# CHAPTER 14

# Jurisdiction and applicable law after Brexit

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On 23 June 2016 the people of the United Kingdom voted in a referendum to leave the EU. Notice to leave the EU under article 50 of the Treaty was given on 29 March 2017, following passing of the European Union (Notification of Withdrawal) Act 2017, with the effect that after two years, at 11 pm on 29 March 2019, the United Kingdom will cease to be a member of the EU. EU legislation takes effect in the UK legal order through the European Communities Act 1972. Section 2(1) ensures that rights and obligations in some types of EU law, such as the EU treaties and regulations, are directly applicable in the UK legal system, without the need for the UK Parliament to pass specific domestic implementing legislation. Section 2(2) provides a delegated power to allow for the implementation of EU obligations, for example obligations in directives, by way of secondary legislation (through statutory instrument).

With the repeal of the European Communities Act 1972 all EU legislation – Regulations, and secondary legislation implementing Directives pursuant to the powers granted by s.2 (2) of the European Communities Act 1972 - will then cease to have effect in the UK. From the EU perspective, Art 50(3) provides that "….the Treaties shall cease to apply to the state in question from the date of entry into force of the withdrawal agreement, or failing that, two years after the notification [of withdrawal]….unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period". The Treaties are the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

A substantial percentage of the UK's laws derive from EU legislation, either directly from Regulations, or indirectly from implemented Directives.[1] To avoid the legal chaos that

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[1] According to the EU's Eur-lex website there are at present nearly 20,000 EU legislative acts in force. These are mainly directives, regulations, decisions and international agreements, but they include a range of other instruments. Of these, around 5,000 EU regulations are directly applicable in all EU Member States (Briefing Paper 7863, Legislating for Brexit: directly applicable EU law ), 12 January 2017, and around 7900 Statutory Instruments have implemented EU legislation (Briefing Paper 7867, Legislating for Brexit: Statutory Instruments implementing EU law, 16 January 2017)..

would occur with their abrupt disappearance at 11 pm on 29 March 2019[2], the UK Government has introduced the European Union (Withdrawal) Bill ('EUWB') which would retain EU legislation as part of UK law on the repeal of the European Communities Act 1972.

Directly applicable EU law, which is currently given effect through s.2(1) of the ECA is referred to as 'converted legislation' and covers: EU regulations; EU decisions; EU tertiary legislation; Direct EU legislation as it applies with adaptations to the European Economic Area; and any other rights which are available in domestic law by virtue of section 2(1) of the ECA, including the rights contained in the EU treaties, that can currently be relied on directly in national law without the need for specific implementing measures.[3] This corpus of EU law will be converted and incorporated into UK law immediately before exit from the EU. The second category of retained legislation is 'preserved legislation' which comprises: regulations made under section 2(2) or paragraph 1A of Schedule 2 to the ECA; other primary and secondary legislation with the same purpose as regulations under section 2(2) ECA; other domestic legislation which relates to the above, or to converted legislation, or otherwise relates to the EU or EEA. This corpus of legislation will be preserved as it exists immediately before exit from the EU.

Clause 7 gives ministers delegated powers to correct operability problems in converted and preserved legislation by way of statutory instrument, and to transfer the functions of EU authorities to UK public authorities and of creating new UK public authorities to take on those functions.

Clause 6 of the EUWB sets out the relationship between the CJEU and domestic courts and tribunals after exit. The validity, meaning or effect of any retained EU law is to be decided in accordance with any retained case law and any retained general principles of EU law, and having regard to the limits, immediately before exit day, of EU competences.[4] Decisions of the CJEU made after exit day will not be binding on domestic (UK) courts. Domestic courts cannot refer cases to the CJEU on or after exit day and are not required to have regard to anything done by the EU or an EU entity on or after exit day.[5] However, domestic courts, when interpreting retained EU law, will be able to consider post-exit EU actions including CJEU case law if they consider it appropriate.[6] The UK Supreme Court (UKSC) and the High Court of Justiciary (HCJ) are not bound by either retained general principles or retained CJEU case law.[7] In deciding whether to depart from any retained EU case law, the Supreme Court or the High Court of

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2 At the time of writing, 13 December 2017, it appears that there may be transition period after this date during which the UK will remain subject to existing EU regulatory, budgetary, supervisory, judiciary, enforcement instruments and structures.

3 Clause 4. Examples of these EU Treaty Rights are provided in the Explanatory Notes, at pp24-25, and include the following provisions of the Title VII Chapter 1 of the TFEU relating to competition – arts 101(1) and 102, 106(1) and (2), 107(1), 108(3).

4 Clause 6(3).

5 Clause 6(1).

6 Clause 6(2).

7 Clause 6(4).

Justiciary must apply the same test as it would apply in deciding whether to depart from its own case law.[8]

## 1. Brexit and English shipping law

How will Brexit affect shipping law? Substantively, not a great deal. English dry shipping is based on common law, and a few key statutes, such as the Carriage of Goods by Sea Act 1992, and the implementation of international carriage conventions through domestic legislation – such as the Carriage of Goods by Sea Act 1971 with the Hague-Visby Rules. With wet shipping, the 1992 CLC and the Fund[9], and the 2003 Supplementary Fund[10], are part of our national law through domestic law implementing international conventions. And similarly with the Nairobi International Convention on the Removal of Wrecks 2007, the International Convention on Salvage 1989, and the Convention on Limitation of Liability for Maritime Claims 1976. Nothing European here, so *plus ça change*.[11]

However, shipping litigation is profoundly affected by EU Regulations in the field of jurisdiction and the enforcement of judgments, and applicable law in contract and in tort. EU involvement in these fields began with the conclusion of an international treaty between the six then members of the European Economic Community, the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The Convention and the two Regulations that have since superseded it exclude arbitration[12] and insolvency. [13]

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8 Clause 6(5).

9 The International Convention of 27th November 1992 on Civil Liability for Oil Pollution Damage (the '1992 CLC') and the International Convention of 27th November 1992 on the Establishment of an International Fund for Compensation for Oil Pollution Damage (the '1992 Fund' ).

10 The 2003 Protocol establishing an International Oil Pollution Compensation Supplementary Fund.

11 However, the Bunker Oil Pollution Convention 2001 is affected because it was implemented in the UK by delegated legislation pursuant to the powers given to the Secretary of State by s2(2) of the European Communities Act 1972. Absent the EUWB, the Convention will cease to be part of UK law on 30 March 2019.

12 Arbitration will not be affected by Brexit. The enforcement of arbitration awards by private parties is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention") to which the UK and all the Member States are parties.

13 Insolvency is subject to a jurisdiction and enforcement regime in the European Insolvency Regulation 1346/2000 and the European Insolvency Regulation (Recast) 2015/848 which applies to insolvency proceedings opened on or after 26 June 2017. As with the Brussels I Regulation and the Brussels I (Recast) Regulation there is an issue with reciprocity. The UK can apply the Regulation as part of its domestic law, but the 27 will no longer apply the Regulation as regards the UK once it ceases to be a Member State. The UK, Poland, Greece, Slovenia and

All new Member States, such as the UK, acceded to the Convention through Accession Conventions[14] and implemented it through domestic legislation.[15] With the accession of Austria, Finland and Sweden in 1996 the parties to the Convention stood at fifteen. A parallel regime, the 1988 Lugano Convention, was concluded by the Member States and the EFTA States. In 1980 the Member States of the EEC concluded a further treaty among themselves, the Rome Convention on the law applicable to contractual obligations. This was implemented through domestic legislation, in the case of the UK the Contracts (Applicable Law) Act 1990 which came into effect on 1 April 1991.

In 1999 the Treaty of Amsterdam transferred judicial co-operation in civil and commercial matters from the third pillar to the first pillar which gave the EU competence to conclude secondary legislation operating between the Member States.[16] The result has been four Regulations and two treaties with third parties. These are: The Brussels I Regulation 44/2001[17]; the Brussels I (Recast) Regulation 1215/2012[18]; the Rome I Regulation 593/2008[19]; the Rome II Regulation 864/2007 [20]; the 2005 Hague Convention on Choice of Court Agreements; and the 2007 Lugano Convention[21].

The transfer of competence has also had an effect on the competence of Member States to ratify or accede to international conventions. If these contain provisions on jurisdiction and enforcement of judgments, as many of the liability conventions do, this will make the conventions an area of shared competence between the EU and the Member States, and EU authorization is required if the Member States are to sign up to the Conventions. The EU has authorized the Member States to ratify the 2001 Bunker Oil Pollution Convention and the 2010 HNS Convention, subject to their making a declaration preserving the effect, as between Member States that are party to the convention, of the provisions of Brussels I relating to the recognition and enforcement of judgments. A consequence of this shift in competence is that the

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Romania are also parties to the 1997 UNCITRAL Model Law on Cross Border Insolvency which will continue to apply as between them after Brexit.

14 The 1978 Accession Convention for the UK, Denmark, and the Republic of Ireland. There were further Accession Conventions for Greece in 1982, for Spain and Portugal in 1989, and for Austria, Finland and Sweden in 1996.

15 In the case of the UK through s.1(4) of the Civil Jurisdiction and Judgments Act 1982 which took effect on 1 January 1987.

16 The position is now set out in art.81 of the TFEU.

17 COUNCIL REGULATION (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

18 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).

19 REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL. of 17 June 2008. on the law applicable to contractual obligations (Rome I).

20 REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

21 The Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Revised Lugano Convention).

2001 Bunker Oil Pollution Convention was implemented in the UK by statutory instrument pursuant to the powers given to the Secretary of State by s.2(2) of the European Communities Act 1972. Absent, the EUWB the Convention would cease to be law in the UK on Brexit day.

This paper will look at each of these Regulations and Conventions, with a view to ascertaining what will be the position on Brexit day 30 March 2019. First, I shall examine the default position if no legislation is introduced to deal with the effect of existing EU Regulations under domestic law. Secondly, I shall consider the position if the EUWB is enacted before Brexit day. Thirdly I shall consider possible options for ratifying other international agreements relating to jurisdiction and enforcement of judgments where reciprocity with the remaining 27 Member States of the EU may be thought desirable.

## 2. Jurisdiction and enforcement of judgments- The Brussels I Recast Regulation 1215/2012.

The Brussels I Regulation entered into force on 1 March 2002 and replaced the Brussels Convention as between the Member States, except Denmark.[22] The Regulation was modified by the Brussels I Recast Regulation 1215/2012 which applies to legal proceedings instituted on or after 10 January 2015.[23] The Recast Regulation applies to all Member States, including Denmark.[24] The main changes in the Recast Regulation are as follows:

> Article 25 gives exclusive jurisdiction to the courts of a Member State that the parties have agreed are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, irrespective of the domicile of the parties
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> Article 31(2) of the Recast Regulation now provides that where an EU Member State court, in favour of which an exclusive jurisdiction clause exists, is seised, then any other EU Member State court shall stay its proceedings and this is reinforced by Recital 22.
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> Recital 12 deals with the arbitration exception and confirms the free-standing nature of the process. In particular it states that a court's decision that an arbitration clause is void

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22 In 2005 Denmark concluded a treaty with the EU which applied a modified version of the Regulation to relations between Denmark and the rest of the EU which provides a procedure by which amendments to the regulation are to be implemented by Denmark.

23 The Brussels I Regulation continues to apply to legal proceedings commenced between after 1 March 2002 and 9 January 2015.

24 Although Recital 41 states that "Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application" the Recast Regulation was implemented by Denmark by Danish Law No. 518 of 18 May 2013 which entered into force on 1 June 2013.14

does not preclude its award on the substance being enforced under the Regulation and so reverses the decision in *The Wadi Sudr*.[25]

Articles 33 and 34 give EU Member State courts a discretion to stay proceedings brought before them where the same or related matters are already before the courts of a non-EU state, but only where the non-EU proceedings are first in time and where jurisdiction in the EU proceedings is based on Articles 4 (domicile), 7, 8 or 9 (special jurisdiction) of the Recast Regulation. The judgment of the non-EU court must also be capable of recognition and enforcement in the EU Member State seized.

Article 39 abolishes exequatur i.e. the procedure for the declaration of enforceability of a judgment in another member state.

Absent any legislation such as the EUWB, the position on leaving the EU would be as follows. Section 1(4) of the Civil Jurisdiction and Judgments Act 1982 (CJJA) gave the force oflaw to the 1968 Brussels Conventions and its 1991 amendment gave the force of law to the 1988 Lugano Convention. The amendments to s1(4) of the CJJA adding in references to 'the Regulation' in place of the former, and to the 2007 Lugano Convention in place of the latter, have both been implemented by secondary legislation deriving from s2(2) ECA 1972[26] and will therefore cease to have effect when that Act is repealed. This will leave us with the original CJJA 1982 applying the Brussels Convention together with the 1991 amendment which gave the force of law to the 1988 Lugano Convention. This would not be particularly desirable, as we would be applying the original 1968 Convention, without the benefits of the improvements introduced first with the 2001 Regulation, and then, more significantly, with the 2012 Brussels 1 (Recast) Regulation which largely addresses the menace of the 'Italian Torpedo'. [27]

With the enactment of the EUWB the Brussels I (Recast) Regulation would continue to apply as UK law from the moment of exit from the UK, as converted legislation, but would require corrections to make it work, such as adding a reference to the UK to every reference to 'Member State'. The CJJA would maintain its current wording due to the effect of the provisions of the EUWB on preserved legislation, so as far as the UK is concerned. Similarly the 2007 Lugano Convention would continue to apply as UK law in relation to Norway, Switzerland and Iceland.

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25 [2010] 1 Lloyd's Rep 193.The recital does not refer to the issue of anti-suit injunctions issued by courts in support of arbitral proceedings, and the ECJ's decision in Case C-185/07 *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc, The Front Comor* will continue to prevent such injunctions being granted.

26 The Civil Jurisdiction and Judgments Order 2001 SI 3929/2001.

27 The obtaining of exclusive jurisdiction by commencing proceedings for a negative declaration of liability in the courts of the Member State in which the defendant is domiciled, contrary to the provisions as to arbitration or jurisdiction in the contract between the parties.

However, this may work for the UK, but there will be no reciprocity as regards the remaining 27 Member States of the EU.[28] Its provisions on jurisdiction and enforcement of judgments will cease to have effect as regards the UK once it leaves the EU. With regard to enforcement of judgments, there is a lacuna with respect to the application of the Regulation where proceedings are commenced before withdrawal and the resulting judgment is delivered after withdrawal. The Commission's position paper of 12 July 2017, TF50 (2017) 9/2, states. "(4) The relevant provisions of Union law applicable on the withdrawal date on recognition and enforcement of judicial decisions1 should continue to govern all judicial decisions *given before the withdrawal date*.(emphasis added)". By contrast the UK's response in "Providing a crossborder civil judicial cooperation framework. A future partnership paper" states that these rules should also apply to "judicial decisions *given after the withdrawal date* in proceedings which were instituted before that date (emphasis added)."[29] With regard to choice of court agreements, the Commission's position is as follows.

> (2) The relevant provisions of Union law applicable on the withdrawal date establishing the Member State whose courts are competent should continue to govern all legal proceedings instituted before the withdrawal date.
> (3) Choices of forum made prior to the withdrawal date should continue to be assessed against the provisions of Union law applicable on the withdrawal date.

By contrast, the UK's position is as follows:

> where a choice of court has been made prior to withdrawal date the existing EU rules should continue to apply to establishment of jurisdiction, and recognition and enforcement of any resulting judicial decision, where a dispute arises to which such a choice applies, whether before or after withdrawal date.

The reciprocity issue will be the same as regards the three non-Member States that are parties to the 2007 Lugano Convention. The UK is not a party to the Convention in its own right, but only as a member of the EU.[30] I will now consider a variety of options that may be available to enable the UK to have at least some form of reciprocal agreement in place on exiting the EU.

### *2.1 Back to the 1968 Brussels Convention?*

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[28] A sliver of reciprocity would remain in relation to the *lis alibi pendens* provisions in articles 33 and 34 regarding parallel proceedings in non-Member States, which is what the UK will be after Brexit, which are commenced before proceedings in a Member State.

[29] Annex A para 7.

[30] In Opinion 1/03, ECLI:EU:C:2006:81, the Court of Justice determined that the conclusion of the new Lugano Convention fell within the Community's exclusive competence. Under art.216(2) TFEU, international agreements agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

Before the Brussels 1 Regulation, there was the 1968 Brussels Convention. This was a treaty between the then six members of the EEC and related back to art. 220 of the Treaty of Rome which provided that: "Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: … the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards." For new Member States article 63 provided that the Convention should form the basis for negotiations by way of fulfilling their Article 220 obligations. All new Member States admitted before 1999 have acceded to the Convention. Member States were initially given the right to extend the scope of the Convention to their non-metropolitan territories by way of declaration. The Netherlands did so in respect of Aruba, and France in respect of French New Caledonia and French Polynesia. The Convention is accompanied by the 1971 Protocol which provides for the supervisory jurisdiction of the Court of Justice.

The 1999 Treaty of Amsterdam amended the European Treaties so that the Community obtained legislative competence in the area of jurisdiction and judgments. At this time there were 15 Member States who were parties to the Brussels Convention. The Brussels Convention was then replaced by the Brussels I Judgments Regulation 2001. Article 68 of the 2001 Brussels Regulation provides

> 1. This Regulation shall, as between the Member States, supersede the 1968 Brussels Convention, except as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 299 of the Treaty.

There is no provision as to what would happen if a Member State subsequently left the EU, an inconceivable prospect at the time of the Regulation. At the time of the Brussels I Regulation, and at the time of Recast Regulation, the UK was a Member State and was not excluded from their provisions superseding the Brussels Convention. Accordingly, as matters stand there is only limited scope for the continued operation of the Convention, in respect of Aruba, French New Caledonia and French Polynesia.

However, it has been suggested that when the UK ceases to be a Member State the Convention will revive to govern the relationship between the UK and the 15 EU Member States that are parties to the Convention. This is something that is unlikely to be desired either by the UK, not least because of the supervisory jurisdiction of the Court of Justice provided for by the Protocol. It is also unattractive in that any revived Convention would only have a partial scope of application in relation to 15 of the remaining 27 Member States.

The Convention contains no provision for renunciation or withdrawal by its parties. The question would have to be decided by the CJEU in the light of the principles of interpretation set out in the 1969 Vienna Convention on the Law of Treaties[31] which the UK ratified in 1971 and which entered into force on 27 January 1980. The treaty has not been implemented by legislation

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31 1155 U.N.T.S. 331, 8 I.L.M. 679.

but will enter the domestic UK legal order as it is clear that it constitutes customary international law.[32] There are five provisions which might provide an answer to this question.[33]

*2.1.1 Article 54*

This deals with termination of or withdrawal from a treaty under its provisions or by consent of the parties.[34] This may be done either in conformity with the provisions of the treaty, which clearly does not apply to the Brussels Convention, or at any time by consent of all the parties after consultation with the other contracting States. It could be argued that the necessary consent for withdrawal of all the then members of the Community was provided with the implementation of the 2001 Regulation, given the reference in art.68 to the supersession of the Convention. However, the Regulation did not provide for complete supersession and allowed for the continuance of the Convention as regards non-metropolitan territories of the Member States so there was in fact no withdrawal from the Convention, but only a substantial modification of its effect.

*2.1.2 Article 56*

This deals with denunciation or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal. It provides:
1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
(a) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or
(b) A right of denunciation or withdrawal may be implied by the nature of the treaty.
2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

The right of denunciation of a party that was no longer a member of the EU would be implied by the nature of the treaty, given that it was a treaty exclusively between members of what was then the European Economic Community. This would allow the UK to denounce or withdraw from the Convention, on giving the necessary 12 months notice, which would have to be given after leaving the EU.

*2.1.3 Article 59*

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[32] Which is a recognized source of English law, at least as regards civil matters. See Lord Mance in *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69 at [150].

[33] It would also be possible for the UK to clarify the position by seeking a revision of the Convention pursuant to art. 67 which provides that: “Any Contracting State may request the revision of this Convention. In this event, a revision conference shall be convened by the President of the Council of the European Communities.” Such a request should be made by the UK before Brexit day.

[34] This is the position argued for by Hess, Back to the Past: BREXIT and European International Private and Procedural Law, 36(5) IPrax 2016 pp. 409-420 (in German).

This provides for termination or suspension of the operation of a treaty implied by conclusion of a later treaty, as follows:

> 1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:
> *(a)* It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
> *(b)* The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.
> 2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

This provision would not apply because there has been no subsequent treaty, unless the Regulation can be regarded as a treaty. It also contemplates termination/suspension of the treaty in full, whereas partial termination would be contemplated given the continued operation of the Convention in relation to the non-metropolitan territories of France and the Netherlands.

*2.1.4 Article 62*

This provides for the effect of fundamental change of circumstances on a treaty, as follows:

> 1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
> *(a)* The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
> *(b)* The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
> 2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
> *(a)* If the treaty establishes a boundary; or
> *(b)* If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.
> 3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

I think it can be agreed that Brexit constitutes a 'fundamental change of circumstances' and that those circumstances, the treaty only being open to members of what was then the Common Market and subsequently the European Community, constituted the essential basis of the consent of the parties to be bound by the treaty.[35] The departure of the UK from the EU would radically transform the extent of obligations still to be performed under the treaty, so that would pave the way for the UK to withdraw from the Convention or for an agreement between the UK and the 27 to terminate it, subject to some agreement as regards Aruba and French New Caledonia and French Polynesia. What does not seem possible is the forced withdrawal of the UK from the Convention.

*2.1.5 Article 40*

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[35] See Andrew Dickinson, "Back to the Future: the UK's EU Exit and the Conflicts of Laws", 12(2) Journal of Private International Law 2016, pp. 195-210.

This provides for the amendment of treaties.

> "1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.
> 2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:
> (a) the decision as to the action to be taken in regard to such proposal;
> (b) the negotiation and conclusion of any agreement for the amendment of the treaty.
> 3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.
> 4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(b), applies in relation to such State.
> 5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:
> (a) be considered as a party to the treaty as amended; and
> (b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement."

It is arguable that the process by which the Member States ceded competence to the EU in this area with the Treaty of Amsterdam amounted to a pre-emptive consent by all of them to any subsequent change in their mutual obligations under the Brussels Convention with the change then being executed through the Brussels I Regulation.[36]

### *2.2. Ratify the 2007 Lugano Convention?*

An alternative would be for the UK to ratify the 2007 Lugano Convention which applies the original Brussels Regulation regime.[37] The courts of the non-EU members, Switzerland, Norway and Iceland, are required to pay "due account" to the principles laid down "by any relevant decision concerning the provisions" of the Brussels convention 1968 (as amended) the 1988 Lugano Convention and the Brussels I Regulation. The Convention will cease to have effect as regards the UK on our departure from the EU.[38] Art 69(6) of the 2007 Lugano Convention

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[36] This is the preferred solution in the paper put forward by Richard Hoyle and Lucas Bastin "Jurisdiction and Judgments: Replacement Regimes and the Default Regime (in the absence of a Replacement Regime) from the perspective of Public International Law." December 2016 [66]. https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=0ahUKEwiJqvvlmIXYAhWHfFAKHWMsA6AQFgg9MAM&url=https%3A%2F%2F101r4q2bpyqyt92eg41tusmj-wpengine.netdna-ssl.com%2Fwp-content%2Fuploads%2F2017%2F01%2FBrexit-Conflicts-Sub-Group-International-Law-Aspects.pdf&usg=AOvVaw3GQxDS74GVl8296u7ElIBx <accessed 12 December 2017>

[37] The Convention was made an EU "Act" by the Council Decision of 15.12.2007: [2007] OJ L339/3.

[38] See Art. 216(2) of the TFEU and s.2(1) ECA 1972.

stipulates that it "shall replace" the 1988 Lugano Convention which indicates that the earlier Convention has terminated and will not be subject to any possible revival on Brexit.

However, ratification of the 2007 Lugano Convention would require the UK first to become a member of the European Free Trade Association, or to obtain the agreement of all theContracting Parties, the European Community and Denmark, Iceland, Norway and Switzerland. It would also be somewhat of a retrograde step as it would entail giving up the improvements made by the Recast Regulation for which the UK lobbied so hard.

### *2.3 Ratify the 2005 Hague Convention on Choice of Court Agreements?*

The 2005 Hague Convention on Choice of Court Agreements (the "Hague Convention") was ratified by the EU (excluding Denmark) and came into effect on 1 October 2015. Two other states have ratified the Convention, Mexico, and Singapore (ratifying on 2 June 2016). The Convention applies only to wholly exclusive jurisdiction agreements in favour of the courts of one Contracting State (or one or more courts within one Contracting State). Its provisions are similar to those in art. 25 of the 2012 Brussels I (Recast) Regulation. The Convention also provides for the reciprocal enforcement of judgments given in disputes resulting from qualifying exclusive jurisdiction agreements. Currently the UK is a party to the Convention through the EU, and is not a party in its own right. Accordingly on exit day it will cease to be a party to the Convention and would have to apply to ratify in its own right, a process that should take about three months.

The Convention is more limited than the Recast Regulation in that it only applies to exclusive jurisdiction agreements and does not apply to interim protection measures. Furthermore, the Convention does not apply to: consumer or employment contracts; insolvency; carriage of passengers or goods; maritime pollution; anti-trust/competition; rights in rem in immovable property, and tenancies of immovable property; the validity, nullity or dissolution of legal persons, and the validity of decisions of their organs; various matters concerning the validity or infringement of intellectual property rights; the validity of entries in public registers; arbitration and related proceedings.

Temporally the Convention only applies to exclusive choice of court agreements concluded after its entry into force in the state of the chosen court and only to proceedings instituted after its entry into force. For the EU and Mexico that date is 1 October 2015 and for Singapore 1 October 2016. With the UK ratifying in its own right it would apply to exclusive jurisdiction agreements entered into from that date, and to proceedings instituted after that date but there would be uncertainty as to the position with regard to exclusive jurisdiction agreements entered into after 1 October 2015 when the UK participated in the Convention through the EU. At the very least there would be a three month gap from the depositing of the UK's instrument of ratification after Brexit day to the coming into force of the Convention for the UK.

### *2.4 Revival of prior jurisdiction and enforcement treaties?*

Before ratifying/acceding to the 1968 Convention, the UK had concluded six reciprocal judgment enforcement treaties with the following Member States: Belgium[39], Italy[40], Netherlands[41], Austria[42], Germany[43], and France[44]. Effect is given to the treaties via the Foreign Judgments (Reciprocal Enforcement) Act 1933, although the regime applies only to money judgments. Article 55 of the Brussels Convention provides for such agreements to be superseded by the Convention, with art. 56 providing that the treaties "shall continue to have effect in relation to matters to which this Convention does not apply." There is uncertainty as to whether these treaties will revive on Brexit. The arguments as regards their revival are similar to those canvassed in relation to the revival of the Brussels Convention. It is likely that the effect of art. 56 is that the agreements are superseded where they cover the same ground at the Brussels Convention but remain in force where they cover matters which fall outside the Convention. There is similar uncertainty as regards the UK's treaty with Norway given similar provision in art 65 of the Lugano Convention 2007.

***2.5 Negotiate a new jurisdiction and judgments treaty with the EU and Denmark based on the Recast Regulation?***

For many, this would be the preferred solution. A template already exists in the form of the 2005 treaty between the EU and Denmark, a Member State, which applied first the Brussels I regime, and then the Recast regime. However, the treaties provided for the supervisory role of the CJEU, something which might prove politically impossible for the UK, always assuming that the EU was prepared to negotiate such a treaty. A compromise on this issue could be found in the Lugano Convention's provisions as regards the courts of the three non-EU states who are merely required to 'take account of' decisions of the CJEU. Whether the 27 would be willing to make such a compromise is another matter, let alone agreeing to enter a jurisdiction and judgments agreement with a former Member State. This must be doubtful given the prospect that the ending of the Recast regime as regards the UK may be seen as an opportunity to attack England's

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39 Convention for the reciprocal enforcement of Judgments in Civil and Commercial Matters between the UK and Belgium (signed on 2 May 1934) (1936) UK Treaty Series (UKTS) No 31.

40 Convention for the reciprocal enforcement of Judgments in Civil and Commercial Matters between the UK and Italy (signed on 7 February 1964), with amending Protocol (signed on 14 July 1970) (1974) UKTS No 5.

41 Convention for the reciprocal enforcement of Judgments in Civil and Commercial Matters between the UK and the Netherlands (signed on 17 November 1967) (1969) UKTS No 97.

42 Convention for the reciprocal enforcement of Judgments in Civil and Commercial Matters between the UK and Austria (signed on 14 July 1961), with amending Protocol (London, 6 March 1970) (1962) UKTS No 70.

43 Convention for the reciprocal enforcement of Judgments in Civil and Commercial Matters between the UK and Germany (signed on 14 July 1960) (1961) UKTS No 64

44 Convention for the reciprocal enforcement of Judgments in Civil and Commercial Matters between the UK and the French Republic (signed on 18 January 1934) (1936) UKTS No 18.

position as a jurisdiction of choice in commercial contracts, with a subsequent transfer of business to the jurisdiction of other Member States.[45]

### *2.6 Revert to the common law?*

If no agreement can be reached with the EU, a further possibility for after Brexit day would be to repeal the converted Recast Regulation and to revert to the common law rules on jurisdiction.[46] The basic Brussels rule of jurisdiction based on the defendant's domicile would be gone. We would be back to jurisdiction being established by a defendant's presence in the jurisdiction or through service out of the jurisdiction with the leave of the court. A French defendant could once again be sued in the English courts through its presence in England, no matter that its domicile was in France.

English litigants would still retain their rights to sue Member State defendants in the courts of their State of domicile under the Recast Regulation which, with a few exceptions, applies irrespective of the claimant's nationality.[47] However, we would lose the protection of English jurisdiction clauses currently provided by art. 25 and art.31(2). Our courts would be free to stay proceedings on the grounds of *forum non conveniens* notwithstanding that proceedings had been brought against a defendant domiciled in England. Once again our courts would be able once again to issue anti-suit injunctions restraining proceedings in the courts of EU Member States in violation of agreements to arbitrate in the UK.

## 3. Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I)[48]

The 1980 Rome Convention on the law applicable to contractual obligations was an international treaty concluded between the then Member States of the European Economic Community. Its rules applied to contractual obligations in any situation involving a choice between the laws of different countries, subject to various exceptions, notably arbitration agreements and agreements on choice of court, and to contracts of insurance covering risks situated in the territories of the Member States. The Convention was replaced by the Rome I Regulation, as regards contracts concluded on or after 17 December 2009. The Regulation does not apply to Denmark, which continues to apply the Rome Convention.

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45 A view expressed by Professor Burkhard Hess and Professor Prof. Marta Requejo-Isidro in their blog "Brexit – Immediate Consequences on the London Judicial Market"of 24 June 2016 on Conflict of Laws dot Net. http://conflictoflaws.net/2016/brexit-immediate-consequences-on-the-london-judicial-market/ <accessed 13 December 2013>.

46 A prospect enthusiastically endorsed by Professor Adrian Briggs (QC) in *Secession from the European Union and Private International Law: The Cloud with a Silver Lining*. Paper given to the Commercial Bar Association; January 24th, 2017. https://app.pelorous.com/media_manager/public/260/Prof%20Adrian%20Briggs%20QC%20Brexit%20lecture%2024.1.17.pdf <accessed 12 December 2017>

47 C-412/98 *Universal General Insurance Co v Groupe Josi Reinsurance Co SA* {2000] ECR I-5925.

48 [2008] OJ L177/6.

Article 24 provides that "This Regulation shall replace the Rome Convention in 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." Therefore, the Convention will not revive as regards the UK when it ceases to be a Member State, although it will continue to govern relations between the UK and Denmark and the non-metropolitan territories excluded from the Regulation.

The Rome I Regulation applies to all contracts concluded as from 17 December 2009. Rome I essentially replicates the 1980 Rome Convention as an EC Regulation, and, as with the Convention, is of universal application.[49] The Regulation contains the following important differences from the Convention.

(a) Article 3(1) on 'Freedom of Choice' now provides that "The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case", in contrast to the equivalent provision in the Rome Convention, which provided that "The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case." Article 3(4) prevents the circumvention of mandatory Community law by the parties' choosing the law of a non-Member State.[50]

(b) Article 4 on 'Applicable Law in the Absence of Choice' has a different structure to its equivalent in the Rome Convention but is likely to have a similar effect. If no law is chosen under art 3, para 1 then states the law that will govern various specific types of contract, listed in headings (a)–(h). For example, contracts for the sale of goods or for services are governed by the law of the habitual residence of the seller and service provider respectively. If the contract does not fall within this list, or falls under more than one of the headings, then para 2 applies "the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence". The law specified in these two paragraphs will not, however, necessarily govern the contract. Paragraph 3 provides that "Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply". Where the applicable law cannot be determined under paras 1 and 2, para 4 applies the law of the country with which the contract is most closely connected.

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[49] See art. 2 of the Convention "Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State" and art 2 of the Regulation "Any law specified by this Regulation shall be applied whether or not it is the law of a Member State."

[50] "Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement." A similar provision is to be found in art. 14(3) of Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II).

(c) The provisions relating to the law applicable to contracts for the carriage of goods have been removed from art 4 and now appear in art 5(1) as follows: "To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply". Unlike art 4 of the Rome Convention, this article refers to the place of "receipt" and "delivery" rather than to the place of "loading" and "discharge". The second sentence of art 5(1) is new. Article 5(2) contains provisions regarding applicable law in contracts for the carriage of passengers. Article 5(3) is in the same terms as art 4(3).

(d) Article 7 deals with contracts of insurance. Under the Rome Convention, contracts of insurance covering risks within the Community were excluded under art 1(3), as were contracts of reinsurance under art 1(4). Article 7 (1) provides that the article applies to large-risk insurance contracts referred to in para 2, wherever the risk is situated, and to all other insurance contracts covering risks situated within the territory of the Member States. The article does not apply to contracts of reinsurance, and these would be subject to the general rules in the Regulation. Article 7(3) provides that insurance contracts covering a large risk are to be governed by the law chosen by the parties in accordance with art 3. If no law is chosen, the insurance contract shall be governed by the law of the country where the insurer has his habitual residence. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply. With non large risks, there are restrictions on the law that the parties may choose in accordance with art 3.[51] In the absence of a choice of applicable law, the contract is to be governed by the law of the country where the insurer has his habitual residence; but, if it is clear from all the circumstances of the case that the contract is more closely connected with another country, that country's law shall apply.

(e) Article 9 contains provisions on overriding mandatory provisions. Paragraph 2 provides: "Nothing in this Regulation shall restrict the application of the overriding

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[51] (a) the law of any Member State where the risk is situated at the time of conclusion of the contract;

(b) the law of the country where the policy holder has his habitual residence;

(c) in the case of life assurance, the law of the Member State of which the policy holder is a national;

(d) for insurance contracts covering risks limited to events occurring in one Member State other than the Member State where the risk is situated, the law of that Member State;

(e) where the policy holder of a contract falling under this paragraph pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitual residence of the policy holder.

mandatory provisions of the law of the forum." Paragraph 3 provides: "Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application". The reference to overriding mandatory provisions which "render the performance of the contract unlawful" is considerably narrower than the previous reference in art 7(1) of the Rome Convention to "the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract". Without this amendment, the UK would have been unable to opt in to the Regulation, as the required uniform application of Council Regulations would not have been subject to any reservation by a Member State.

(f) The Regulation refers to the "habitual residence" of a party, as opposed to its "principal place of business", as was the case under the Rome Convention.[52]

The default position is that as far as the UK is concerned we would return to the Contracts (Applicable Law) Act 1990 giving effect to the 1980 Rome Convention. The Act has not been repealed but was amended to give effect to Rome I by the insertion of s4(A) providing "(1) Nothing in this Act applies to affect the determination of issues relating to contractual obligations which fall to be determined under the Rome I Regulation."[53] A point to note is that s.3 of the 1990 Act stipulates that decisions of the ECJ (now CJEU) on the interpretation of the Rome Convention are binding on UK Courts.

Under the EUWB the Regulation will continue to apply after Brexit as converted legislation and the insertion of sections 4A and 4B into the 1990 Act will remain pursuant to the provisions on preserved legislation. Unlike the Judgments Regulation there is no issue of reciprocity. Under art. 2 the Regulation is of universal application, whether or not the relevant law is that of a Member State.

**Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II)[54]**

There was no Community Convention governing applicable law in tort. In the UK from 1 November 1996 until the implementation of the Rome II Regulation on 11 January 2009, the rules for choosing the law to be used for determining issues relating to tort or (for the law of

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52 Article 19(1) defines the "habitual residence" of a party as being the principal place of business of a natural person acting in the course of his business activity. The "habitual residence" of companies and other bodies, corporate or unincorporated, is the place of their central administration. The place of "habitual residence" is determined at the time the contract is concluded.

53 This applies as regards England, Wales and Northern Ireland. A similar provision in respect of Scotland was made by the insertion of s.4B.

54 [2007] OJ L199/40

Scotland) delict were to be found in Part III of the Private International Law (Miscellaneous Provisions) Act 1995. Part III of the 1995 Act. Section 10 abolished the double actionability rule and the exception in *Boys v Chaplin*.[55] Section 11(1) then set out a general rule that 'the applicable law is the law of the country in which the events constituting the tort or delict in question occur'. Where elements of those events occurred in different countries, s 11(2) provided that the applicable law under the general rule was as follows:

> (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.

Section 12(1) then provided for the general rule to be displaced if the law of another country was substantially more appropriate as the applicable law. In determining this, s 12(2) required account to be taken of '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'. The Act did not apply to torts committed on the high seas which were not subject to the rules in ss 11 and 12 which refer to the law of a 'country', or to torts committed in England. These continued to be governed by the common law rules.

There were two situations in which the courts would not apply a foreign law, notwithstanding that this was indicated by the application of the analysis undertaken under ss 11 and 12. First, s 14(3)(a) provided that a foreign law would not be applied if to do so would involve a 'conflict with principles of public policy'. Secondly, s 14(3)(b) provided that nothing in Part III of the Act should affect 'any rules of evidence, pleading or practice' or authorise 'questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum'. Questions relating to quantification of damages[56] and the right to limit liability under the limitation conventions[57] were categorised as questions of procedure.

Tort proceedings arising out of events giving rise to damage occurring on or after 11 January 2009 fall under Rome II.[58] The scope of the Regulation is limited to situations involving a conflict of laws in relation to non-contractual obligations in civil and commercial matters. The Regulation does not apply to Denmark. Article 3 provides for the universal application of any law specified by the Regulation, whether or not it is the law of a Member State.[59] The general

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56 *Harding v Wealands* [2006] UKHL 32; [2007] 2 A.C. 1 (HL).

57 *The Falstria* [1988] 1 Lloyd's Rep 495; *Caltex Singapore Pte Ltd* v. *BP Shipping Ltd* [1996] 1 Lloyd's Rep 286.

58 *Homawoo v GMF Assurances SA* [2011] EUECJ C-412/10.

59 Article 25(2) provides that Member States are not obliged to apply the Regulation to cases that give rise to conflicts solely between separate territorial units located within them. The UK has, however, decided to apply the Regulation to such internal conflicts by the Private

rule is to be found in Art 4.1, and specifies the law of the country where the damage occurred as opposed to the general rule in s.11(1) of the 1995 Act which specifies the law of the country where the events constituting the tort or delict occurred. Where the claimant and the defendant both have their habitual residence in the same country at the time the damage occurs, Art 4.2 then applies the law of that country. An 'escape route' from these rules is provided in Art 4.3 which provides:

> 'Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.'

Where a claim is made in respect of environmental damage, Art 7 provides for the application of Art 4.1 but gives the claimant the option of basing the claim on the law of the country in which the event giving rise to the damage occurred.[60]

The default position following repeal of the European Communities Act 1972 is that the UK would return to the Private International Law (Miscellaneous Provisions) Act 1995. The Act has not been repealed and was amended to give effect to Rome II by the insertion of s.15A providing: "(1) Nothing in this Part applies to affect the determination of issues relating to tort which fall to be determined under the Rome II Regulation."[61] All the amending provisions were made by Statutory Instruments[62] pursuant to the Secretary of State's powers under s.2(2) of the European Communities Act 1972. Consequently, the amendments will fall away on repeal of the Act, leaving the two Acts in their original form.

Under the EUWB the Regulation will continue to apply after Brexit as converted legislation and the insertions of sections 15A and 15B into the 1995 Act will remain pursuant to the provisions on preserved legislation. Unlike the Judgments Regulation there is no issue of reciprocity. Under art. 3 the Regulation is of universal application, whether or not the relevant law is that of a Member State.

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International Law—The Law Applicable to Non- Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008 (SI 2008 No 2986) and the Private International Law—The Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2008 (SI 2008 No 404).

60 Other important provisions are: article 10 provides rules governing claims in unjust enrichment; article 14 (1) allows parties to submit non-contractual obligations to the law of their choice; article 15(c) provides that questions of damages are covered by the applicable law under the Regulation, so reversing the previous position under English law where such issues were dealt with under the law of the forum; article 16 preserves the application of the mandatory rules of the law of the forum; article 26 preserves the application of the public policy of the forum.

61 Again, similar provision was made in relation to Scotland by the insertion of s15B.

62 As regards England, Wales and Northern Ireland, by The Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations 2009 (S.I. 2009/3064).

## 4. CONCLUSION

Assuming that the EUWB becomes law before Brexit day, it might be thought that the immediate effect of Brexit on jurisdiction, enforcement of judgments, and conflict of laws will be negligible. The relevant EU Regulations will from Brexit day be transformed into domestic UK law, with whatever amendments are necessary to make them work in their new context. There is no problem with the domestication of the two conflicts regulations, Rome I and Rome II, as their rules on applicable law are of universal application. A French court will still apply English law where that has been chosen by the parties to the contract. Article 3 of Rome I does not distinguish between the law of a Member State and that of a non-Member State. The position is the same with ascertaining the applicable law in tort claims under Rome II. If the Regulation points to English law then that is what the court of the Member State hearing the tort claim will apply.

However, reciprocity is required with the 2001 Brussels I Regulation and the 2012 Brussels I (Recast) Regulation. By converting these Regulations into domestic UK law, the UK courts will continue to apply the Brussels regime, but the same will not apply as regards the courts of the other 27 Member States. The UK on Brexit day will cease to be a Member State and the only part of the Regulations that the EU Member States will continue to apply will be the provisions on parallel proceedings in non-Member States that were introduced in arts. 33 and 34 of the 2012 Brussels 1 (Recast) Regulation. A French judgment will be enforced in the UK under the provisions of the converted Regulation, but enforcement of an English judgment in France will now have to be effected under the domestic law of France, and not under the automatic procedure in the Regulation.

This paper has set out various options available to the UK whereby some reciprocity with the EU might be obtained, but all have disadvantages. Signing up to the 2007 Lugano Convention would mean the application of the Brussels I regime rather than the Brussels I (recast) regime. It would also require the unanimous agreement of the treaty parties, the EC, Iceland, Switzerland, Norway. There is no assurance that this would be forthcoming. We could, and should, sign up to the 2005 Hague Convention on Choice of Court Agreements which we would be free to do after Brexit. However, the Convention excludes important areas, such as contracts for the carriage of goods. It is possible that a treaty may be possible between the UK and the EU which sees the continuation of the Brussels I (Recast) regime but this might founder on the interpretative role of the CJEU. As for the 1968 Brussels Convention, I cannot see this reviving to form the basis of relations between the UK and the other 14 Member States as at the date of the last Accession Convention in 1996. The EU won't want this and will point to art. 68 and the superseding of the Convention by the Brussels 1 Regulation. The UK won't want it either, as the Brussels Convention comes with its Protocol establishing the supervisory jurisdiction of what is now the CJEU. At most the Convention will still govern relations between the UK and the non-metropolitan territories of France and the Netherlands.

Post-Brexit the UK government will be free to review the converted and preserved EU legislation that has been turned into domestic UK law. It could decide to amend or repeal parts of this inherited corpus of EU law. I think it unlikely that the domesticated Rome I will be amended

or repealed as it is an improved version of what was there before, the Rome Convention. I cannot imagine there is any great appetite to reverting to the common law. The same is probably true of Rome II. The regime is substantially different from what was there before, the Private International Law (Miscellaneous Provisions) Act 1995, but it seems to have worked well and I do not foresee any move to return to the 1995 Act or, heaven forbid, to the common law.

The domesticated Brussels I Regulations are another matter. There is a stronger argument for repealing these, if no new jurisdiction and judgments treaty can be concluded with the EU. The UK will cease to have any of the advantages of portability of judgments within the EU, and the recognition of English jurisdiction clauses by the courts of the Member States. Yet the UK will continue to give automatic recognition to judgments from courts in Member States and to apply the jurisdiction rules in the Regulations. The advantages of reverting to the common law would be the expansion of jurisdiction that would come through applying rule based on presence and service out of the jurisdiction, as opposed to the Regulation default rule which is based on the defendant's domicile. The courts would reclaim their discretion to stay proceedings against defendants domiciled in the UK, on grounds of *forum non conveniens*. The courts would also be able to issue anti-suit injunctions in support of arbitration agreements where proceedings have been brought before the courts of an EU Member State.