Report on the implications of Brexit on judicial cooperation in civil and commercial matters

Demandé puis approuvé, après examen par un groupe de travail, par le Haut Comité Juridique de la Place Financière de Paris (HCJP) *

Horatia Muir Watt,
Loïc Azoulay,
Régis Bismuth
Professeurs de droit à l'École de droit de Sciences Po

Introduction

In December 2016, the Legal High Committee for the Paris Financial Markets created a working group (see composition in Appendix 1) to examine the consequences of Brexit on judicial cooperation in civil and commercial matters. At its plenary meeting on 30 January 2017, the High Committee approved the report on this subject, which was drafted by Ms Horatia Muir Watt and Messrs Loïc Azoulai and Régis Bismuth, all three of whom are professors at Sciences-Po.

London is undoubtedly a preferred forum for the resolution of commercial disputes that arise throughout the world[1]. This nevertheless raises the question of how much of this success is due to the access the United Kingdom (UK) has to the common judicial area set up by the European Union (EU), i.e. the regime that clarifies the rules on judicial jurisdiction, determines the rules applicable by the courts and facilitates the recognition of judgments by the EU Member States. At the centre of this discussion is the treatment to be afforded to contractual provisions in commercial contracts that opt for the jurisdiction of the English courts or choose to be governed by English law.

In the UK, lawyers' opinions on the actual benefit of this common judicial area for the local economy and its legal services are mixed. Some contend, perhaps prematurely, that the UK's withdrawal from the judicial cooperation system currently in place will have no impact on London's global attractiveness, and could even be liberating since the UK would no longer be bound by the restrictions imposed by EU law. Before taking a position on this issue, it is necessary to assess the impact that the end of the current system will have, both from the standpoint of the UK courts and the courts of the EU Member States. For the purposes of this analysis, it is important that all costs be taken into account, including those that may be incurred by the EU Member States, for example due to the fact that the enforcement of their court's judgments in the UK will probably be more difficult.

1. The impact of Brexit on the European judicial cooperation area

1.1. It is widely accepted that the UK's membership in the EU and its participation in the European judicial cooperation area provide certainty and foreseeability to businesses that engage in cross-border transactions. This participation means that businesses are assured:

i) a clear and predictable jurisdiction system in the event of a dispute;

ii) a simplified, fast and efficient mechanism for recognising and enforcing UK court decisions throughout the EU;

iii) a simplified, fast and efficient mechanism for recognising and enforcing EU Member State court decisions in the UK;

iv) that their rights and interests will be protected under equivalent conditions before all courts of the EU Member States, under the supervision of EU institutions.

1.2. The European judicial cooperation area is based on two sets of EU regulations:

i) In the economic field (family law is excluded from this discussion), the key text concerning jurisdiction and the mutual effects of judgments is Regulation (EU) No. 1215/2012 (known as "Recast Brussels I"), as well as a set of 'satellite' regulations (concerning undisputed monetary claims, small claims, obtaining evidence, notification and service of procedural documents, etc.)[2].

ii) For purposes of determining the applicable law (what law must the court seised apply to a contractual or non-contractual dispute involving parties from different States?), these instruments are supplemented by two major regulations, known as 'Rome I' (No. 593/2008) on the law applicable to contractual obligations and 'Rome II' (No. 864/2007) on the law applicable to non-contractual obligations.

There is a crucial difference between these two sets of regulations. The first set concerns jurisdiction and judgments, and apply only to relations between EU Member States (which does not exclude recognising, to a certain extent, the proceedings or judgments of third States). On

* http://hcjp.fr

1 Ministry of Justice, Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London Based Courts (Eva Lein et al., BIICL), 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>. The structural and functional factors that confer a competitive advantage on the British courts in this context – despite the fact that international commercial arbitration, in London and elsewhere, has become increasingly popular over the last several decades – are quite well-known. What is perhaps less well-known is the awareness of the judicial system that it is a component of a global market for judicial services: see Horatia Muir Watt, 'The economy of justice and international arbitration: reflections on private governance in globalisation' (Économie de la justice et arbitrage international : Réflexions sur la gouvernance privée dans la globalisation), Revue de l'arbitrage, 2008, p. 389; comparison with the US position, Jens Damman & Henry Hansmann, 'Globalizing Commercial Litigation', Cornell Law Review, vol. 94, 2008, p. 1 et seq. (available at: <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=3117&context=clr>. See also William M. Landes & Richard A. Posner, 'Adjudication as a Private Good', Journal of Legal Studies, vol. 8, 1979, p. 235 et seq.

2 See, in particular, Regulation No. 861/2007 establishing a European small claims procedure and Regulation No. 1896/2006 creating a European order for payment procedure.

the other hand, the Rome I and II Regulations on applicable law are 'universal', i.e. they are binding on the courts of the Member States without requiring any reciprocity. Therefore, Brexit (which will cause EU law to cease to be applied to the UK) will have no effect on the application or treatment of English law by the courts of the EU Member States.

1.3. To function, this common judicial area *'is necessarily based on the trust that the Contracting States accord to each other's legal systems and judicial institutions'*[3]. The EU Court of Justice recently reiterated that *"the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law"*[4]. Compliance with EU law essentially means that the national authorities and courts undertake:

i) to preserve the *'full effectiveness'* of EU law within the domestic legal system, including the general legal principles and fundamental rights derived from EU law[5];

ii) to accept the jurisdiction of the EU Court of Justice with respect to interpretation and the authority of its decisions in the sphere of private international law.

1.4. In her important speech on 17 January 2017, Theresa May, the British Prime Minister, clearly stated that she intended to lead her country to Brexit. Brexit will take effect no later than two years after the UK gives notice of its intent to withdraw from the EU in accordance with Article 50 of the EU Treaty (unless the European Council decides to extend that period). To the British Prime Minister this means that the UK will 'take back control of its laws' and 'bring an end to the jurisdiction of the Court of Justice in the UK'[6]. For businesses established in the EU, this means that the UK will be considered a third State vis-à-vis the EU. The current judicial cooperation system will cease to operate between the EU Member States and the UK.

1.5. Therefore, it is worth examining the consequences of the end of this system and to inform all businesses concerned and interested parties. To assist them in this process, we will endeavour to answer the following questions: What are the expected consequences of the end of the current system (2)? What alternative solutions may be considered (3)? After having answered these two questions and presented a summary of these responses (4), we will set out certain conclusions and recommendations (5).

2. The end of the current system and its consequences

From the UK's standpoint, the end of the application of EU private international law principles to the relations between the UK and the EU Member States means a return to ordinary international private law principles.

From the standpoint of the EU Member States, including France, the return of the UK to third State status has varying consequences, depending on whether the issues under consideration concern jurisdiction, the effects of judgments or choice of law (or 'conflict of laws') issues. As stated earlier, in the first case, the EU instruments in place (the aforementioned Recast Brussels I Regulation for jurisdiction and judgments in civil matters) apply solely between EU Member States, i.e. with respect to issues of jurisdiction or the recognition of decisions, they apply only to the mutual relations of EU Member States, whereas, in the second case, the EU instruments (for example, the aforementioned Rome I Regulation on the law applicable to contractual obligations) are 'universal' in nature and are applicable without distinction by the courts of the Member States, whether the governing law is the law of a Member State or of a third State. Therefore, under the current system, a British judgment is recognised and enforceable in France (and in the other Member States) nearly automatically. After Brexit, that same judgment will be treated as that of a third State not a party to any bilateral or multilateral convention[7], applying ordinary private international law principles. On the other hand, if a contract submitted to a French court contains a clause choosing English law as the applicable law, Rome I makes that choice binding on the French court, both before and after Brexit. Whether or not the United Kingdom belongs to the common judicial area is irrelevant.

The exceptional nature of the European system concerning jurisdiction and judgments that Recast Brussels I created will require resolving **transitional situations** that arise before the EU treaties cease to apply to the UK[8]. Concretely, for example, an issue to be resolved is how to handle a judgment rendered on one side of the English Channel before the date on which the Regulation ceases to apply, but whose enforcement is requested after such date on the other side of the English Channel[9]. In this regard, it would be beneficial if the withdrawal agreement to be negotiated between the EU and the UK in connection with Brexit on the grounds of Article 50 of the EU Treaty clarifies the status of pending disputes and decisions handed down before such date.

3 CJEC, 9 December 2003, Gasser, Case C-116/02, paragraph 72; CJEU, 16 July 2015, Diego Brands, Case C-681/13, paragraph 63.

4 CJEU, 18 December 2014, Opinion 2/13 (Accession of the EU to the ECPHRFF), paragraph 191.

5 CJEC, 7 February 2006, Opinion 1/03 (Competence of the Community to conclude the new Lugano convention on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters), paragraph 128.

6 'So we will take back control of our laws and bring an end to the jurisdiction of the European Court of Justice' (Theresa May, Lancaster House, 17 January 2017).

7 In Franco-British relations, the 1934 bilateral convention seems to have been abrogated by the Brussels Convention. However, certain British judgments would be covered by the multilateral 2005 Hague Convention on choice of court agreements, if the United Kingdom becomes a party thereto. On these issues, see infra.

8 See, by analogy, CJEU, 21 June 2012, Wolf Naturprodukte, Case C-514/10.

9 Conversely (when ordinary legal principles are replaced by a convention), Article 54 of the Brussels Convention of 1968 provided:

The provisions of this Convention shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after its entry into force.

However, judgments given after the date of entry into force of this Convention in proceedings instituted before that date shall be recognized and enforced in accordance with the provisions of Title III if jurisdiction was founded upon rules which accorded with those provided for either in Title II of this Convention or in a convention concluded between the State of origin and the State addressed which was in force when the proceedings were instituted.

2.1. Consequences with respect to jurisdiction

2.1.1. Due to the UK's withdrawal from the EU, Recast Brussels I on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters will **cease to apply** to relations between the UK and the EU Member States. The foregoing is also true for the 'satellite' regulations.

2.1.2. From France's standpoint, the end of the current system will have varying effects depending on the situation:

i) ***in the case of a defendant domiciled in the UK*** (which becomes a third State), the jurisdiction of the French courts will be determined in accordance with ordinary French private international law principles. In principle, the French courts would lack jurisdiction in such case (as is currently the case under Recast Brussels I) as a result of the transposition (decided by the Court of Cassation well before the creation of the European judicial area) of the grounds for domestic territorial jurisdiction set out in the French Code of Civil Procedure to international matters. Accordingly, the French courts would have international jurisdiction (although it would then have to be determined which domestic court has special jurisdiction) if the defendant is domiciled in France (with certain exceptions), and otherwise would lack jurisdiction. However, the situation would be different if ***the claimant or the defendant himself holds French nationality*** (Articles 14 and 15 of the French Civil Code). This latter rule applies to both individuals and legal entities. Therefore, it is possible that this 'nationality privilege' may be revived for purposes of Franco-British cases as the basis of the jurisdiction of the French courts over a defendant domiciled in the United Kingdom[10]. This may potentially confer broader jurisdiction on the French courts in Franco-British cases[11].

ii) Moreover, the French courts may hold that they have jurisdiction pursuant to a ***choice of forum clause that confers jurisdiction on the French courts***. The enforceability of such a clause will be governed by Recast Brussels I (Article 25), which applies regardless of the parties' domicile. In such case, the clause will be enforceable (subject to a series of exclusive jurisdiction situations laid down by the Regulation) and deemed valid *'unless the agreement conferring jurisdiction is null and void as to its substantive validity under the law of the Member State'*, i.e. under French law.

iii) ***If the defendant is domiciled in an EU Member State***, Recast Brussels I (Article 4) in principle confers jurisdiction on the courts of such State, even if the claimant is British or is domiciled in the UK.

iv) However, it is possible that in a case in which a French court has jurisdiction pursuant to Recast Brussels I (on the grounds of Article 4), the defendant (for example, a company that has its principal office in England) may assert a ***choice of court clause that confers jurisdiction on the English courts*** (or one of them, generally the Commercial Court). Such a case is problematic. To date, the issue of whether jurisdiction derived from Recast Brussels I prevails over a choice of court clause conferring jurisdiction on a third State has not yet been resolved. This uncertainty, and the possibility that the EU Court of Justice may hold that Recast Brussels I jurisdiction prevails, is a source of worry in the UK. This uncertainty is due to the interpretation of a very controversial decision of the EU Court of Justice, the *Owusu* decision[12], which held that jurisdiction pursuant to the Brussels convention, which was the model for Brussels I and Recast Brussels I, prevailed over English legal principles in a case involving a third State.

However, we deem it unlikely that the EU Court of Justice will adopt such a position. In various situations, Recast Brussels I recognises proceedings initiated in third countries. Furthermore, regardless of France's position on this point, if jurisdiction is conferred on the English courts, they will undoubtedly continue to exercise such jurisdiction and, if necessary, will issue an anti-suit injunction to halt a proceeding before another court, in the event the French courts accept jurisdiction. Such injunctions, which are forbidden in the European judicial area, would once again be possible in Franco-British cases after Brexit. The real issue as to the effectiveness of the clause would depend on whether or not there are assets in France over which an English judgment rendered pursuant to the clause could be enforced.

2.1.3. From the standpoint of the UK courts, returning to ordinary private international law principles means returning to a much more complex system.

i) The focus of this system is the defendant's domicile (even if, technically, what is most important is being able to legally serve the defendant, which is possible if the defendant is present within the jurisdiction). Accordingly:

- if the ***defendant is domiciled in the UK***, the English courts generally hold that they have jurisdiction;
- if the ***defendant is domiciled outside the UK***, the High Court must grant permission to subject a defendant to the jurisdiction of the English courts, which will be granted based on three factors: (1) there is a reasonable probability that the action will be successful; (2) the UK is the appropriate forum to hear it; and (3) each request falls within one of the 21 different jurisdictional gateways. The Court therefore has a great deal of discretion.

ii) Returning to ordinary legal principles would also entitle the UK courts to once again use tools that are prohibited in relations between EU Member States within the judicial cooperation area.

10 With respect to Brexit, it is noteworthy that the case-law of the EU Court of Justice that prohibits EU Member States from refusing to recognise a company validly incorporated under the law of the UK as an EU Member State will no longer apply (Centros (C-212/97), Uberseering (C-208/00), Inspire Art (Case C-167/01) and other decisions). Thus, domestic rules for determining the nationality of companies will apply. Before the French courts, the nationality of a company that has ties to various jurisdictions or several locations (different locations for its registered office, central administration, principal place of business, assets, control, etc.) will be determined on the basis of its principal office (defined as its registered office, although third parties would be entitled to assert its actual headquarters if there is a difference between the two). However, a holder of the French nationality privilege may waive such privilege, in particular by a contractual clause, and therefore it is highly likely that such a commercial practice will develop – in the rare cases in which the parties to a Franco-British contract fail to include a choice of court clause in the contract, which would clearly prevail over the nationality privilege.

11 This jurisdictional nationality privilege has been criticised, in France and abroad, due to its extravagant nature (by definition, it cannot be 'bilateralised' and prevails regardless of any other ties between the subject of the dispute and France). However, application thereof has been significantly restricted due to the effect of the European judicial area which prohibits it, to the point that cases on these laws have become very rare. Moreover, the Court of Cassation has limited its traditional scope with respect to the recognition of judgements under ordinary legal principles and, therefore, a party who opposes the enforcement of a judgment in France is no longer entitled to raise his nationality privilege as a ground therefor.

12 CJEC, 1 March 2005, Owusu, Case C-281/02.

- The UK courts could declare themselves ***forum non conveniens*** at the defendant's request if they deem they are not the most appropriate courts to resolve a dispute.
- The UK courts would once again be able to issue **anti-suit injunctions** to halt proceedings initiated abroad if they deem they are better suited to hear the matter. What effect such measures would have in the French courts is unclear. In certain cases, the Court of Cassation has ruled in favour of recognising such measures in France[13]. However, the private international law rules of the EU Member States are not all equally tolerant with respect to the English courts' extraterritorial exercise of their injunctive powers[14]. It is entirely possible that the courts of other EU Member States may refuse to recognise (and enforce) anti-suit injunctions issued by the British courts[15]. Nevertheless, the real issue – which is common to any injunction issued *in personam* rather than *in rem* – is whether an *exequatur* is necessary for such measures. Requesting exequatur locally would be prudential more than anything else.
- With respect to ***provisional measures***, the UK courts will regain the power to issue Mareva injunctions (or freezing orders), i.e. measures to freeze assets, including assets located abroad, in France or any other EU Member State. These *in personam* orders are extremely effective if the defendant holds funds in a financial institution located in the UK. Due to the pressure these measures place directly on the party enjoined, they do not need to be enforced in the country where they are in fact carried out[16].

iii) If the English courts are conferred jurisdiction pursuant to a ***choice of court clause***, they will determine whether they have jurisdiction in accordance with ordinary UK private international law principles, unless they deem themselves *forum non conveniens* (which would be very rare in such case). If necessary, they may defend such jurisdiction by issuing an anti-suit injunction. If the choice of court clause is exclusive, the UK's accession to the Hague Convention of 2005 would increase the efficacy of the clause by eliminating the court's discretion with respect to jurisdiction, as well as the need to issue anti-suit injunctions.

iv) If a ***clause that designates a French court*** (or the court of another EU Member State) is asserted before a British court that also has jurisdiction, the UK court will usually decline jurisdiction in deference to the intent of the parties.

2.2. Consequences with respect to applicable law

2.2.1. The main issue is what treatment will be afforded to contractual choice of law clauses that designate English law (a frequent choice) or the law of another EU Member State in contracts concluded before Brexit actually takes effect.

2.2.2. From France's standpoint, the consequences of the UK's withdrawal from the EU will be limited. Rome I is 'universal': it requires application of the law governing the contract, including if the law chosen is not that of an EU Member State. A French court hearing a matter involving a contract with a choice of law clause that opts for English law will therefore apply it.

However, in practice, this situation will rarely arise because parties seldom choose an applicable law without also choosing the courts of the same country (parties who choose English law will ordinarily choose the English courts to apply it).

Moreover, even if the parties fail to choose the applicable law, a French court applying Rome I may apply English law based on the various choice of law factors included in the regulation (in particular, for various types of special contracts).

In non-contractual matters, Rome II may also designate the English law, in particular if a dispute arises concerning liability (for example, of a financial intermediary) and the damage occurs in England. Under this regulation, in principle (subject to numerous exceptions and correcting mechanisms) the applicable law will be the law of the place where the damage occurs, regardless of the place where the tortious conduct or indirect consequences occur.

2.2.3. From the UK's standpoint, Rome I would cease to apply. Unless a specific agreement is reached between the EU and the UK, the British courts will apply ordinary private international law principles in contract matters. In particular, this will mean a high degree of deference to the freedom of contract in the event of a choice of law clause (e.g. in favour of English law), or else, the application of the rather archaic rules used to otherwise determine the law of the contract. We do not believe it is feasible to revive the 1980 Rome Convention on the law applicable to contractual obligations[17].

13 Anti-suit injunctions are not contrary to international public policy (Cass. Civ. 1, 14 October 2009, Revue Critique de Droit International Privé, 2010, p. 158, note by Horatia Muir Watt; D. 2010. 177, note by Sylvain Bollée. The Court of Cassation has even allowed French courts to use similar mechanisms (mandatory or prohibitory injunctions subject to fines for non-compliance) in an international insolvency matter, in which the French court ordered a creditor, subject to fines for non-compliance, to drop foreclosure proceedings initiated in Spain against a property owned by the debtor (Cass. Civ. 1, 19 November 2002, Banque Worms v. Mr and Mrs Brachot et alia, Revue Critique de Droit International Privé, 2003, p. 631, note by Horatia Muir Watt).

14 This diversity is apparent in the background of a recent CJEU decision in the Gazprom case (CJEU, 13 May 2015, 'Gazprom' OAO v. Lietuvos Respublika, Case. C-536/13). In arbitration matters, which are not within the scope of Recast Brussels I, the CJEU granted a Member State (in this case, Lithuania) the discretion to refuse to enforce such an injunction. Moreover, in the Meroni decision, Latvia deemed that an injunction involving a third party who had not been informed was contrary to its public policy (CJEU, 25 May 2016, Rūdolfs Meroni v. Recoletos Limited, Case C‑559/14).

15 For an overview of the current discussion in Europe, see Gilles Cuniberti, 'Protective measures applicable to assets located abroad' (Les mesures conservatoires portant sur des biens situés à l'étranger), Paris, LGDJ, 2000 (preface by Hortia Muir Watt). The German case-law, in particular, has been unfavourable to recognition of such measures.

16 See the case law cited at note 14.

17 The Rome Convention provided that, if the parties did not choose the applicable law, the contract would be governed by the law of the country with which the contract was most closely connected, which was presumed to be the country in which the party who was to effect the performance which was characteristic of the contract had his habitual residence or central administration at time the contract was concluded. A return to the Rome Convention does not seem possible for reasons similar to those set out and explained infra regarding the 1968 Brussels Convention and the 2008 Lugano Convention. It should be noted that Rome I states that it 'shall replace (NB: 'supersede' in the English version) the Rome Convention between the Member States, except as regards the territories of the Member States which fall within the territorial scope of that Convention and to which this Regulation does not apply pursuant to Article 299 of the Treaty' (Article 24 of the Regulation). This means that the convention has ceased to apply between Member States and that only the residual application mechanism is governed exclusively by EU law, which will no longer apply to the UK after Brexit. It should also be pointed out that only EEC Member States could become parties to the Rome Convention (Article 28 of the Convention) and that the CJEC was designated as the final authority with power to interpret the convention (see the first and

Undoubtedly, it is the uncertainty about the law applicable to commercial contracts in the absence of a choice of law clause that explains the recommendation of the Financial Markets Law Committee (FMLC) to retain the provisions of Rome I in UK domestic law, including its suggestion that the UK courts take due account of the decisions of the EU Court of Justice on the interpretation of these provisions[18]. In this respect, it is noteworthy that the ordinary English law is more liberal and less protective with respect to the rights of weaker parties (consumers, workers, insureds, etc.) than the EU private international law.

The FMLC also seems to recommend a sort of indirect survival of the provisions of Rome II on non-contractual obligations[19]. Under this regulation, in tort matters, the applicable law is the law of the place where the damage occurs (subject to numerous exceptions and correcting mechanisms). The ordinary English law, to which the English courts would turn unless an alternative solution is adopted, is governed by an Act of 1995 whose provisions confer greater discretion on the court considering the issue, and which contains many fewer 'special' rules covering torts of different types[20].

2.2.4. Brexit raises the issue of whether the UK intends to 'strip' from British law the EU law rules that currently govern business matters. This is a crucial point because it will in part determine the treatment of contracts already concluded. In such case, some parties may attempt to challenge choice of law clauses that designated English law on the grounds that Brexit constitutes changed circumstances (unforeseen events or frustration of contract), and that the incorporation of EU law into the English law was a material factor in the choice of applicable law at the time the contract was made. Practitioners are already considering such a possibility. In private international law the issue of the impact of unforeseen events on contracts is governed by the law applicable to the contract itself. However, the choice of a law (for example, English law) does not freeze the content of such law at the time the choice is made, but accepts, in advance, all subsequent legislative changes. In France (and the Member States, which are bound by Rome I), this is due to the requirement, implicit in Article 3 of Rome I, that the 'law' chosen must be the law of a State currently in force. Nevertheless, under the applicable law (here, hypothetically, the English law itself), it cannot be excluded that the drastic change caused by the elimination of EU law could be interpreted as grounds for frustration of contract. On this point, practitioners are already considering the post-Brexit impact on ISDA contracts[21]. The law applicable to an ongoing contract can always be changed by the agreement of both parties. The more general issue, therefore, is whether these uncertainties are likely to discourage professionals from including English choice of law clauses in contracts and, if so, what law would be chosen as an alternative. It is possible that a certain number of contracts may opt for arbitration due to the fact that parties cannot currently use non-binding private instruments (for example, the Unidroit Principles, the rules applicable to the ISDA Master Agreement itself, etc.) as the law applicable to their contracts.

However, undoubtedly in an effort to reassure the City on this point, in her 17 January 2017 speech, Theresa May stated that due to the extensive influence of EU law on the

second protocols conferring jurisdiction on the CJEC to interpret the convention).

18 FMLC, 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, p. 3-4, available at: <http://www.fmlc.org/uploads/2/6/5/8/26584807/brexit_-_english_law_and_jurisdiction_paper..pdf>.

19 Ibid.

20 The Act of 1995 focuses primarily on tort obligations. See, in particular, the sections below:

11 Choice of applicable law: the general rule

(1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.

(2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being –

(a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;

(b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and

(c) in any other case, the law of the country in which the most significant element or elements of those events occurred.

(3) In this section "personal injury" includes disease or any impairment of physical or mental condition.

12 Choice of applicable law: displacement of general rule

(1) If it appears, in all the circumstances, from a comparison of –

(a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and

(b) the significance of any factors connecting the tort or delict with another country, that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.

(2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events.

13 Exclusion of defamation claims from Part III

(1) Nothing in this Part applies to affect the determination of issues arising in any defamation claim.

(2) For the purposes of this section "defamation claim" means –

(a) any claim under the law of any part of the United Kingdom for libel or slander or for slander of title, slander of goods or other malicious falsehood and any claim under the law of Scotland for verbal injury; and

(b) any claim under the law of any other country corresponding to or otherwise in the nature of a claim mentioned in paragraph (a) above.

21 The following has been posted on the ISDA's website (ISDA, ISDA Brexit FAQs, December 2016, available at: <https://www2.isda.org/functional-areas/legal-and-documentation/uk-brexit/>):

Contractual points under ISDA documentation

1. Could Brexit constitute a Force Majeure, Impossibility or an Illegality Termination Event under the ISDA Master Agreement?

A Force Majeure Termination Event requires a practical impediment to payment/delivery which seems unlikely to occur, even if the UK does not retain its passporting rights for investment services. An Illegality Termination Event is a theoretical possibility if Brexit results in a total loss of access for UK financial services firms to EU financial markets and the consequence of this is for performance of a Transaction to become illegal in the relevant EU member state. Such an outcome is unlikely in respect of the performance of pre-existing contractual obligations, but will depend on local law in the jurisdiction of performance.

(…)

3. Could there be a breach of the representation under Section 3(a)(iii) (No violation or Conflict) or Section 3(a)(iv) (Consents) as a consequence of Brexit?

A breach of the 'no conflict with applicable law' representation is unlikely to arise as, assuming that this representation is true and accurate when given and repeated pre-Brexit (including on entering into each new Transaction), then existing Transactions will not cause a Misrepresentation Event of Default simply by virtue of such representations becoming untrue at a subsequent date as a result of Brexit (if, for example, in the absence of passporting rights for UK financial services firms, performance of a Transaction conflicts with local law due to local authorisation requirement – as to which, please refer to the answer to Question 1 (Force majeure, Impossibility or Illegality Termination Event)). The same is true of the representation on consents in Section 3(a)(iv). Caution should be exercised in respect of any novation or amendment of an existing Transaction to the extent this is actually the entry into a new Transaction, at which point these representations will be deemed to be repeated.

various branches of domestic law, and in order to provide a certain stability to the economic and social environment in the UK, the UK would incorporate into British law the EU law already in force in the UK[22]. Nevertheless, the content and scope of such incorporation remains to be seen.

2.2.5. In any event, after Brexit, the UK will no longer be bound by changes in EU law or the supervision of EU institutions as to effective application of such law. Therefore, certain EU law provisions that would cease to apply under the English law as the law applicable to a contract may be held by the courts of the EU Member States to come within the category of 'overriding mandatory provisions'. This means that such courts would enforce these provisions, regardless of the law otherwise applicable to the contract[23]. Similarly, the specific conflict rules that offer protection in international matters would cease to be applied by the UK courts[24]. Therefore, for example, a British decision that applies provisions that are less protective than the legislation of the State where a consumer has his habitual residence may be held to be contrary to international public policy and, accordingly, be refused *exequatur* by the EU Member States.

2.2.6. The issue of the applicable law is particularly important in the case of derivatives contracts. The law applicable to insolvency proceedings involving a credit institution is the law of the institution's home Member State. However, Article 25 of Directive 2001/24/EC, as amended[25], on the reorganisation and winding up of credit institutions provides that *'netting agreements shall be governed solely by the law of the contract which governs such agreements'*. This means that the law of the contract prevails over the law applicable to insolvency proceedings. In practice, this article favours application of English law because the law of the contract is very frequently English law. However, due to the uncertainties surrounding the impacts of Brexit with respect to judicial cooperation and the rules applicable to contracts, professionals may cease choosing English law (see section 2.2.4).

2.2.7. Furthermore, more generally, international private law issues concerning security interests (in particular, security interests securing bank loans) are extremely complex and raise numerous questions in the post-Brexit context. The common judicial area was unable to resolve problems concerning the international recognition of security interests between continental Europe and the United Kingdom, other than to impose a uniform conflict of laws system for ordinary insolvency proceedings pursuant to Regulation 2015/848 of 20 May 2015 on insolvency proceedings (which does not apply to the specific situation of the reorganisation of credit institutions discussed above)[26]. It is nevertheless clear that the ease with which security interests may be realised will impact lenders' decisions to grant loans to borrowers whose assets are located in another country. It is possible that the uncertainties created by Brexit may affect banks' practices on this point.

2.3. Consequences with respect to enforcement and *lis pendens*

2.3.1. The recognition and enforcement of judgments and other public instruments within the Union is governed by Recast Brussels I, which will **cease to apply** to the effects of UK judgments in France (or any other Member State), and vice versa.

The time at which such cessation will take effect is problematic. Under Recast Brussels I, any judgment rendered by a court of a Member State is automatically deemed a final judgment in the other Member States as from the time it is rendered. Nevertheless, there is some uncertainty about the transitional period, in particular with respect to compelled enforcement. Such enforcement does not require an *exequatur* and, therefore, it may be assumed that Member States' judgments become enforceable in the other Members States ***as from the time the original decision is rendered***[27].

2.3.2. From France's standpoint, the ***abolition of the exequatur*** by Recast Brussels I will cease to apply. The judgments of the UK courts will be subject to the requirements and procedures for granting *exequatur* under the ordinary private international law principles applicable to judgments issued in third States. The procedure will be contentious and will be heard by the District Court (*Tribu-*

22 In her speech she stated: 'We will convert the "acquis" – the body of existing EU law – into British law. This will give the country maximum certainty as we leave the EU. The same rules and laws will apply on the day after Brexit as they did before. And it will be for the British Parliament to decide on any changes to that law after full scrutiny and proper Parliamentary debate'.

23 Article 9(1) of Rome I provides: 'Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation'.

24 Rome I, Article 5(8).

25 Amended by Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms.

26 That Regulation provides:

Article 8

Third parties' rights in rem

1. The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

Article 12

Payment systems and financial markets

1. Without prejudice to Article 8, the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market.

2. Paragraph 1 shall not preclude any action for voidness, voidability or unenforceability which may be taken to set aside payments or transactions under the law applicable to the relevant payment system or financial market.

27 Below are the provisions of the Brussels I Regulation of 2000 on the transition from the 1968 Brussels Convention:

CHAPTER VI: TRANSITIONAL PROVISIONS

Article 66

1. This Regulation shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof.

2. However, if the proceedings in the Member State of origin were instituted before the entry into force of this Regulation, judgments given after that date shall be recognised and enforced in accordance with Chapter III:

a) if the proceedings in the Member State of origin were instituted after the entry into force of the Brussels or the Lugano Convention both in the Member State of origin and in the Member State addressed;

b) in all other cases, if jurisdiction was founded upon rules which accorded with those provided for either in Chapter II or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

nal de grande instance). *Exequatur* will be required both for compelled enforcement and to recognise a judgment as final, unless that issue is raised as a defence in a pending proceeding (in which case it will apply only in such proceeding). In fact, the Court of Cassation has significantly relaxed the conditions for granting *exequatur* under ordinary legal principles and, therefore, the return to ordinary legal principles will not have particularly draconian consequences in this area. The English judgment need only be deemed consistent with French public policy as to its substance and the procedure followed. Nevertheless, certain difficulties may arise on this point, in particular if the English judgment fails to state the reasons in support thereof[28]. The most significant change will be a return to the procedural complexities of contentious proceedings under ordinary legal principles.

From the UK's standpoint, another consideration will be the complexity due to the differing recognition and enforcement regimes in the EU Member States. Although the *exequatur* requirements have been relaxed in France for non-EU judgments, that is not necessarily the case in other Member States. In particular, the French system has practically abolished all grounds for opposing the enforceability of decisions issued by third States other than non-conformity with international public policy (interpreted as a core of non-derogeable values and fair trial principles). However, in their respective national laws, other Member States have retained certain grounds for refusing *exequatur* that France has abolished, such as compliance with the rules of the forum for jurisdiction[29] or applicable law, or may continue to require that the matter judged abroad be re-judged on the merits (even if only summarily). Therefore, the recognition and enforcement of UK judgments risk being conditioned on compliance with contentious procedures that are at times complex and, in any event, are not consistent.

2.3.3. With respect to the ***recognition of pending foreign proceedings***, Recast Brussels I adopts a *lis pendens* system that is mandatory for Member States, which gives preference to the first court seised. In other words, if two proceedings are initiated simultaneously in France and the UK, the first one will have preference (in fact, technically, preference is given to the first court seised to rule first on its own jurisdiction but, concretely, if that court finds it has jurisdiction, the proceeding will continue until it is concluded). This is the 'first-come, first-served' system, which enabled the **practice of 'torpedo' proceedings**, a manoeuvre that attempts to subvert a choice of court clause by quickly and pre-emptively initiating proceedings before the courts of another Member State (in practice, preferably an Italian court) obliging the parties to await its decision as to its jurisdiction. However, Recast Brussels I had to a large extent solved this problem by abandoning the preference afforded to pending proceedings in the event of a choice of court clause. Furthermore, Recast Brussels I allows courts of Member States to decline jurisdiction under certain conditions in favour of proceedings in third States[30]. Therefore, English proceedings pending at the time a parallel proceeding is initiated in France would probably be respected by a French court despite the fact that such deference to pending proceedings would have ceased to be mandatory.

2.3.4. From the UK's standpoint, the judgments of the EU Member States will be recognized and enforced in accordance with ordinary UK legal principles (unless bilateral agreements are concluded[31]). *Exequatur* does not exist as such in the UK. However, the judgment creditor of a foreign judgment that orders the payment of a sum of money may request enforcement of the foreign judgment as an instrument evidencing a debt[32]. The foreign judgment is not

28 See, in an interesting case, le Guernesey: 'Exequatur refused for a non-reasoned foreign judgment' 'Refus d'exequatur d'un jugement étranger non motive), Cass. Civ. 1, 9 September 2015, Classic Cruising Ltd. v. Mr X., No. 14-13.641, Revue Critique de Droit International Privé, 2016, p. 189, note by Laurence Usunier (After having determined, in the exercise of its discretion, and without any distortion, that no document providing the reasons for the non-reasoned foreign judgment had been produced, and because the certificate of the original court did not constitute such a document, the Court of Appeal properly concluded that the decision was inconsistent with the French conception of the international public policy applicable to proceedings').

29 For example, in Germany (source: Götz-Sebastian Hök, 'Current German international private law' (Le Droit International Privé allemand actuel), 15 February 2001, available at: <http://www.dr-hoek.de/FR/beitrag.asp?t=Le-Droit-International-Prive-allemand-actuel>):

Article 328 of the ZPO establishes the conditions under which foreign judgments will be recognised in Germany. Recognition of divorce judgments is governed by the rule laid down by Article 7 I of the law on the unification and amendment of family law provisions (FamRÄndG) of 11 August 1961 (see BGBl 1961 I, p. 1221). The exequatur procedure is governed by Articles 722, 723 and 328 of the ZPO.

1. The autonomous German law recognises foreign decisions without any specific procedure. Foreign decisions will not be recognised if:

- the courts of the first State lacked jurisdiction under German law;
- the documents that initiated the proceedings were served in an irregular manner or late, thereby depriving the defendant of the opportunity to prepare its defence;
- the judgment is inconsistent with a domestic judgment or a prior foreign judgment to be recognised or if the proceedings on which it is based are inconsistent with a prior domestic proceeding that is not final;
- recognition of the judgment would have a result contrary to the fundamental principles of German law, in particular if its recognition is inconsistent with fundamental liberties;
- contradictory results cannot be avoided.

30 Article 33(1). Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and proceedings are pending before a court of a third State at the time when a court in a Member State is seised of an action involving the same cause of action and between the same parties as the proceedings in the court of the third State, the court of the Member State may stay the proceedings if: a) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.

31 With respect to the convention between the United Kingdom and France of 18 January 1934 on mutual enforcement of judgements in civil and commercial matters, see infra section 3.1.

32 See below the very clear summary prepared by the Pinsent Masons law firm ('Enforcing foreign judgments in England and Wales', available at: <http://www.out-law.com/topics/dispute-resolution-and-litigation/enforcement/enforcing-foreign-judgments-in-england-and-wales>):

If a country does not fall under any of the above schemes, you will have to start fresh legal proceedings in England and Wales to enforce a foreign judgment. In effect, you will be suing on the judgment as a debt. You may have to serve the claim outside the jurisdiction, in which case specific rules apply.

Unless, for example, a fraud is alleged there should be no need to re-examine the merits of the case at court so it will often be possible to obtain summary judgment. This is a procedural device allowing the speedy and early hearing of a claim without the need for a trial. Such applications are normally successful and are largely a formality.

However, in some situations the judgment debtor may have a credible challenge to the recognition or enforcement of the original judgment. For example, the judgment must have been given by a court regarded under English law as competent to do so. Note that it does not matter that the foreign court had jurisdiction according to its own law - what matters is that it had jurisdiction according to the rules of English private international law. The debtor must therefore have either been present within the jurisdiction of the foreign court or submitted to its jurisdiction, by voluntary appearance or by contract.

A foreign judgment can only be enforced if it is for a definite sum of money. The England and Wales court will not enforce judgments for taxes or penalties, such as fines - this means that USA-style punitive damages will not be recoverable.

Judgement must be final and conclusive, not provisional. There is a general presumption that a foreign judgment is conclusive but a debtor may seek to challenge it on various grounds, including that it was obtained by fraud or in

reviewed on the merits, but the procedure is cumbersome and costly, and its outcome is uncertain.

It is possible that to bypass the difficulties discussed above in relation to the enforcement of UK judgments in the Member States, the UK courts may more frequently issue *in personam* injunctions (if the defendant is 'subject to UK jurisdiction'), which would allow their judgments to be enforced without obtaining *exequatur* and without requesting compelled enforcement. For such purpose, it would suffice for the defendant to hold assets or a bank account with a bank that is itself subject to the equitable jurisdiction of the English courts.

3. Towards a new cooperation regime?

If the uncertainties surrounding the consequences of Brexit in this area are deemed too high, it may be tempting to look for solutions in the existing legal frameworks that provide greater certainty for each of the parties than the solutions derived from the disparate application of the various ordinary private international law systems. This requires an examination of the international law regimes that may be used to establish effective judicial cooperation between the UK and the EU Member States or between the UK and France.

This solution is clearly favoured by the City of London and groups of experts in the UK[33]. These parties are endeavouring to find a new cooperation framework equivalent to the framework governing existing relations or, at least, as close as possible to an effective recognition and enforcement regime for UK judgments in the EU Member States. However, the British government seems to have embarked on a different course. That was the message Theresa May delivered in her 17 January 2017 speech: the UK rejects all application of EU law principles and the authority of the EU Court of Justice in any form. Under these circumstances, the chances to establish an effective cooperation solution appear slight.

3.1. Return to the 1968 Brussels Convention?

Some British commentators have suggested that if Recast Brussels I ceases to apply, the 1968 Brussels Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters could be revived to govern relations between the UK and the EU Member States. That convention provides a common set of rules governing jurisdiction, recognition and *exequatur*. It is not entirely equivalent to the more effective regime established by Recast Brussels I: in particular, the *exequatur* procedure continues in existence, although the formalities thereof have been reduced.

The issue of the 'revival' of the 1968 Brussels Convention is debatable. Various possibilities and elements must be considered.

i) Article 68 of Recast Brussels I provides that *'this Regulation shall, as between the Member States replace the 1968 Brussels Convention'*. However, this provision did not necessarily definitively extinguish all obligations under the Convention. The English version of the Regulation is less categorical and states that *'this regulation shall, as between the Member States, supersede the 1968 Brussels Agreement'*. Article 68 may therefore be viewed as a provision that merely asserts the pre-eminence of the Regulation over the Convention and, consequently, the extinction of the effects of the Regulation for the UK should lead to the application of the Convention between the UK and the other States party to the Convention[34].

ii) Although the revival of the 1968 Brussels Convention has generated some support from legal commentators, this position nevertheless does not stand when subjected to a more global analysis that incorporates the requirements of EU law.

The Brussels Convention was derived from former Article 220 of the EEC treaty concerning relations between Member States of the European Community. The EU Court of Justice has consistently stressed the links between that Convention and the European Community and its objectives, one of the first of which is the establishment of a European common market. Undoubtedly, the UK's withdrawal from the EU severs such links, at least until a general agreement can be reached to determine the new relations between the UK and the EU. In any event, Recast Brussels I is clear: it *'replaces'* the Brussels Convention for the States that were members of the Union at the time. Although certain 'non-European' territories continue to be covered by the Convention, it is only because they are closely associated with certain EU Member States and are subject to a special association regime defined in the EU treaties. As a third State vis-à-vis the EU, the UK cannot be considered to be a 'non-European territory' within the meaning of the EU treaties.

iii) Moreover, a return to the Brussels Convention is likely to create discrimination between two categories of EU Member States. Litigants from Member States that are parties to the Convention and that are entitled to its benefits in their relations with the UK would be treated differently from litigants from other Member States that are not parties to the Convention (in particular, because they joined the EU after 2004) and who would be deprived of its benefits. This type of discrimination between litigants who are citizens or residents of different EU Member States is inconsistent with EU law. This has been confirmed by several precedents handed down with respect to bilateral

proceedings which were contrary to natural or substantial justice. The debtor will have to be able to prove these grounds.

33 TheCityUK, Brexit and UK-Based Financial and Related Professional Services, 12 January 2017, available at <https://www.thecityuk.com/assets/2017/Reports-PDF/Brexit-and-UK-based-financial-and-related-professional-services.pdf>; FMLC, op. cit. note 18.

34 Furthermore, the residual application mechanism of the Brussels Convention has been considered a factor in support of a return to that instrument: the convention would be revived in a certain manner to govern relations between the EU Members States and the UK. Article 68 of the convention states that the regulation replaces the 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 355 of the Treaty on the Functioning of the European Union'. Thus, the convention continues to apply to the relations between the Member States and Aruba and France's overseas territories. Therefore, it could be argued that the regulation prevails over the convention and continues to apply strictly to EU Member States. However, the convention was not 'terminated' for purposes of the relations between such States if they cease to be members of the Union. In other words, the convention was merely 'put on standby' for purposes of the relations between Member States without being legally 'terminated'. However, this residual application mechanism is strictly governed by EU law alone, which by definition would cease to apply to the UK after Brexit. Therefore, it is not tenable to rely on this residual application mechanism in support of a return to the Brussels Convention after Brexit.

tax conventions[35] and bilateral investment treaties[36]. Consequently, retaining a system based on the Convention that grants a preference to certain Member States and a third State with respect to matters within the exclusive competence of the EU, such as judicial cooperation, is highly implausible. In addition to establishing discriminatory measures incompatible with EU law, it would risk calling into question the *'unified and coherent nature'* of the current judicial cooperation system, which, it must not be overlooked, is a substantial component of the proper functioning of the internal market[37]. For all of these reasons, a return to the 1968 Brussels Convention does not seem feasible.

iv) The same analysis holds for the bilateral conventions that preceded the Brussels Convention. This is the case of the ***convention between the UK and France of 18 January 1934 on the mutual enforcement of judgments in civil and commercial matters***. Even if this convention could be reactivated after Brexit[38], the fact remains that implementing this convention would discriminate between Member States concerning their relations with the UK, and such discrimination is incompatible with EU law.

Conclusion. In our opinion, the 1968 Brussels Convention is unlikely to be revived to govern the relations between EU Member States and the UK. This is also true for the prior bilateral conventions concluded between the UK and the Member States.

3.2. The Danish model

The 1968 Brussels Convention continues to govern relations between Denmark and the other EU Member States. This is the case pursuant to the protocol concerning Denmark appended to the EU treaties that makes Brussels I inapplicable to it. Could a similar solution be offered to the UK as a third State?

It should be noted that, according to the CJEU, the adoption of uniform rules concerning jurisdiction and the recognition and enforcement of judgments at the EU level are closely tied to the *'smooth working of the internal market'*[39]. It is important to avoid creating legal situations due to disparities between applicable rules, as such situations would generate obstacles to the proper functioning of the internal market[40]. Accordingly, the EU has insisted on the need to have a *'unified and coherent'* system of rules to govern the relations between the States that participate in the internal market[41]. For this reason, Denmark was required to agree to be bound by Brussels I pursuant to an international agreement concluded between the European Community and Denmark[42]. This agreement extends to Denmark the application of the content of Brussels I, except certain provisions of the regulation which are modified[43]. It also stipulates that Denmark cannot take part in the adoption of amendments to Brussels I and that such amendments are not binding on it[44]. However, Denmark can notify the Commission of its decision to apply such amendments[45]. The objective of the agreement is also achieved by the provisions requiring Denmark to recognise the jurisdiction of the CJEU. The parties have the right to terminate the agreement[46].

The same conditions could possibly apply to the UK if it wishes to have a status similar to that of Denmark. If such conditions were accepted, they could enable the operation of a system with the same general features as the current system. However, this would require foregoing the main political benefits proffered in support of Brexit: although the UK might derive some satisfaction from being bound by an international agreement rather than an EU law, the UK would not be fully independent at a legal and jurisdictional level because, similarly to Denmark, it would have to confer jurisdiction on the CJEU with respect to the interpretation of and compliance with such agreement. In addition it would forfeit the right to take part in amending the EU law governing judicial cooperation in civil and commercial matters.

Conclusion. The Danish model may provide inspiration for the new legal relations to be established with the UK. However, this possibility would require that the UK agree to abandon certain political claims asserted in connection with Brexit. Theresa May appeared to exclude that possibility in her 17 January 2017 speech.

3.3. Is accession to the 2007 Lugano Convention a possibility?

This discussion will focus solely on accession to the 2007 Lugano Convention because reactivating the 1998 Lugano Convention does not appear feasible[47].

The Lugano Convention, which was signed in 2007, extends the judicial cooperation system in civil and commercial

35 The CJEU held that a provision of a bilateral tax convention for the avoidance of double taxation concluded between a Member State and a third State that provided tax benefits that were not extended to an establishment located in such Member State but held by a company in another EU Member State were in breach of Article 49 of the TFEU (right of establishment) (CJEC, 21 September 1999, Saint-Gobain, Case. C-307/97).

36 In the field of foreign direct investment, over which the EU has jurisdiction since the Treaty of Lisbon (TFEU Article 207), the EU has set up a transitional mechanism to amend bilateral agreements previously concluded by Member States with third countries that have provisions inconsistent with EU law (Regulation No. 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries). The European Commission has also initiated infringement procedures against certain Member States requesting them to terminate intra-EU bilateral investment treaties that establish discriminatory measures based on nationality by offering additional protection to investors from certain EU Member States (Commission asks Member States to terminate their intra-EU bilateral investment treaties, Brussels, 18 June 2015). On other aspects concerning the inconsistency with EU law of bilateral investment treaties concluded by the Member States with third States, see also CJEC, 3 March 2009, Commission v. Austria, C-205/06; CJEC, 3 March 2009, Commission v. Sweden, C-249/06.

37 CJEC, 7 February 2006, Opinion 1/03, op. cit. note 4.

38 The issue raised is what the status of this Franco-British convention of 1934 is after the entry into force of the 1968 Brussels Convention. The French version of the Brussels Convention states that it 'replaces' prior bilateral agreements, which includes the 1934 convention, whereas the English version uses the terms 'shall supersede'. Therefore, this raises the same uncertainty as that concerning the Brussels Convention due to the adoption of Brussels I.

39 CJEC, 1 March 2005, Owusu, Case C-281/02, paragraph 33.

40 CJEC, 7 February 2006, Opinion 1/03, op. cit. note 4, paragraph 143.

41 CJEC, 7 February 2006, Opinion 1/03, op. cit. note 4, paragraphs 148, 151, 160, 168 and 172.

42 EC-Denmark Agreement of 19 October 2005; Decision 2005/790/EC of the Council of 20 September 2005.

43 EC-Denmark Agreement of 19 October 2005, Article 2(2).

44 EC-Denmark Agreement of 19 October 2005, Article 3(1).

45 EC-Denmark Agreement of 19 October 2005, Article 3(2).

46 EC-Denmark Agreement of 19 October 2005, Articles 6 and 7.

47 Both the French and English versions of the 2007 convention state that it 'replaces'('shall replace') the 1988 convention (Article 69(6) of the 2007 Lugano Convention). There is also no residual application mechanism for the 1988 convention (there is only a transitional information exchange mechanism pursuant to Article 3(3) of Protocol No. 2 on the uniform interpretation of the convention and on the standing committee).

matters created by Brussels I to the Member States of the European Free Trade Association ('EFTA') with a view to strengthening '*legal and economic cooperation*'. This convention is an international treaty between the European Union, Denmark and the three EFTA States (Iceland, Norway and Switzerland)[48]. Recast Brussels I states that it '*shall not affect the application of the 2007 Lugano Convention*'[49]. Consequently, the fact that Brussels I ceases to apply between the EU Member States and the UK would not prevent applying the Lugano Convention to such States.

For that to happen, after withdrawing from the EU, the UK would have to become a party to the convention. That is legally possible: the UK could accede to the convention and to its three protocols as an EFTA contracting State if it applies to join EFTA and its application is accepted[50], or as a third State[51]. These two possibilities will be discussed separately.

i) The UK's accession to the EFTA would require the agreement of the contracting States, which is possible. However, such accession would require that the UK accept to be bound to the EU with respect to its economic, commercial and legal relations under the same conditions as the other EFTA contracting States. This seems unlikely in the current context of the negotiations concerning the UK's withdrawal from the EU.

ii) As a sovereign State, and a third State to the EU and EFTA, the UK can accede to the convention only if it obtains '*the unanimous agreement of the contracting parties*'[52]. Because the EU has exclusive competence in this field[53], such agreement requires a decision of the EU Council voting by a qualified majority[54], as well as the consent of the EFTA contracting States. It would remain to be seen whether the EU would be willing to accept the UK into a system that was designed to specifically govern relations with EFTA, and which is supplemented by a series of more extensive agreements on economic and social matters binding the EU and the EFTA contracting States.

If such obstacles can be overcome, this option could offer businesses a certain stability. The objective of the Lugano Convention is to align the relations between EU Member States and EFTA contracting States with the relations between Member States as they were governed by Brussels I. Consequently, on the basis of this convention, a choice in favour of the English courts could continue to apply if the defendant is domiciled in an EU Member State[55]. It is true that compared to Recast Brussels I, which currently applies to the relations between EU Member States, Brussels I is somewhat less satisfactory, essentially with respect to 'torpedo' proceedings, which cannot be stayed under the provisions of the Lugano Convention[56]. However, it is possible that the Lugano Convention will eventually be aligned with Recast Brussels I.

This system nevertheless requires a certain uniformity in the interpretation of the convention's provisions in the various contracting States. This objective is met by requiring the courts of each contracting State to '*pay due account to the principles laid down by any relevant decision rendered by the courts of the other Contracting States concerning the provisions of said Convention*'[57]. In practice, it is obvious that the interpretations of the CJEU have particular authority because they bind all EU Member States. Therefore, the UK courts would also have to comply with this obligation, which, as stated earlier, is inconsistent with the general position of the UK with respect to Brexit.

Conclusion. Extending the Lugano Convention to cover relations with the UK is theoretically possible, but this option seems unlikely without an overall agreement that is favourable to the EU. In her 17 January 2017 speech, Theresa May excluded the possibility of the UK adopting a status similar to that of an EFTA State.

3.4. Would accession to the Hague Convention be beneficial and for whom?

The UK is bound by the 2005 Hague Convention on choice of court agreements due to its status as a member of the EU, which is a party to this convention. If the UK withdraws from the EU, the convention will cease to apply to it.

However, all countries may become a party to the convention. The convention imposes no preconditions for accession. Unlike the Lugano Convention, it is therefore possible for the UK to accede to the Hague Convention without having to obtain the prior agreement of the other contracting parties[58]. Moreover, from the standpoint of its domestic law, the UK is already equipped to implement this convention.

The Hague Convention has been much criticised. Its scope is limited because it applies only to 'exclusive' clauses. However, according to an authorised commentator, '*In our opinion, the Hague Convention of 30 June 2005 does not ultimately deserve to be judged too harshly. This new instrument, whose adoption was greeted with a great deal of enthusiasm, offers genuine benefits despite its imperfections. Although the numerous restrictions on its scope reduce the clarity of the text and make it more complex, they do not entirely deprive the instrument of its utility because it remains potentially applicable to nearly all choice of court agreements made in international commercial contracts. Furthermore, the firm protection the Convention affords such agreements reflects genuine progress compared to the current positive law of many countries*'[59]. For this reason, it '*can also claim to be "the true counterpart to the 1958 New York Convention on arbitration"*'[60].

With respect to the ***mandatory nature of court of choice agreements***, the court designated by such a clause will have jurisdiction if the clause is valid under the law applicable to

48 2007 Lugano Convention, Article 69(1).

49 Brussels 1, Article 73(1).

50 2007 Lugano Convention, Article 70(1)(a).

51 2007 Lugano Convention, Article 72.

52 2007 Lugano Convention, Article 72(3).

53 This is the result of the CJEU's opinion 1/03, which was rendered against the contrary opinion of the Council and numerous governments, which had argued that it should be considered a mixed agreement.

54 TFEU Article 218.

55 The example is drawn from the CJEU in in its opinion 1/03, paragraph 153.

56 FMLC, op. cit. note 18, p. 9-10.

57 Protocol No. 2 to the 2007 Lugano Convention on the uniform interpretation of the convention and on the standing committee, Article 1.

58 2005 Hague Convention, Article 27(3).

59 Laurence Usunier, 'The Hague Convention of 30 June 2005 on choice of court agreements' (La Convention de La Haye du 30 juin 2005 sur les accords d'élection de for), RCDIP, 2010, No. 1, p. 37 et seq.

60 Ibid.

the court[61], and it cannot decline jurisdiction on the ground that another court should hear the dispute[62]. This therefore excludes the doctrine of *forum non conveniens*.

If ***other courts are seised despite the court of choice agreement***, Article 6 requires that they decline jurisdiction without recognising any exceptions on the grounds that there is a more appropriate forum or that parallel proceedings are pending abroad. Article 6 also offers the advantage of eliminating the uncertainties created in the European judicial area by the *Owusu* decision of the EU Court of Justice on the effect of choice of court clauses that designate the courts of third States (see *supra*).

The convention lays down ***rules facilitating the obtaining of*** **exequatur** for decisions rendered pursuant to a choice of court agreement by stating in Article 8(1) that the recognition and enforcement of such decisions may be refused only on the exclusive grounds specified in the convention.

Article 9 sets out the ***grounds for refusal of recognition or enforcement***. A judgment may be denied enforcement if the choice of law agreement is void under the law of the State of the designated court, unless such court determines that the agreement is valid. Concretely, the power of the court of the requested State to review the validity of the agreement is quite limited, because if the court chosen reviews the validity of the clause during the principal proceedings, which, logically, will almost always be the case, its decision will no longer be subject to challenge on such grounds at the *exequatur* stage.

Conclusion. It will no doubt be beneficial for France and French businesses if the UK accedes to this convention as it would eliminate the uncertainty created by the doctrine of *forum non conveniens*. The UK would also benefit from the treatment afforded to choice of law clauses that designate the courts of third countries.

4. Summary

	CONTRACTUAL CHOICE OF COURT	CONTRACTUAL CHOICE OF LAW	EFFECT OF JUDGMENTS	PROVISIONAL AND PROTECTIVE MEASURES
Pre-Brexit situation				
Franco-English disputes pre-Brexit	Recast Brussels I: choice of court clauses choosing the courts of a Member State enforced	Rome I: choice of law clauses enforced (except in the case of restrictive regimes applicable to relations involving a weaker party)	Recast Brussels I and 'satellite' regulations: recognition and enforcement without *exequatur* ('European' enforceability)	Recast Brussels I: no 'extra-territorial' measures (ordered against assets located abroad) unless ordered by the court with jurisdiction as to the merits under the Regulation
Post-Brexit situation if the UK does not accede to other international instruments				
Post-Brexit French international private law in Franco-English disputes	Recast Brussels I applicable if French courts chosen. Uncertainty if the courts of a third country (UK) are chosen if the defendant is domiciled in France (or a Member State)	Rome I will continue to apply to the French courts even if the law chosen is English law (because this instrument applies 'universally'). A clause choosing English law could be challenged on the grounds that it no longer incorporates the principles of EU law	English judgments will be recognised in France pursuant to the ordinary *exequatur* procedure (contentious proceeding). On the merits, the requirements for finding that foreign judgments not governed by EU law are enforceable are very liberal. NB: English judgments will also be subject to the *exequatur* procedures of the other Member States which may be less liberal	Traditionally, the French law courts order *in rem* measures (seizures) with territorial effect. However, the case law of the Court of Cassation includes precedents that show that mandatory injunctions with fines for non-compliance may yield the same results as the English Mareva injunctions and freezing orders
Ordinary English private international law	In principle, choice of court clauses enforced. However, the English courts have discretion to determine if the court chosen is the appropriate jurisdiction (*forum non conveniens* – exceptional) and may also issue an anti-suit injunction ordering the defendant to drop proceedings pending abroad	Choice of law clauses enforced	Very cumbersome legal procedure to enforce a foreign judgment	Mareva injunctions or freezing orders issued against assets located abroad (including bank accounts). Penalties for contempt of court make these tools very effective
Post-Brexit situation if the UK accedes to certain international instruments				
2007 Lugano Convention revived (agreement required by the EU and EFTA States)	Choice of court clauses enforceable under conditions similar to those under Recast Brussels I		Liberal recognition and enforcement of judgments regime, *exequatur* required (non-contentious proceeding; conditions simplified)	
2005 Hague Convention (open to all States)	Exclusive choice of court clauses enforceable (only)		When enforceability is sought of a judgment rendered by the court chosen, reduced uncertainty about the applicability of the choice of court clause (indirect review of the jurisdiction of the chosen court)	

61 2005 Hague Convention, Article 5(1).

62 2005 Hague Convention, Article 5(2).

5. Conclusion

5.1. Brexit: winners and losers

5.1.1. Brexit is above all a source of uncertainty for all businesses in the EU. These uncertainties concern not only the post-Brexit situation but, first and foremost, the existing contractual situations that arose before Brexit.

5.1.2. The UK will face major complications if a new cooperation framework with the EU Member States is not negotiated for the post-Brexit period. These complications fall into three categories.

i) Brexit creates uncertainty. One of the advantages of the current system is that it provides a certain foreseeability with respect to the attribution of jurisdiction to the various courts before which a specific dispute may be brought, and for the recognition and enforcement of foreign judgments. However, after Brexit, the choice of British courts and the choice of English law will no longer be guaranteed by EU law. In some cases, the choice of English law or courts may be challenged (see *supra* 2.1.2, 2.2.4, 2.2.5 and 2.2.6).

ii) After Brexit, the UK will lose access to a harmonised legal area. British judgments will be faced with the multiple recognition and enforcement regimes of the EU Member States. One of the benefits of the current system is that it harmonises recognition and enforcement throughout the EU, thereby facilitating the enforcement of judgments issued in the UK. The UK will be deprived of this benefit.

iii) Brexit may limit the efficacy of measures ordered in the UK if assets cannot be found within the UK. In such case, British judgments will not be covered by the preferential mechanisms that confer enforcement without *exequatur* within the EU. Recognition and enforcement procedures will be subject to additional uncertainties and will be more time-consuming.

5.1.3. Consideration must also be given to the benefits that may accrue to the UK due to its withdrawal from the judicial cooperation area with the EU Member States. These also fall into three categories.

i) The UK will regain full use of its specific procedures (anti-suit and Mareva injunctions, *forum non conveniens* and reserve power).

ii) The procedure for recognising French (or foreign) judgments in the UK will become more complex (technically, a new action on the merits 'of the foreign judgment'), much more so than the corresponding French procedure under ordinary legal principles, which have developed very liberal recognition conditions. The only stumbling block may be that English judgments are insufficiently reasoned.

iii) The UK has developed legal tools that confer significant autonomy on the English courts compared to the position of other States on issues concerning the enforceability of clauses or judgments (in particular, the injunctive power of English courts which Brexit will free from the restrictions imposed by Recast Brussels I). In the view of certain UK experts, access to this cooperation area is certainly beneficial, but is not a priority for businesses based in London.

5.1.4. It seems useful to inform businesses of this entire spectrum of positive and negative elements. This is particularly true for banks, which have dual roles as lenders and actors in the financial markets.

5.2. Is a new cooperation framework desirable?

5.2.1. The possibility of a new cooperation framework between the UK and the EU seems less likely after the British Prime Minister's speech on 17 January 2017. At this point, however, that option should not be completely excluded.

5.2.2. What benefits would businesses based in London obtain if a regime similar to that under Recast Brussels I were adopted (by accession to the Lugano Convention or, less completely, by accession to the 2005 Hague Convention)? The main benefit would be that foreign judgments would have easier access to the European area. However, the English courts have developed injunctive tools that enable them to indirectly produce an effect equivalent to enforcement without having to obtain *exequatur*. Moreover, if a party chooses to request *exequatur*, the French ordinary legal principles with respect thereto are quite liberal. Furthermore, the English courts may order provisional and protective measures without having to take into account the prohibition against extraterritorial actions that limits the power of the French courts to issue similar orders.

5.2.3. Businesses in Paris would also benefit from the adoption of a cooperation regime. The English law concerning the recognition and enforcement of foreign judgments is clearly archaic. Moreover, contractual choice of court clauses (which are very effective when they choose English law) are subject to some unforeseeability due to the English court's discretion to determine whether the chosen court is an appropriate jurisdiction (including when recognition is sought for judgments rendered by the chosen court), which would be limited by the 2005 Hague Convention.

5.3. The future of Paris as a litigation forum after Brexit

5.3.1. It is most probable that, at least during a transitional period, choice of court clauses designating English law, regardless of whether or not they also explicitly choose English law, will not be affected by the prospect of Brexit. The English courts will continue to apply such clauses and, except in the event of doubt about the applicability of a choice of court clause choosing the English courts if the defendant is domiciled in a Member State, which can be easily resolved by a reference for a preliminary ruling, the courts of the Member States will also continue to apply them. It is also true that Recast Brussels I, which will continue to bind the Member States with respect to proceedings in third States, eliminated most of the disadvantages of the prior regime, from the UK's standpoint. In more specific cases, such as choice of law clauses applicable to purchases of sovereign debt on the secondary market, the English courts tend to hold that the choice of English law creates a link with England that justifies the jurisdiction of the English courts (at least for the purpose of protective injunctions). This position generated a sharp dispute with the US federal courts (in the NML case), but there is little likelihood of a similar case arising in UK-EU relations.

5.3.2. In fact, the strength and attractiveness of London as a litigation forum are due to factors unrelated to the judicial cooperation area. It is certain that the English language is a key element, as well as the methods applied by the courts to interpret commercial contracts, which are rigorously literal. This offers businesses a clear choice.

5.3.3. Nevertheless, certain studies raise the possibility that the end of the current system may lead to a transfer to the

EU of some legal and judicial activities currently centred in the UK[63]. However, for this to become a reality will require that the system in place between the EU Member States continues to function efficiently and consistently after Brexit.

5.3.4. What can be done to increase the attractiveness of Paris as a litigation forum? This would require equipping our courts with the skills and organisational resources that would enable them to adequately meet the needs of businesses. Such evolution requires at least three sets of reforms.

i) It would require adjusting the rules of procedure to allow the use of English at the various stages of proceedings (oral argument, submissions, decisions). In this regard, arbitration practice may provide a source of inspiration. Furthermore, an experiment begun on 1 January 2016 is currently underway in the Rotterdam District Court. It offers the parties the possibility of conducting proceedings in English, for certain types of matters only which have an international dimension (maritime law, transport law, international sales of goods)[64]. Similarly, certain German regional courts (Bonn, Cologne, Aix-la-Chapelle) have established special chambers to handle international commercial disputes for which English may be used if the parties agree[65].

ii) It would require updating the rules of procedure to add certain evidentiary tools inspired by the common law (discovery, cross-examination, etc.). In addition, special fast-track proceedings could be developed for commercial disputes.

iii) This would require setting up special courts for cross-border civil and commercial disputes. These courts should be staffed by French judges who speak English, as well as by recognised common law specialists in order to increase the credibility of these courts vis-à-vis businesses.

5.3.5. Furthermore, there is a political choice to be made in relation to the interpretation methods that courts apply to contracts. The advantage of the English courts, from the standpoint of major businesses, is that they literally apply the text of contracts without the moderating intervention of which French courts are too often accused. Abandoning such intervention in favour of an ultra-liberal model would be a heavy price to pay to make Paris more attractive as a litigation forum.

Appendix 1

Composition of the Working Group

Group Leader:

- Horatia MUIR WATT

Members:

- Loïc Azoulai
- Régis Bismuth
- Dominique Borde
- Frédéric de Brouwer
- Guy Canivet
- Nicolas Castell
- Sarah Finkelstein
- Dominique Hascher
- Perrine Macorigh
- Emmanuel Monnet
- Alice Navarro
- Alain Pietrancosta
- Michel Prada
- Marie-Albanie Terrier
- Hubert de Vauplane

63 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, p. 11, 16-17, available at : <http://www.barcouncil.org.uk/media/508513/the_brexit_papers.pdf>.

64 The rules of procedure can be viewed at the following address: <https://www.rechtspraak.nl/SiteCollectionDocuments/Procedure-Rules-for-proceedings-in-English.pdf>.

65 In general, see Christoph A. Kern, 'English as a Court Language in Continental Courts', Erasmus Law Review, vol. 5(3), 2012, p. 187 et seq.