https://www.law.ox.ac.uk/research-subject-groups/commercial-law-centre/blog/2016/10/reading-tea-leaves-private-international

judgments in family proceedings[7] or maintenance orders[8]). Nevertheless, the Brussels I regime, now embodied in the recast Brussels I Regulation,[9] is of particular interest, and not only by reason of its long pedigree and commercial significance. This element of judicial co-operation within the EU has by a broad consensus[10] been a success. With the benefit of recent modifications, it is seen as working well in practice. Moreover, in the view of many UK commentators, practitioners and judges, it is advantageous for the UK and compares favourably with the residual (statutory and common law) rules governing questions of jurisdiction and the recognition and enforcement of judgments in civil cases.[11]

A number of possible models for future UK-EU arrangements in this area have been suggested. First, exact replication of the recast Brussels I Regulation by a bilateral agreement between the

---

7 Council Regulation (EC) No 2201/2003 of 27 November 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). See also the Commission's Proposal to recast this Regulation (COM (2016) 411 final). The UK has opted into negotiations upon this Proposal.

8 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ([2009] OJ L7/138).

9 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 (recast) ([2012] OJ L351/1) ("**recast Brussels I Regulation**").

10 See, in addition to the materials in the following footnote, Commission Proposal for the recast Brussels I Regulation (COM (2010) 748 final), 3

11 See (1) the evidence presented to the House of Lords' EU Justice Sub-Committee during its enquiry into the ramifications of the UK's departure for civil justice co-operation, available at https://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-justice-subcommittee/inquiries/parliament-2015/brexit-civil-justice-cooperation/, in particular the oral evidence of The Rt Hon Sir Richard Aikens (17 January 2017), David Green/Dr Helena Raulus (Law Society) and Hugh Mercer QC (Bar Council) (10 January 2017), Richard Lord QC, Oliver Jones and Professor Jonathan (13 December 2016) and Professor Richard Fentiman and Dr Louise Merrett, University of Cambridge (6 December 2016), and (2) the evidence presented to the House of Commons' inquiry into the implications of Brexit for the justice system, available at http://.www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2015/brexit-and-the-justice-system-16-17/publications/ in particular the oral evidence of Dr Eva Lein (20 December 2016).

See also Scottish Parliament SPICe Briefing, 'Brexit: Impact on the Justice System in Scotland' (October 2016), 21-24; Law Society of England and Wales, 'Brexit and the Law' (January 2017), 17-19; Bar Council Brexit Working Group, 'The Brexit Papers' (December 2016), 5-15; Financial Markets Law Committee, 'Issues of Legal Uncertainty Arising in the Context of the Withdrawal of the UK from the EU – The Application of English Law, the Jurisdiction of English Courts and the Enforcement of English Judgments' (December 2016); R Aikens and A Dismore, 'Jurisdiction, Enforcement and the Conflict of Laws in Cross-Border Commercial Disputes: What Are the Legal Consequences of Brexit?' [2016] European Business Law Review 903, 912-915.

For a more favourable account of the residual rules and of the UK's future prospects, see A Briggs, 'Secession from the European Union and Private International Law', COMBAR lecture, 24 January 2017, https://www.blackstonechambers.com/news/secession-european-union-and-private-international-law-cloud-silver-lining/, discussed in Section D.11 below.

UK and EU, replicating the arrangements made for Denmark ("**Danish model**").[12] Secondly, a bilateral agreement between the UK and EU modelled on the recast Brussels I Regulation but excluding elements (for example, the jurisdiction of the CJEU and binding rules regarding the application of amendments) considered incompatible with the UK's future status as a non-Member State ("**Brussels I model**"). Thirdly, accession by the UK to the 2007 Lugano Convention[13] or, failing which, a bilateral agreement between the UK and EU modelled on that Convention ("**Lugano model**"). Fourthly, a specifically tailored arrangement between the UK and EU, reflecting some but not all elements of the recast Brussels I Regulation.

Committees of both Houses of the UK Parliament have recently emphasised the desirability of a close continuing relationship between the UK and the EU in this area. The House of Lords' European Committee urged the Government to keep as close as possible to the rules of the recast Brussels I Regulation in the forthcoming negotiations,[14] and described accession to the Lugano Convention as "a workable but inferior solution".[15] In the Committee's view:[16]

> "The predictability and certainty of the [Brussels I Regulation's] reciprocal rules are important to UK citizens who travel and do business within the EU. We endorse the outcome of the Government's consultations, that an effective system of cross-border judicial cooperation with common rules is essential post-Brexit."

The House of Commons Justice Committee adopted a similar position in its own Report.[17]

Accordingly, this represents an issue upon which, if taken in isolation, it seems that a consensus could well quickly be reached that maintaining the *status quo* (i.e. the rules of the recast Brussels I Regulation) would be in the interests of the UK and the EU/EU27. It is also an issue upon which the UK must seek agreement with the EU27: the mutual recognition and enforcement of judgments requires formal cooperation between legal systems - the necessary structures and rules cannot be established by the UK unilaterally. Against this background, the question that this

---

12 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) ("**EC-Denmark Agreement**"); P A Nielsen, 'Brexit: The "Danish Model"', http://www.biicl.org/documents/1457_2017_01_19_-_peter_arnt_nielsen.pdf?showdocument=1.

13 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ([2007] OJ L339/3) ("**2007 Lugano Convention**").

14 House of Lords' European Union Committee, 'Brexit: justice for families, individuals and businesses', 17th Report of Session 2016-2017, [23] (available at https://www.publications.parliament.uk/pa/ld201617/ldselect/ldeucom/134/134.pdf).

15 Ibid, 4.

16 Ibid, [37].

17 House of Commons Justice Committtee, 'Implications of Brexit for the justice system', 9th Report of Session 2016-2017, esp at [26]-[32].

article begs is: how is that negotiating dynamic is changed by the facts that (1) the issue will be bundled with many others in the area of civil justice, and (2) that area will be only one (and a relatively minor one) of the hundreds of topics addressed in the course of the future negotiations.

The article proceeds as follows. First, before turning to consider the chosen issue, the key features of the broader negotiating agendas of the UK and the EU/EU27 will be outlined (Section C). Secondly, a number of factors bearing specifically upon the negotiations concerning the chosen issue will be examined (Section D). Thirdly, the problems arising from the evident need for transitional arrangements in some form will be addressed with respect to the chosen issue (Section E). Finally, some conclusions (necessarily tentative will be drawn) (Section F).

C. Contrasting Agendas for EU Exit

1. *Early signals*

During her campaign for the leadership of the Conservative party following the resignation of David Cameron, Mrs May had pronounced that "Brexit means Brexit, and we're going to make a success of it". This represented more of a crossword clue than a policy statement.

After a long summer of omphaloskepsis among commentators and media outlets as to the meaning of 'Brexit', [18] Mrs May took the opportunity of her speech to the Conservative Party conference in early October 2016 to outline her plan as follows:[19]

> "Article Fifty – triggered no later than the end of March.
>
> A Great Repeal Bill to get rid of the European Communities Act – introduced in the next Parliamentary session.[20]
>
> Our laws made not in Brussels but in Westminster.
>
> Our judges sitting not in Luxembourg but in courts across the land.
>
> The authority of EU law in this country ended forever."

---

18 This inaccurate term is used within this article to describe the process of the UK's withdrawal from the EU.

19 http://blogs.spectator.co.uk/2016/10/full-text-theresa-mays-conference-speech/

20 As to the "Great Repeal Bill", see the UK Government's White Paper, "Legislating for the United Kingdom's withdrawal from the European Union" (Cm 9446) (March 2017).

In the following passages of her speech, having acknowledged that the negotiation would be "tough", she outlined a manifesto for the UK's future relationship with the EU as follows:

> "I want it to reflect the strong and mature relationships we enjoy with our European friends.
>
> I want it to include cooperation on law enforcement and counter-terrorism work.
>
> I want it to involve free trade, in goods and services.
>
> I want it to give British companies the maximum freedom to trade with and operate within the Single Market[21] – and let European businesses do the same here.
>
> But let's state one thing loud and clear: we are not leaving the European Union only to give up control of immigration all over again. And we are not leaving only to return to the jurisdiction of the European Court of Justice. That's not going to happen.
>
> We are leaving to become, once more, a fully sovereign and independent country – and the deal is going to have to work for Britain.
>
> And that Britain – the Britain we build after Brexit – is going to be a Global Britain."

In his first press briefing, on 6 December 2016, the Commission's Chief Negotiator outlined a rather different agenda for the EU/EU27 and its remaining Member States (the "EU27"). Recognising that the EU was in "uncharted waters", Michel Barnier described the negotiations as "legally complex" and "politically sensitive". He emphasised that the actual period for negotiations for an "orderly withdrawal" would be shorter than the 2-year period allowed by Article 50, due to the need for the Council to provide guidance at the beginning of the process and to secure approval from the European Parliament at the end. He targeted completion of the negotiations by October 2018. He then set out three[22] main principles informing preparation for the exit negotiations: (1) protecting the unity of the EU and interests of the EU27, (2) retaining the fundamental connection between the benefits and obligations of EU membership, and (3) the indivisibility of the four fundamental freedoms of the Single Market ("cherry picking is not an option"). Avoiding speculation as to the shape of the future relationship, he put the burden

---

21 The UK Government has since recognised the irreconcilable tension between this statement and the statements in the following paragraph. See below, text to n 34 below.

22 A fourth principle to which M Barnier referred, excluding the possibility of negotiations before service of the Art 50 notice, relates only to timing.

upon the UK to identify the kind of relationship that it wanted, leaving it to the remaining Member States to decide whether that relationship was acceptable.

2. Evolving positions

In a speech delivered on 17 January 2017 at Lancaster House,[23] the Prime Minister put some flesh on the bones of the UK's negotiating objectives. While affirming that the success of the EU was in the UK's national interest, and committing to a "new and equal partnership" with the remaining Member States, she suggested that "there is a lesson in Brexit not just for Britain but, if it wants to succeed, for the EU itself".[24] She set out 12 objectives as follows:

1. Certainty for business, the public sector and individuals.
2. UK control of its own laws, bringing an end to the legislative power of the EU and to the judicial authority of the CJEU.
3. Strengthening the bonds between the 4 nations of the UK, avoiding new barriers to living and doing business within the UK.
4. Maintaining the Common Travel Area with the Republic of Ireland, which pre-dates the EU.
5. Control over the number of people coming to the UK from the EU.
6. Guarantees for the rights of EU citizens currently resident in the UK, and UK citizens currently living in the EU.
7. Protecting workers' rights.
8. Free trade with European markets, outside the single market.
9. New trade agreements with other countries, discarding some elements of the Customs Union (Common Commercial Policy, Common External Tariff).
10. Collaboration on major science, research and technology initiatives.

---

23 https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech

24 The Prime Minister elaborated upon this statement as follows (ibid.): "[T]here are 2 ways of dealing with different interests. You can respond by trying to hold things together by force, tightening a vice-like grip that ends up crushing into tiny pieces the very things you want to protect. Or you can respect difference, cherish it even, and reform the EU so that it deals better with the wonderful diversity of its member states."

11. Co-operation in important areas "such as crime, terrorism and foreign affairs".

12. A smooth, orderly Brexit, with a phased process of implementation of the new arrangements after expiry of the 2-year negotiating period.

These 12 objectives have since been elaborated in the Government's White Paper, 'The United Kingdom's Exit from the European Union'.[25] The final paragraph of that White Paper summarises the Government's approach to the exit negotiations as follows:[26]

> "We are confident that the UK and the EU can reach a positive deal on our future partnership, as this would be to the mutual benefit of both the UK and the EU, and we will approach the negotiations in this spirit. However, the Government is clear that no deal for the UK is better than a bad deal for the UK. In any eventuality we will ensure that our economic and other functions can continue, including by passing legislation as necessary to mitigate the effects of failing to reach a deal."

Unsurprisingly, the headlines were taken by the Prime Minister's acknowledgement that continued, full membership of the single market was incompatible with other negotiating priorities. In the Prime Minister's view:[27]

> "European leaders have said many times that membership means accepting the '4 freedoms' of goods, capital, services and people. And being out of the EU but a member of the single market would mean complying with the EU's rules and regulations that implement those freedoms, without having a vote on what those rules and regulations are. It would mean accepting a role for the European Court of Justice that would see it still having direct legal authority in our country.
>
> It would to all intents and purposes mean not leaving the EU at all.
>
> And that is why both sides in the referendum campaign made it clear that a vote to leave the EU would be a vote to leave the single market.
>
> So we do not seek membership of the single market. Instead we seek the greatest possible access to it through a new, comprehensive, bold and ambitious free trade agreement.

---

25 Cm 9417 (February 2017) ("**White Paper**").
26 White Paper, [12.3].
27 See also White Paper, 35-49.

> That agreement may take in elements of current single market arrangements in certain areas – on the export of cars and lorries for example, or the freedom to provide financial services across national borders – as it makes no sense to start again from scratch when Britain and the remaining Member States have adhered to the same rules for so many years.
>
> But I respect the position taken by European leaders who have been clear about their position, just as I am clear about mine. So an important part of the new strategic partnership we seek with the EU will be the pursuit of the greatest possible access to the single market, on a fully reciprocal basis, through a comprehensive free trade agreement."

In an earlier passage of her speech the Prime Minister commented that the arrangement that the EU was seeking was:

> "Not partial membership of the European Union, associate membership of the European Union, or anything that leaves us half-in, half-out. We do not seek to adopt a model already enjoyed by other countries. We do not seek to hold on to bits of membership as we leave."

Thus, the UK Government appears not only, consistently with Monsieur Barnier's red line, to have accepted that a "single market" relationship without free movement of workers is an untenable objective, but also to have ruled out the possibility of ongoing participation by the UK in the European Economic Area as a non-EU contracting state. This latter approach, as has been pointed out,[28] would have sidestepped the question of the ongoing judicial authority of the CJEU over the UK, if not its continuing influence over the UK's laws.[29] (The rejection of the "EEA model" raises the separate question whether the UK now must invoke Art 127 of the EEA Agreement to withdraw from that treaty, by giving "at least twelve months' notice in writing to the other Contracting Parties" or whether its obligations under that Agreement will fall away

---

28 S Peers, 'Theresa May's speech: The Prime Minister has set the wrong course on Brexit', http://blogs.lse.ac.uk/europpblog/2017/01/18/theresa-may-speech-wrong-course-on-brexit/.

29 EEA Agreement, Arts 6, 105-111.

automatically at the moment it ceases to be an EU Member State.[30] For present purposes, that appears to be question of quite limited significance, and can be put to one side.[31])

3. Towards formal guidelines

In the UK's Article 50 Notice, Mrs May set out the UK's approach to the forthcoming negotiations. The following points, relevant to the present discussion, may be noted:

- A desire to agree with the EU a comprehensive agreement, "a deep and special partnership that takes in both economic and security cooperation", at the same time as negotiating the terms of withdrawal.[32]
- That partnership to be based on the objectives set out in the Prime Minister's Lancaster House speech and in the Government's White Paper.[33]
- Acknowledgement by the United Kingdom that it cannot (and does not) seek membership of the single market: "the four freedoms of the single market are indivisible and there can be no 'cherry picking'".[34]
- The proposition that citizens' interests should be put first.[35]

---

30 The argument was raised, but considered premature, in *R (Yalland and Wilding) v Secretary of State for Exiting the European Union* (2017), unreported, 3 February 2017. See also U Shroeter and H Neneczek, 'The (Unclear) Impact of Brexit on the United Kingdom's Membership of the European Economic Area' (2016) 27 European Business Law Review 921.

31 If the UK does remain a party to the EEA Agreement after it ceases to be a Member State of the EU, that agreement will confer and impose rights and obligations upon the UK with respect to the participating EFTA States (Iceland, Liechtenstein and Norway) and not with respect to the remaining EU Member States. The EEA Agreement cannot, in context, be understood as duplicating the arrangements in place between the States which participated as EU Member States or as conferring rights and obligations on a State which is neither an EU Member State nor a member of the European Free Trade Association. If, therefore, the UK had wished to participate on the other side of the relationship established by the EEA Agreement, it would need to negotiate membership of EFTA and an adjustment to the treaty to enable it to join in that capacity. For a different view, see U Shroeter and H Neneczek, above. See also, in the same journal issue, F de la Peña, 'Gentle Brexit, a very British Exit: EEA Membership as the Most Favourable Model to Secure Financial Services Passports' (2016) 27 European Business Law Review 1057.

It, however, is suggested that Art 127 applies only to the withdrawal of a "Contracting Party", not including the UK as an individual Member State party (see EEA Agreement, Art 2(c)). On that view, the UK would cease to be bound by (or benefit from) the EEA Agreement upon withdrawal from the EU by virtue of the fact that the EU treaties would no longer apply to its territory (Art 126(1).

Whatever the legal position may be, it is important that the status of the EEA Agreement and the legislation giving effect to it should be addressed within both the withdrawal negotiations and the UK Parliamentary processes that will run in parallel with it, not least because a notice of withdrawal under Art 127 of the EEA Agreement, if needed, would likely require an Act of Parliament, in the same way as a notice of withdrawal under Art 50 TEU (cf *R (Miller and Dos Santos) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 WLR 853).

32 Letter from Theresa May to Donald Tusk (n 1), 3, 4 (point iii).

33 Ibid, 6.

34 Ibid, 4 (point i).

- A desire, if possible, to agree "implementation periods" (i.e. transitional arrangements[36]) at an early stage to allow investors, businesses and citizens to plan and adjust in a smooth and orderly way to new arrangements.[37]
- A wish to start technical talks on detailed policy areas as soon as possible, while giving priority to "the biggest challenges".[38]
- A commitment to "shared European values".[39]

In response, the EU Council published its own draft negotiating guidelines, to be discussed by representatives of the EU27 at a summit to be held on 29 April.[40] **[Update after meeting?]** The following points are to be noted:

- Emphasis that the EU's overall objective in the negotiations will be to preserve its interests, those of its Member States, its citizens and businesses.[41]
- Confirmation that the EU/EU27, acting "as one" in the negotiations, will strive to find an agreement on all issues as a single package ("nothing is agreed until everything is agreed, individual items cannot be settled separately"), but will at the same time be prepared for talks to break down.[42]
- Recognition that the UK's decision to leave the EU creates significant uncertainties that have the potential to cause disruption in the UK and the EU27, and a commitment to "a phased approach giving priority to an orderly withdrawal".[43]
- Accordingly, for the EU:
    - the first phase of negotiations will focus on disentangling the UK from the Union and will seek clarity as to the immediate effects of the UK's withdrawal.
    - only when "sufficient progress" has been made on these issues will the negotiations proceed to the next stage.[44] The later negotiations will seek to identify "an overall understanding on the future relationship", recognising that a

---

35 Ibid (point ii).
36 See Section E below.
37 Letter from Theresa May to Donald Tusk (n 1), 4 (point iv).
38 Ibid, 5 (point vi).
39 Ibid (point vii)
40 General Secretariat of the Council, Draft guidelines following the United Kingdom's notification under Article 50 TEU, Council document XT 21001/17 (31 March 2017). See also the European Parliament resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union (2017/2593 (RSP)).
41 Ibid, 2.
42 Ibid, 2, 3 ([2]).
43 Ibid, 2, 3-4 ([3]), 5 ([8]-[9]).
44 Ibid, 4, 3-4 ([3]).

final agreement on these matters could not be concluded until the UK has become a third country.[45]

- the negotiations may also seek to settle upon time limited (and heavily conditioned) transitional arrangements to provide for "bridges towards the foreseeable framework for the future relationship", provided that such arrangements would be in the EU's interest.[46]

- Affirmation of the integrity of the single market, ruling out participation based on a sector-by-sector approach.[47]
- A qualified welcome to the UK's stated desire to establish an ongoing close partnership:[48]

> "[W]hile a relationship between the Union and a non-Member State cannot offer the same benefits as Union membership, strong and constructive ties will remain in both sides' interest and should encompass more than just trade."

Accordingly, a future trade agreement should be "balanced, ambitious and wide-ranging" without amounting to participation in the single market or parts thereof.[49]

- Beyond trade relations, an expressed willingness to "consider establishing a partnership in other areas, in particular the fight against terrorism and international crime as well as security and defence".[50]

D. The Factors in Play

Against the background of the two sides general negotiating objectives, this section highlights several aspects of the forthcoming negotiations insofar as they pertain to the topic under discussion (jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

1. The UK Government's likely negotiating agenda

The UK Government has emphasised the importance, from its perspective, of ongoing co-operation between the UK and the EU in the area of civil justice.[51] More specifically, it has

45 Ibid, 4 ([4]), 8 ([18]-[19]).
46 Ibid, 4 ([5]), 5 ([9]).
47 Ibid, 3 ([1]).
48 Ibid, 7 ([17]).
49 Ibid, 8 ([19]).
50 Ibid, 8 ([20]).
51 The Ministry of Justice Press Release, 'Legal services at forefront of Global Britain' (19 January 2017), contains the following quote from the Lord Chancellor, Elizabeth Truss: "It is in the interests of

identified the desirability of maintaining arrangements for the mutual recognition and enforcement of judgments between the UK and the remaining Member States. In evidence to the Justice Sub-Committee of the House of Lords' Select Committee on the European Union,[52] the Minister of State for Courts and Justice, Rt Hon Oliver Heald QC MP stated as follows:[53]

> "We have had a very wide-ranging set of meetings and discussions, with officials and Ministers involved. There is no doubt that the clear and consistent message that comes across is that an effective system of cross-border judicial co-operation with common rules is essential to embed certainty and predictability for businesses, particularly for those with a commercial aspect—and for individuals, including families, as you mentioned—where there are international disputes, whether commercial or family. We recognise the importance of the mutual recognition of choices of law, courts and the enforcement of judgments across borders in order to maintain confidence for trade and to help with family disputes."

Nevertheless, the Minister was hazy on the detail of the UK's negotiating objectives. In his opinion, "it is too early to say to what extent the Brussels regime will feature in any agreement". All that he was prepared to commit to was that "these are important principles that will form part of the negotiations, and we will be looking to make a new agreement, a new relationship, with the EU for the future that is constructive and tackles these important issues". Under cross-examination about the Government's approach to the negotiations, he was equally elusive:[54]

> "Their content will have to be part of the negotiations. I am not necessarily saying that we will argue for these Regulations; it is the content that is key, especially with regard to mutuality and reciprocity."
>
> "These packages of Regulations have been carefully worked out; each of them is a balanced package. I would not want to say that there are parts to be abandoned. The issues covered by these Regulations should form part of the negotiations. Of course, it would be difficult for me to express a priority, because we have said that we do not want to do that ahead of the negotiations. We want to enter the negotiations with our position

---

all European countries who want to do business here that we maintain civil justice cooperation when we leave the EU, so we are already working to make sure we get the best possible deal for the profession." https://www.gov.uk/government/news/legal-services-at-forefront-of-global-britain

52 For the Committee's conclusions and report, see nn 14-17 and the accompanying text.

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

54 Ibid.

> intact and not fully known. But, yes, they are important and there is nothing that I would offer up [*to be abandoned*]."

Reading between the lines, it would appear that the UK's ideal outcome would be a stand alone reciprocal enforcement agreement between the UK and the EU closely mirroring the substantive content of the recast Brussels I Regulation. It seems clear, however, that what has been described as the "Danish model" for future co-operation[55] is likely precluded, on the UK side, by the formal role of the CJEU, controls over external competence and the mechanisms for amendment or termination of the agreement in the event of future amendments to the Brussels I Regulation.[56] Equally, although the Minister mentioned the Protocol on the uniform interpretation of the Lugano Convention as a possible model for accommodating the CJEU's jurisprudence without accepting its judicial authority,[57] he did not specifically identify accession to the 2007 Lugano Convention as an option on the table. It may well be, but this can only be a matter speculation, (a) that this option is considered incompatible with the UK's stated wish to leave the single market,[58] and/or (b) that the Lugano Convention is considered as an inferior option in light of the improvements made in the recast Brussels I Regulation, particularly with regard to choice of court agreements.[59]

2. The EU/EU27's likely negotiating agenda

In light of M Barnier's statement that it is for the UK to identify the future relationship that it seeks and for the EU/EU27 to negotiate in their own interests once Art 50 has been triggered,[60] there are presently few clues as to the EU's likely negotiating position in this area. It would, however, be unwise to assume that there is a single agenda. In particular, some Member States will likely see potential advantages for their own civil justice systems, and legal services sectors, of a future in which the UK does not enjoy the advantages of a Brussels I or Lugano model arrangement and in which EU and non-EU businesses providing services within the single

---

55 n 12.
56 EC-Denmark Agreement, Arts 4-6.
57 http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-civil-justice-cooperation/oral/46539.html (response to Q44). See Section D.8 below.
58 See Section D.4 and Section D.10 below.
59 Aikens and Dismore (n 11), 913-915. See also text to n 15 above.
60 Text to n 22 above.

market are encouraged (indeed, in some cases, required[61]) to resolve their disputes before Member State courts. As Professor Hess has noted:[62]

> "The main interest of the Union won't be to maintain or to strengthen London's dominant position in the European judicial market: EU Member States might equally provide for modern and highly-qualified legal services ready to attract commercial litigants and high-value litigation [and] arbitration. Examples in this respect are The Netherlands and Sweden. In addition, there is a genuine interest of the Union to see mandatory EU law applied in disputes related to the Internal Market by courts operating within its regulatory framework."

Others may take the view of the German Chancellor and the European Parliament's negotiator, Mr Verhofstadt, that "cherry picking" is to be forbidden or at the very least discouraged and that allowing the UK to participate in the Brussels I regime without the oversight of the CJEU or commitment to the single market or single justice area[63] would send entirely the wrong signal, whatever practical advantages or disadvantages such an agreement might involve.

3. Mechanisms and negotiating priorities

Negotiating agendas are one thing, the practicalities of negotiation and of bringing an agreement to fruition quite another. Two practical points, in particular, appear to be worth emphasising.

First, it appears unlikely that co-operation in the area of civil justice will figure high on either side's list of priorities in the forthcoming negotiation. By contrast with criminal justice and security co-operation, the area of civil justice was not mentioned by Mrs May in her Lancaster House speech, and the UK's approach to this area was addressed in a single, impassionate

---

61 Professor Hess (see text to the following footnote) refers to Art 46(6) of Regulation (EC) No 600/2014 of the European Parliament and of the Council on markets in financial instruments ([2014] OJ L173/84) which provides that: "Third-country firms providing services or performing activities in accordance with this Article shall, before providing any service or performing any activity in relation to a client established in the Union, offer to submit any disputes relating to those services or activities to the jurisdiction of a court or arbitral tribunal in a Member State.".

Internal market legislation may also invalidate attempts to contract out of overriding mandatory provisions of EU law by means of a third country choice of court agreement (*Accentuate Ltd v Asigra* [2009] EWHC 2655 (QB), [2009] 2 Lloyd's Rep. 599; BGH, Sep. 5, 2012 – VII ZR 25/12, 2013 IHR, 35. cf Case C-381/98, *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [2000] ECR I-9305) or strike down such provisions as unfair contract terms (Joined Cases C-240/98 etc, *Océano Grupo Editorial SA v Quintero* [2000] ECR I-4941).

62 http://conflictoflaws.net/2016/brexit-immediate-consequences-on-the-london-judicial-market/. See also, by the same author, 'Back to the Past: Brexit and European international private and procedural law', https://www.mpg.de/10824865/back-to-the-past. For a robust response, see A Briggs (n 11), 15-26.

63 See Section D.4 and Section D.5 below.

sentence in the Government's White paper.[64] In its draft negotiating directives, the Council also appears to focus on future co-operation in the fields of crime, security and defence.[65] With time in short supply, other topics (budgetary settlement, trade, status of residents, security and foreign policy co-operation) will inevitably dominate.

Secondly, although a global trade and co-operation agreement between the UK and the EU (to be concluded after the UK ceases to be a Member State) will require the separate participation of all Member States, and approval through their constitutional arrangements,[66] a stand-alone agreement on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters could be pursued in the future through EU competence (with qualified majority voting) alone.[67] On a positive note, this could lead to the area being flagged as one in which a new UK-EU arrangement could be achieved more smoothly and even in the face of objections from some Member States. That fact, however, could lead to the area being sidetracked in the forthcoming negotiations on withdrawal and the framework for the new UK-EU relationship.

4. The single market dimension

Fifty years is a long time. That said, it must not be forgotten that the 1968 Brussels Convention originated as an accessory to the EEC's internal market. In the words of the Commission in its note inviting the original six Member States to begin negotiations under Art 220 of the EEC Treaty (later EC Treaty, Art 293):[68]

> "[A] true internal market between the six States will be achieved only if adequate legal protection can be secured. The economic life of the Community may be subject to disturbances and difficulties unless it is possible, where necessary by judicial means, to ensure the recognition and enforcement of the various rights arising from the existence of a multiplicity of legal relationships. As jurisdiction in both civil and commercial

64 White Paper, [8.19] ("We recognise that an effective system of civil judicial cooperation will provide certainty and protection for citizens and businesses of a stronger global UK."). Two further references to civil justice matters concerned transitional matters (White Paper, [12.2], discussed in Section E below) and co-operation between the civil justice agencies of Northern Ireland and Ireland (White Paper,Annex B, [B.15]).

65 Text to n 50 above

66 Opinion procedure 2/15, *Conclusion of the Free Trade Agreement between the EU and the Republic of Singapore*, Opinion of Adv Gen Sharpston [2016] ECLI:EU:C:2016:992.

67 Opinion 1/03, *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2006] ECR I-1145.

68 Quoted in the Report of P Jenard on the 1968 Brussels Convention ([1979] OJ C59/1, 3). See also Case C-398/92, *Mund & Fester v Hatrex Internationaal Transport* [1994] ECR I-467, Opinion of Adv Gen Tesauro, [8]-[9].

> matters is derived from the sovereignty of Member States, and since the effect of judicial acts is confined to each national territory, legal protection and, hence, legal certainty in the common market are essentially dependent on the adoption by the Member States of a satisfactory solution to the problem of recognition and enforcement of judgments."

Accordingly, the "free movement of judgments" began as an objective subordinate to the free movement of persons, goods, services and capital under the EC Treaties. Even when civil justice matters were brought directly within EU competence following the Treaty of Amsterdam, they were directly tethered to matters of necessity for the "proper functioning of the internal market".[69] That link remains, albeit in diluted form, today, in Art 81 TFEU,[70] although the "principle of mutual recognition of judgments" is now specifically identified as an end in its own right within the area of freedom, security and justice.[71] Moreover, the recast Brussels I Regulation emphasises the connection to the internal market in its fourth Recital.[72]

The 1988 Lugano Convention[73] also found its driving spirit in the close trading relationship between the EEC and the members of EFTA. According to the Jenard and Möller Report:[74]

> "It thus became apparent that this economic cooperation between the two groupings of European States ought to be strengthened through a convention on jurisdiction and the recognition and enforcement of judgments …
>
> Because of the magnitude of trade between the EEC Member States and EFTA, it was to be expected that the need would arise for a judgment being given in a Community Member State to be enforced in an EFTA Country *[or vice versa]*."

The 1988 Lugano Convention was concluded before the EEA Agreement established, from 1994, a single market between the then EC Member States and four of the five then remaining non-EU Lugano Contracting States (Austria, Iceland, Norway and Sweden, with Switzerland having rejected participation in the EEA by referendum). Although each EFTA member state

---

69 EC Treaty, Arts 61 and 65. See A Dickinson, 'European Private International Law: Embracing New Horizons or Mourning the Past?' (2005) 1 J Priv Int L 197.

70 TFEU, Art 81(2): "shall adopt measures, particularly when necessary for the proper functioning of the internal market".

71 TFEU, Art 67(4) and 81(1), discussed in Section D.5 below.

72 Recast Brussels I Regulation, Recital (4): "Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters, and to ensure rapid and simple recognition and enforcement of judgments given in a Member State, are essential."

73 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, done at Lugano, 16 September 1988 ([1988] OJ L319/9) ("**1988 Lugano Convention**").

74 [1988] OJ C189/57, 63-64.

had previously negotiated bilateral free trade agreements with the EEC, those agreements dealt only with tariffs and quantitative restrictions on goods.[75]

By contrast, the 2007 Lugano Convention was concluded against the background of much closer economic relations between the EU and the non-EU Contracting States through the EEA Agreement (Iceland, Norway) and the packages of bilateral agreements concluded between the EU and Switzerland in 1999 and 2004,[76] including the EU-Swiss agreement on free movement of persons, which entered into force in 2002.[77] That said, in its Opinion on the conclusion of the 2007 Lugano Convention, the CJEU affirmed that EU law did not demand, as a condition for the EU's external competence, that the third country agreement be concluded with the object of facilitating the functioning of the internal market – it was sufficient that the agreement affected EU legislation (the Brussels I Regulation) that did have that object.[78]

From this, we may conclude that, although the recast Brussels I Regulation is closely connected to, and may indeed be inseparable from, the Member States' participation in the internal market, EU law and EU treaty making practice countenances arrangements with third countries for the reciprocal enforcement of judgments under the Lugano model in order to promote trade. Moreover, the conclusion of such arrangements is not conditional upon a single market arrangement being in place between the EU and those countries.

5. The single justice area

Even if an arrangement under the Lugano (or other) model may be compatible with the UK's withdrawal from the single market see above), it must at the same time be recognised that the recast Brussels I Regulation is a central pillar of the EU's area of freedom, security and justice, in which the UK will no longer participate following its withdrawal from the EU.

TFEU, Art 67(1) refers to "an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States", and Art 67(4) requires the EU to "facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters". Recital (3) to the recast Brussels I Regulation, in turn, refers to the "gradual establishment of such an area". The

---

75 See e.g. the EC-Switzerland Trade Agreement, 22 July 1972 ([1972] OJ L300/189).

76 The agreements in force are listed at https://www.eda.admin.ch/dea/en/home/bilaterale-abkommen/inkrafttreten.html. Austria and Sweden had, in the meantime, become EC Member States.

77 Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons ([2002] OJ L114/6).

78 Opinion 1/03 (n 67), [131].

adoption of the recast Brussels I Regulation represents, in comparison with its forebears and with the Lugano Conventions, a significant step forward in establishing the area of justice insofar as it authorises the direct cross-border enforcement of judgments between the Member States without the need for any special procedure: as the Regulation puts it "a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed".[79] The single justice area involves a pooling of judicial sovereignty, and the free movement of judicial dispute resolution services, underpinned by the single market in legal services and with the oversight of the CJEU. Such arrangements demand a particularly close level of co-operation between the Member States' judicial systems, of a kind that will almost certainly be absent in the post-exit arrangements between the UK and the EU.[80] It appears, therefore, doubtful whether the conditions for continued close co-operation on a Brussels I model will exist.

6. *Fundamental rights*

The respect for fundamental rights at the heart of the area of freedom, security and justice is reinforced by TEU, Art 6 giving legal force to the Charter of Fundamental Rights.[81] Recital (38) to the recast Brussels I Regulation states that the Regulation "respects fundamental rights and observes the principles recognised in the Charter …, in particular the right to an effective remedy and to a fair trial guaranteed in Article 47 of the Charter".

Upon exit, the UK will no longer be bound by the Charter in its future relationship with the EU. Although "Brexit" will not affect the UK's status as a party to the European Convention on Human Rights (ECHR), press reports have suggested that the Conservative Party of Prime Minister Mrs May wishes to review that relationship.[82] **[Update following publication of**

---

79 Recast Brussels I Regulation, Recital (26).

80 Unless otherwise agreed, UK judges will no longer participate in the European Judicial Network established by Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters (2001/470/EC), as amended ([2001] OJ L174/25, consolidated version at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:02001D0470-20110101)

81 [2000] OJ C364/1.

82 e.g. http://www.independent.co.uk/news/uk/politics/theresa-may-campaign-leave-european-convention-on-human-rights-2020-general-election-brexit-a7499951.html. The Government's plans for a "British Bill of Rights" have been put on hold until after the EU exit process has been completed, see https://www.theguardian.com/law/2016/dec/29/ministers-put-british-bill-of-rights-plan-on-hold-until-after-brexit.

election manifesto?] Moreover, the Government has suggested that it considers that fundamental rights are a matter for negotiation with EU partners.[83]

Unless, therefore, the future protection of human rights is satisfactorily addressed as part of the arrangements governing its future relationship between the UK and the EU, the EU27 may well consider that an essential pre-condition to an agreement on the Brussels I model (and, indeed, on any model) is lacking. The EU's current treaty making practice with respect to trade and cooperation agreements is to insist upon an "essential elements" clause recording the parties' understanding that respect for human rights as laid down in the Universal Declaration of Human Rights and a further provision allowing for countermeasures if that commitment is not met.[84] For States (such as the UK) that are also members of the Council of Europe, the human rights clause refers also to the ECHR.[85] It is suggested that such a clause represents the minimum standard likely to prove acceptable in the present context.[86] If the UK Government is unwilling to give an unqualified commitment to the ECHR's standards of protection, that may represent a substantial obstacle to agreement on this and other matters.

7. Consumer rights

A committee of the European Parliament[87] has reportedly flagged a concern regarding the protection of consumers with respect to transactions concluded before the UK's exit but falling to be performed or having consequences for the consumer thereafter.[88] Although this is one of

---

83 Evidence of Rt Hon Sir Oliver Heald to the Joint Parliamentary Committee on Human Rights, in the course of its inquiry into the human rights implications of Brexit, 23 November 2016, http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/what-are-the-human-rights-implications-of-brexit/oral/44097.pdf, responses to Q10. In its Report (5th Report of Session 2016-2017), the Committee concluded that (p 4) "we believe that it is not appropriate to treat individuals' fundamental rights as a bargaining chips in negotiations with the remaining EU Member States" (see also ibid, [21]-[22]). The Government's White Paper deals with human rights protection only in passing (p 67).

84 Directorate-General for External Policies, Policy Department, 'The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements', http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433751/EXPO-JOIN_ET(2014)433751_EN.pdf, 6-20; Report of Joint Parliamentary Committee on Human Rights, above, ch 4; L Bartels, 'The EU's human rights obligations in relation to policies with extraterritorial effects', https://www.repository.cam.ac.uk/bitstream/handle/1810/245244/EJIL%20EU%20and%20ET%20-%20final.pdf?sequence=1&isAllowed=y.

85 See the report of DG External Policies, above, [18]-[19], [49].

86 In its resolution on the forthcoming negotiations (n 40), the European Parliament has stressed that "any future agreement between the European Union and the United Kingdom is conditional on the United Kingdom's continued adherence to the standards provided by international obligations, including human rights" (2017/2593 (RSP), [25]).

87 Presumably Internal Market and Consumer Protection (IMCO) or Legal Affairs (JURI).

88 http://www.politico.eu/article/brexit-negotiation-issues-worrying-the-european-parliament/

the many transitional issues that will inevitably arise in the course of the negotiations (including with respect to the application of the recast Brussels I Regulation itself[89]), the existence of this concern may provide one of the more persuasive reasons for post-exit arrangements on a Brussels I or Lugano model, in order to maintain the protection for consumers to be found in Section 4 of Chapter II of the recast Regulation.[90] In this connection, it may be noted that only Scotland among the legal systems of the UK currently has a residual rule of jurisdiction that specifically protects consumers.[91]

8. Mutual trust and the role of the CJEU

The present UK Government has made it clear that one of its principal negotiating objectives to remove the UK from the CJEU's judicial authority.[92] In the case of the recast Brussels I Regulation, the possibility of a preliminary reference to the CJEU and the CJEU's supervisory jurisdiction over Member States' compliance with their obligations represent essential components in a system founded on "mutual trust in the administration of justice in the Union".[93] The "principle of mutual trust" which the CJEU has elaborated in this context[94] is a thinly disguised version of the principle of sincere cooperation in TEU Art 4(3), and that principle refers not only to co-operation between the Member States themselves but also cooperation between the Member States and the EU.

The Explanatory Report upon the 2007 Lugano Convention also speaks, although no doubt in a less formal sense, of "the solid mutual trust that exists between the States bound by the Convention".[95] The arrangements for ensuring a harmonious interpretation of the provisions of that Convention, set out in its Protocol No 2, require due account to be taken of the

---

The House of Lords EU Justice Select-Committee has launched an inquiry into consumer protection issues within "Brexit" (see https://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-justice-subcommittee/news-parliament-2015/brexit-consumer-protection-inquiry-launched/)

89 Section E below.

90 Indeed, the continued protection of EU and UK consumers along the lines of the *existing acquis* (including the Unfair Contract Terms Directive (93/13/EEC, [1993] OJ L95/29) and Consumer Rights Directive (2011/83/EC, [2011] L304/64) may represent one area in which consensus is more straightforwardly achieved. The UK has recently (and laboriously) enacted a single statute, the Consumer Rights Act 2015, to give effect to both Directives. In a recent House of Lords debate on consumer rights policy in the context of Brexit, the responsible Minister, Lord Prior of Brampton, stated: "The Consumer Rights Act is generally recognised by consumers here as an extremely good piece of legislation, and we will be working to have as much of a free market within Europe as we can." (Hansard, HL Deb, 9 February 2017, vol 778, col 1855).

91 Civil Jurisdiction and Judgments Act 1982, Sch 8, rule 3.

92 See text following n 24.

93 Recast Brussels I Regulation, Recital (26).

94 Case C-681/13, *Diageo Brands BV v Simiramida-04 EOOD* [2015] ECLI:EU:C:2015:471, [40].

95 Report by Professor F Pocar, [2009] OJ C319/1, [21].

jurisprudence of the CJEU and the contracting parties' national courts upon the Convention and upon the Brussels I instruments, without extending the competence of the CJEU to cover references in proceedings arising before the courts of non-EU Contracting States.[96]

The UK Government has pointed to this Protocol as a possible template for future cooperation with the EU. According to the Minister, Sir Oliver Heald:[97]

> "[W]e would not have the CJEU overseeing anything that we do. It would be English law made in England, and then obviously the devolved Administrations would make their laws. It would be our courts in charge of everything that we do. As for the agreement that we make with the EU, we would need to find mechanisms and tools to ensure that the agreement was satisfactory to both sides. You mentioned Lugano, which may be one of them."

Thus, an agreement on the Lugano model appears to provide a viable solution to this problem, if other obstacles can be overcome.

9. Significance of the 2007 Lugano Convention

Once outside the EU, the UK could seek to participate in the 2007 Lugano Convention. It could, as part of the exit negotiations, seek a commitment from the EU to support its membership. If that support were forthcoming, the UK would also need the unanimous support of the three non-EU Lugano Contracting States.[98]

The 2007 Lugano Convention, and the UK's possible future accession to it, suggests a powerful reason why the EU27 might be reluctant to conclude a bilateral agreement with the UK, whether on the Brussels I or another model. As regards a Brussels I model, why should the UK leap to the front of the queue as the first non-EU Member State to secure the most up to date technology for the reciprocal enforcement of judgments and on the protection of choice of court agreements? A decision to proceed on this basis would surely attract criticism from the other Lugano Contracting States, as discussions with a view to updating the 2007 Lugano Convention

---

96 2007 Lugano Convention, Protocol No 2 on the uniform interpretation of the Convention and on the Standing Committee, esp Art 1(1).

97 Evidence of the Rt Hon Sir Oliver Heald to the House of Lords' EU Justice Sub-Committee during its enquiry into the ramifications of the UK's departure for civil justice co-operation, available at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-civil-justice-cooperation/oral/46539.html (response to Q44).

98 2007 Lugano Convention, Art 70(1)(c) and 72. The option of automatic accession as a new EFTA contracting state (Art 70(1)(a) and 71) does not appear a viable option in light of the UK's position on the participation in a single market.

to bring it into line with the recast Brussels I Regulation appear to have stalled.[99] As the EU will almost certainly enjoy closer economic and social ties with those States than with the UK in the future, it appears unlikely that the UK will be given "most favoured nation" status. If that option is put to one side, the option of a less favourable arrangement for the UK (including a bilateral agreement on a Lugano model) begs two further questions: why should the EU have two parallel treaties (Lugano, EU-UK bilateral) when one would suffice, and why would the EU wish to disincentivise the UK from seeking promptly to accede to the 2007 Lugano Convention?

The best, therefore, that the UK may be able to hope for in the negotiations is a commitment from the EU to support a future application by the UK to accede to the 2007 Lugano Convention. Such accession cannot, however, be guaranteed given the need for unanimous consent of the other Contracting States and the consent procedure set out in Art 72 of the Convention could only begin (unless all parties agreed) after the UK's withdrawal from the EU. Nevertheless, this option could become more attractive for both sides, if the EU were to indicate at the same time a willingness to bring the 2007 Lugano Convention into line with the recast Brussels I Regulation at the earliest opportunity.

10. Significance of the 2005 Hague Choice of Court Convention and the wider Hague judgments project

The UK and EU's future relationships with the Hague Conference on private international law must also be borne in mind. Two aspects require to be considered. First, there is undoubtedly a strong case for the UK to accede to the 2005 Hague Convention on choice of court agreements (to which the EU is a party[100]) at the earliest possible opportunity. That step would strengthen exclusive choice of court agreements made in the future in favour of UK courts, requiring EU Member State courts to stay proceedings and to recognise and enforce judgments of the chosen court, subject to the limits set out in the Convention[101] and in the declarations made by the EU upon its accession.[102] Though much narrower in scope, and less streamlined, than an agreement on the Brussels I or Lugano model, this option has the distinct advantage of being a step that can be taken unilaterally, without the need for consent of the EU27, and which will address some of

---

99 https://www.bj.admin.ch/bj/en/home/wirtschaft/privatrecht/lugue-2007.html

100 Council Decision of 4 December 2014 on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements ([2014] OJ L353/5).

101 Hague Convention on choice of court agreements, Art 2, excluding (among other matters) consumer and employment contracts, the carriage of passengers and goods, and anti-trust (competition) matters.

102 See https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1044&disp=resdn, excluding many insurance contracts.

the concerns of parties negotiating commercial contracts about increased enforcement risks flowing from a choice of UK courts.

Nevertheless, given that the UK is currently bound by the Convention through the EU's accession as a Regional Economic Integration Organisation,[103] it appears doubtful whether the UK will be able to begin the process of signature and accession in its own right until after its withdrawal from the EU, unless the EU and the Hague Conference are willing to agree otherwise. On that basis, the Convention could not enter into force for at least three months after deposit of the instrument of ratification.[104] Moreover, the Convention would then apply only to exclusive choice of court agreements concluded, and to legal proceedings instituted, after its entry into force.[105] Thus, for the foreseeable future (unless addressed as part of the transitional arrangements[106]), a significant *lacuna* would exist between the protection afforded by Art 25 of the recast Brussels I Regulation, which will no longer apply to choice of court agreements in favour of the UK as a non-Member State (even if concluded before the withdrawal date), and the protection afforded by the 2005 Hague Convention. The *lis alibi pendens* provisions for third States, which require EU Member State courts to take into account (among other matters) whether the third State in question has exclusive jurisdiction in the particular case in circumstances where a court of a Member State would have exclusive jurisdiction[107] provide only a crumb of comfort. In the circumstances, it appears unlikely that the availability (and attractiveness) of this option for the UK will have a significant bearing upon the negotiations. It provides neither an incentive for the EU to proffer close co-operation in other cases, nor a sufficiently robust fallback position for the UK.

Secondly, the EU is closely involved in the ongoing negotiations within the Hague Conference for a global judgments convention with respect to civil and commercial matters.[108] The UK has opted into discussions with a view to the adoption and application of a Decision authorising the

---

103 Hague Convention on choice of court agreements, Art 30. See the preceding footnote.

104 Hague Convention on choice of court agreements, Art 31(2)(a).

105 Hague Convention on choice of court agreements, Art 16.

106 See Section E below.

107 Recast Brussels I Regulation, Arts 33 and 34 and Recital (24). The reference to "exclusive jurisdiction" in the Recital appears broad enough to encompass exclusive jurisdiction arising under Art 25 as well as under Art 24.

108 See https://www.hcch.net/en/projects/legislative-projects/judgments and https://www.hcch.net/en/projects/legislative-projects/judgments/special-commission1.

For the current (February 2017) preliminary draft of the proposed Convention, see https://assets.hcch.net/docs/d6f58225-0427-4a65-8f8b-180e79cafdbb.pdf.

opening of negotiations on such a Convention.[109] The current (2016) preliminary draft convention is very different in form and ambition from the 1999 preliminary draft convention. The 1999 draft was modelled as a mixed convention, combining detailed regulation of matters of jurisdiction with rules upon the recognition and enforcement of judgments. It borrowed to some extent (but not slavishly) from the 1968 Brussels Conventions, itself inspired by earlier work of the Hague Conference.[110] By contrast, the 2017 draft convention limits itself to rules upon the recognition and enforcement of judgments in civil and commercial matters (subject to a number of excluded areas[111]) and upon the basis of specific grounds of eligibility.[112] Examination of those grounds reveals, inevitably, a process of compromise between the negotiating parties, with a significant dilution in the influence of the Brussels I regime.

It is difficult to say whether and, if so, to what extent these ongoing discussions[113] will bear upon the negotiations concerning post-exit arrangements for the mutual recognition and enforcement of judgments between the UK and the EU27. It seems likely that the proposed Hague Convention will be finalised during the two year period of the Art 50 negotiations.[114] If so, the EU/EU27 may consider that its interests would be better served by encouraging the UK to ratify this convention alongside the EU, thereby increasing the attractiveness of the convention to other third countries with whom the EU enjoys significant trading relations.

11. The relative significance of rules of jurisdiction and rules governing the recognition and enforcement of judgments

In a recent lecture to the Commercial Bar Association in London, Professor Adrian Briggs has argued that "to look on the Brussels Regulation as an instrument made to secure the free movement of judgments is to be deceived by appearances".[115] He acknowledges that the 1968 Brussels Convention was originally adopted to secure the more effective enforcement of judgments between the Member States, and that uniform rules of jurisdiction were adopted at

---

109 Council document 9559/16 (27 May 2016). The linked Commission's Proposal (COM (2016) 216 final) is unfortunately not in the public domain.

It appears from a note prepared by the UK that there is a disagreement between the EU and the UK as to whether the opt-in procedure under Protocol 21 to the Treaties applies to the exercise of the EU's external competence (Council document 8814/16 ADD1 (25 May 2016)). In the present context, such a dispute would seem to be of trifling importance.

110 See P Nygh and F Pocar, Report of the Special Commission (August 2000), 27-30.

111 2017 preliminary draft Convention (n 109), Art 2.

112 2017 preliminary draft Convention (n 109), Arts 5-6.

113 A further meeting of the special commission for the project has been fixed for November 2017.

114 On the current timetable, a diplomatic conference is planned towards the end of 2018 or 2019.

115 A Briggs (n 11), 18.

the same time principally in order to facilitate that objective,[116] but argues persuasively that the Regulation's rules of jurisdiction have taken on an importance in theory and practice that now far outranks that of the rules on the recognition and enforcement of judgments. This argument appears uncontestable. As the Recitals to the recast Brussels I Regulation attest, the Regulation's rules of jurisdiction manifestly serve ends other than facilitating the free movement of judgments, including facilitating the effective administration of justice, the protection of weaker parties, and the promotion of party autonomy.[117] Moreover, one has only to count the number of references to and decisions of the CJEU in relation to Chapter II of the Regulation, in comparison to those in relation to Chapter III[118] (or to make a similar comparison for the courts of any Member State[119]) to take the point about practical importance.

From this starting point, Professor Briggs advances a practical case for the continuation of Brussels I or Lugano model following the UK's withdrawal.[120] That outcome, he accepts, would be in the UK's interests because it would secure the enforceability of the judgments of its courts in the legal systems of the EU127. That would be a valuable benefit, if not (in Professor Briggs' view) essential to maintain London's position as a centre for international commercial litigation.[121] Such an arrangement would also, Professor Briggs suggests, manifestly be in the interests of the EU27, as termination of the existing arrangements for judicial co-operation would expose businesses and consumers from other Member State to the broad residual grounds of jurisdiction which exist under English law: they "would lose their defensive shields".[122] He concludes:[123]

---

116 Jenard Report (n 68), 7-8.

117 Recast Brussels I Regulation, Recitals (13)-(19).

118 The tables to one excellent casebook (M Bogdan and U Maunsbach, *EU Private International Law: an ECJ Casebook* (Groningen, 2012), xxi-xxvii, list Chapter II cases across 4 pages. The equivalent list of Chapter III cases takes up less than half that space.

119 According to statistics in the national report for England and Wales annexed to the 2005 (Heidelberg) Report (Study JLS/C4/2005/03) on the Brussels I Regulation (http://ec.europa.eu/civiljustice/news/docs/study_bxl1_england_wales.pdf) only 92 declarations of enforceability were granted under that regulation in the judicial year 2004/2005 and only 71 in 2005/2006.

120 A Briggs, above, 16-26.

121 Accession to the Hague Choice of Court Convention (Section D.10) would, in any event, alleviate some concerns as to the effectiveness of English judgments, but *semble* only for choice of court agreements made after the accession date.

122 A Briggs, above, 18. Professor Briggs does not consider it necessary to rely in aid of his argument on the re-arming of the jurisdictional weapon of the anti-suit injunction if the fetters of "mutual trust" under the Brussels I and Lugano regimes were to be removed (ibid, 25, 29. cf Case C-159/02, *Turner v Grovit* [2004] ECR I-3565; Case C-185/07, *Allianz SpA v West Tankers Inc* [2009] ECR I-663).

123 A Briggs, above, 25-26.

> "Taking all that into consideration, it is evident that to focus attention on the fact that English judgments would lose their European passport is to take a rather myopic view of what will follow if nothing is done once the Brussels I Regulation has gone. One would have thought that the other Member States would be doing their level best to encourage the European Union to lock or tie the United Kingdom into a regime for the control of judicial jurisdiction as a matter of priority. Perhaps they are, though there is little sign of it yet … The perception of those early commentators was, and may still be, that the United Kingdom will need to beg for the free movement of its judgments along with the free movement of its goods and services, and that the European Union should act in its own self-interest. Quite so; but however may be the position with trade in goods and services, the United Kingdom does not need to be given the freedom to exercise its rules of civil jurisdiction over defendants from the Member States: we have it already. The self-interest of the European Union may be seen to be rather different from what was first claimed on its behalf."

One need not (and the present author does not[124]) have a soft spot for the current English common law and statutory rules of jurisdiction to see that the practical consequences for Europe's businesses and citizens of ending judicial co-operation between the UK and the EU with respect to jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ought to figure in the parties' calculations underlying the negotiations.

Yet, it is hard to imagine that the UK will openly resort to arguments of the kind that Professor Briggs advances. The fear of encouraging countermeasures[125] or destabilising negotiations on other (higher priority) issues may operate as sufficient deterrents. It also appears highly unlikely that the EU/EU27 would be persuaded by such arguments, if they were to be tabled. In the expansive ocean of the exit negotiations, suspicion, sentiment and solidarity will likely trump utilitarian arguments for cutting a deal on a specific issue. Suspicion that the UK is seeking to cherry pick the elements of EU membership that it considers favourable to it, a sentiment that the UK should not be entitled to jump the queue ahead of the EU's single market partners and fears (whether or not well-founded) that the solidarity of the EU will be weakened if the UK is seen to be better off following its exit make it, in my estimation, more likely that the negotiations

---

124 A Dickinson, "Keeping Up Appearances: The Development of Adjudicatory Jurisdiction in the English Courts" (2016) British Yearbook of International Law (forthcoming), advanced access version at https://academic.oup.com/bybil/article/3059320/Keeping-up-Appearances-The-Development-of.

125 n 61 above.

on this and many other issues will conclude with a polite but firm request that the UK closes the door behind it when leaving.

E. Transition to a new arrangement (or to no arrangement)

In its White Paper, the UK Government stated:[126]

> "It is, however, in no one's interests for there to be a cliff-edge for business or a threat to stability, as we change from our existing relationship to a new partnership with the EU. Instead, we want to have reached an agreement about our future partnership by the time the two year Article 50 process has concluded. From that point onwards, we believe a phased process of implementation, in which the UK, the EU institutions and Member States prepare for the new arrangements that will exist between us, will be in our mutual interest. *This will give businesses enough time to plan and prepare for those new arrangements. This might be about our immigration controls, customs systems or the way in which we cooperate on criminal and civil justice matters.* Or it might be about the future legal and regulatory framework for business. For each issue, the time we need to phase in the new arrangements may differ; some might be introduced very quickly, some might take longer. And the interim arrangements we rely upon are likely to be a matter of negotiation. The UK will not, however, seek some form of unlimited transitional status. That would not be good for the UK and nor would it be good for the EU."

The reference to "civil justice" in this passage, one of only three in the whole of the White Paper,[127] suggests that the Government foresees that the UK's future relationship with the EU in this area may well be significantly different from the arrangements presently in force.

As matters stand, it seems highly unlikely that the UK will secure a temporary, full continuation of the Brussels I regime, unless at the same time it negotiates parallel transitional participation in the single market, with the ongoing budgetary contributions and CJEU oversight that this would involve.[128] If such an arrangement is discounted, further questions arise as to whether the application of the recast Brussels I Regulation up to the withdrawal date[129] will have lingering transitional effects, whether by virtue of "acquired rights"[130] or otherwise.

---

126 White Paper, [12.2] (emphasis added).
127 n 64 above.
128 Council Secretariat draft negotiating guidelines (n 40), 4 ([5]), 5 ([9]) (text to n 46 above).
129 TEU, Art 50(3)
130 Vienna Convention on the law of treaties (1969), Art 70(1)(b).

The principal matters to be considered in the negotiations, and separately by the UK Government in drafting the Great Repeal Bill,[131] are (a) the application of the Regulation's rules of jurisdiction to proceedings instituted before the withdrawal date, (b) the application of the Regulation's *lis pendens* rules where one or more Member State proceedings are pending before the withdrawal date, and (c) the application of the Regulation's rules concerning the recognition and enforcement to judgments delivered before the withdrawal date.

Applying the rules of jurisdiction in force at the date of institution of legal proceedings would appear a logical and sensible solution, even if the hearing on jurisdiction takes place after the withdrawal date.[132] Indeed, there is much to be said for the UK adopting this solution unilaterally, whatever EU law may require and regardless of any arrangement with the EU27. At present, litigants before the English courts do not require the court's permission to serve a claim form outside England and Wales if the rules of the Brussels I or Lugano regime positively confer jurisdiction, [133] but do require permission in other cases.[134] Where permission is required, the applicable grounds of jurisdiction differ significantly from those in the Regulation.[135] The foreseeability of forum that the Brussels I regime seeks to promote,[136] and which is surely desirable in all civil justice systems, would be impaired if process valid at the time of issue were to be called into question solely because a question of jurisdiction falls to be determined after the withdrawal date.

By contrast, as a matter of general principle, it appears doubtful whether a judgment of a UK court would be capable of recognition and enforcement in another Member/Contracting State, or that a UK court would be bound as a matter of EU law to recognise and enforce, a judgment given after the UK's withdrawal from the EU, even if the proceedings were on foot beforehand.[137] If, however, the judgment has been given before the date of withdrawal, a reasonably strong argument exists that its automatic recognition under the 2012 Brussels I Regulation[138] and 2007 Lugano Convention[139] confers on the judgment creditor an "acquired right" which may be relied on to support *res judicata* effects and the basis for an enforceable title even after the withdrawal date. It is less clear, however, whether fresh enforcement actions could

131 n 20 above.
132 Cf 2012 Brussels I Regulation, Art 66(1); 2007 Lugano Convention, Art 63(1).
133 Civil Procedure Rules (SI 1998/3132) as amended ("CPR"), r 6.33.
134 CPR, r 6.36.
135 See Section D.11 above.
136 Recast Brussels I Regulation, Recital (15); Case C-196/15, *Granorolo SpA v Ambrosi Emmi France SA* [2016] ECLI:EU:C:2016:559, [16].
137 Cf *Wolf Naturprodukte GmbH v SEWAR spol sro* [2012] ECLI:EU:C:2012:367.
138 2012 Brussels I Regulation, Art 36(1).
139 2007 Lugano Convention, Art 33(1).

be brought under the expedited mechanisms in the Regulation and Convention even after the withdrawal date: it may be that recourse would need to be had to national procedures (new action based on the underlying judgment or *exequatur* proceedings) to secure the enforceable title.

Finally, the function of the *lis pendens* rules in avoiding irreconcilable judgments, it seems doubtful whether these elements of the Brussels I Regulation/2007 Lugano Convention would apply (or continue to apply) once there is no prospect that an outgoing UK judgment or incoming Member State judgment would be capable of recognition or enforcement under the Regulation or equivalent regime, and there is no obvious reason why the UK should seek to apply those rules unilaterally. On this view, England proceedings stayed under Art 29 or Art 30 of the Regulation could be reactivated following the withdrawal date if the court determines that it is just to do so, having regard in particular to whether the matters in issue would be more suitably tried before the EU Member State court than before the English court.[140]

Nevertheless, a document prepared by the Commission (and leaked to the press[141]) dealing with "key elements likely to feature in the draft negotiating directives" contains a fascinating insight as to the EU's possible approach to transitional arrangements upon civil justice matter. The relevant section of that document states as follows:[142]

> "The Agreement should provide for arrangements relating to judicial cooperation procedures governed by Union law which are ongoing on the withdrawal date. It should establish in particular that such procedures remain governed until their completion by the relevant provisions of Union law applicable before the withdrawal date.
>
> Regarding judicial cooperation in civil and commercial matters between the United Kingdom and the EU27, the Agreement should ensure the continued application of the rules of Union law relating to choices of forum and choices of law made before the withdrawal date. It should also ensure that the recognition and execution of national judicial decisions handed down before the withdrawal date in those matters remain governed by the relevant provisions of Union law applicable before the withdrawal date."

In terms of theoretical (if not political) underpinning, this shopping list appears rather haphazard. The statement in the first paragraph suggests that the Commission wishes to treat a procedure as falling within the framework of EU law (giving rise to rights and obligations under

140 *Spiliada Maritime Corporation v Cansulex* [1987] AC 460, 476 (Lord Goff).

141 http://www.politico.eu/article/european-commission-wants-uk-to-pay-brexit-costs-in-euros/

142

the applicable instruments) as soon as the procedure is started, guaranteeing the applicability of that law (irrespective of the UK's withdrawal of a Member State) until the procedure of the procedure in question. If applied to a lawsuit commenced within the jurisdictional framework of the recast Brussels I Regulation, this might suggest that the Regulations rules of jurisdiction, *lis alibi pendens* and recognition and enforcement would apply to proceedings commenced before the withdrawal date. By contrast, the statement in the last sentence of the second paragraph refers only to the recognition and execution of national decisions handed down before the withdrawal date. A possible reconciliation of the two statements would to separate, for this purpose, Chapters II and III of the Regulation, such that the institution of proceedings subject to the Regulation's rules of jurisdiction and the recognition and enforcement of judgments delivered fall to be treated as distinct "procedures" commencing at different times. On this view, the lis pendens rules would remain problematic, as they form part of Chapter II but (as noted above) are closely tied to the prospective recognition and enforcement of judgments under Chapter III. Clearer thinking will be required on this point.

The statement regarding choice of court agreements in the first paragraph of the second paragraph, although sensible from a commercial perspective and no doubt potentially advantageous to the UK, is also difficult to reconcile with the CJEU's approach to what is now Art 25 of the recast Brussels I Regulation. In *Sanicentral v Collin*,[143] the Court held that the rules contained within Art 17 of the 1968 Brussels Convention fell to be applied to determine the validity of a choice of court agreement according to the date of institution of the proceedings, and not according to the date of the choice of court agreement. Thus, a pre-existing choice of court agreement, valid and effective at the time of its conclusion, could be invalidated by the Regulation, and *vice versa*.[144] That approach would, contrary to the Commission's proposal, not favour the continued application of Art 25 to pre-withdrawal choice of court agreements for Member State courts in the event that proceedings are instituted after the withdrawal date.

H. Conclusions

Following the UK's notice to leave the EU, the UK and its soon to be former partners find themselves in an unprecedented situation. It is, however, much too early to say what shape the future UK-EU relationship will take – there are far too many players and variables in play. The present UK Government has an optimistic view of how things will turn out, but the early signs

143 Case 25/79, [1979] ECR 3423.

144 In *Sanicentral*, the clause in question was invalid under the pre-existing national law governing employment contracts.

are that the EU does not (at least outwardly) feel able to share that optimism, and there appear a number of sizeable obstacles to the creation of a new and lasting partnership.

This article has considered how the negotiations might proceed on one of the many hundreds of issues to be addressed in the negotiations, the arrangements concerning jurisdiction and the recognition and enforcement of judgments. For now, all that can be said in the fog of "Brexit" is that there are a number of factors that suggest that the future landscape will be significantly different from the present arrangements, notwithstanding the UK's wish to continue close cooperation in this area and regardless of actual or perceived benefits to both sides of continuing to operate arrangements on a Brussels I or Lugano model. If that tentative prediction is accurate, the market for cross-border litigation in Europe and the applicable rules of private international law appears on the verge of another revolution. The future may not be bright, but it will certainly be lively.