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Martyna Kulińska

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CROSS-BORDER COMMERCIAL DISPUTES: JURISDICTION, RECOGNITION AND ENFORCEMENT OF JUDGMENTS AFTER BREXIT

Martyna Kulińska*

Abstract: Brexit raises a whole range of legal issues in multiple areas. The consequences on the EU framework for jurisdiction, recognition and enforcement of judgments are of particular interest for private parties involved in cross-border commercial agreements. This paper explores the legal basis for the jurisdiction of courts and the enforcement and recognition of judgments between the UK and EU-27 courts after Brexit. In addition, it broadly contrasts the main differences of the proposed solutions compared to the EU system. The paper argues that international conventions can provide answers to some of the questions as they set out rules for the jurisdiction, enforcement and recognition of judgments. However, there are factors that can have an impact on possible legal outcomes, such as the framework of the future deal between the UK and the EU-27, the moment of the commencement of proceedings by the parties in the transition period, or the fact that the parties did not opt for exclusive jurisdiction in their agreements. The Withdrawal Agreement provides for some clarity on which EU law provisions apply during the transition period. In addition, the EC Notices and the UK Brexit legislation provide for guidelines as to the rules applicable in and immediately after the transition period. Nevertheless, as the paper analyses, there is still a need for further clarification. Therefore, other methods of dispute resolution proposed in the article such as moving to arbitration instead of English court jurisdiction could provide legal certainty for private parties.

Keywords: EU law, Brexit, art 50, withdrawal agreement, recognition and enforcement of judgements, EU civil justice and judicial cooperation, cross-border commercial disputes.

1 Introduction

The creation of the EU legal framework on civil justice and judicial cooperation in civil and commercial matters facilitates the jurisdiction, recognition and enforcement of judgments between EU Member States. At the core of the system is the reduction of the complexity of multiple legal regimes existing in EU states and providing legal certainty and predictability for the parties involved in cross-border disputes. The UK's exit from the EU opened 'Pandora's box' of complex and intertwined legal problems in multiple areas. This paper aims to analyse the Brexit effect on the EU system of jurisdiction, recognition and enforcement of judgements, as this subject is particularly

* LLM (KU Leuven, Belgium), PhD candidate (University of Gdańsk, Poland), Juriste d'entreprise (IJE/IBJ) – Member of Institut des juristes d'entreprise (Belgian In-house Bar Association).

important from the cross-border commercial perspective. At the time of writing, nearly three years after the UK government notified the EU Member States of its intention to withdraw from the EU under Article 50 of the EU Treaty (TEU), it is still uncertain what form the future relationship between the UK and the EU-27 will take. The UK has been closely linked to the EU legal framework for almost 50 years, and consequently Brexit raises multiple questions for private parties involved in transnational commercial contracts. Most notable amongst them are: (a) will the parties be able to enforce and recognise court judgments handed down in the UK against an EU based counterparty and vice versa; and (b) can they rely on the jurisdictions or governing clauses under English law?

The paper explores the legal basis for the jurisdiction of courts and the enforcement and recognition of judgments between the UK and EU-27 courts after Brexit. In addition, it broadly contrasts the main differences of the proposed solutions compared to the EU system. Providing clear answers to the questions raised is vital from a cross-border business perspective and also provides legal certainty for international business. It will be argued that international conventions can provide answers to some of the questions as they set out rules for the jurisdiction, enforcement and recognition of judgments. However, there are factors that can have an impact on possible legal outcomes, such as the framework of the future deal between the UK and the EU-27, the moment of the commencement of proceedings by the parties in the transition period, or the fact that the parties did not opt for exclusive jurisdiction in their agreements. Nevertheless, if legal certainty is sought, then as an alternative to the enforcement of court judgments by convention, private parties could consider moving to arbitration before the end of the transition period.

2 Brexit: state of play on the future relationship in civil justice and judicial cooperation

The key document to analyse is the Withdrawal Agreement.¹ Upon the exit of the UK from the EU on 31 January 2020, the Withdrawal Agreement entered into force and the UK became a third-party state to the EU. Under the terms of the exit deal, the transition period will end at 11.00 pm GMT on 31 December 2020 unless extended.² The transition period provides the time for both parties to negotiate a future relationship agreement, with the UK remaining subject to most rules as if were still an EU Member State. Unless otherwise provided in the Withdrawal Agreement, EU law will be applicable to and in the UK during that period³ and the UK will be bound by the obligations

¹ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L29/7.

² Article 132 of the Withdrawal Agreement permits the extension of the transition period for up to one or two years with the decision to extend to be taken before 1 July 2020. However, the UK government took measures to adopt legislation that excludes the possibility of extension.

³ Withdrawal Agreement art 127.

stemming from the EU's international agreements.⁴ EU supervision and enforcement mechanisms, including the jurisdiction powers of the Court of Justice of the European Union (CJEU), will remain applicable to the UK. However, as a third-party state it will not have the right to participate in EU institutions, bodies and agencies. Concerning the status of the negotiations, the UK's imposed goal of agreeing a comprehensive trade deal before 31 December 2020 has been met with scepticism by EU leaders (among others) who argue that such a short deadline is unrealistic given the vast range of issues that need to be negotiated. In the context of this process, there are potentially many legal repercussions of the UK ending the transition period without any deal or one in very narrow terms. Consequently, there are considerable uncertainties for the EU, national administrations and private parties concerning the effect of Brexit on civil justice and judicial cooperation.

The UK's position towards the framework of civil justice and judicial cooperation can be examined in the following documents. Further to general papers on the UK's vision of the future relationship in relation to civil and commercial matters, the UK government published specific papers on 22 August 2017⁵ and on 23 August 2017.⁶ The papers set out the key issues in this policy area and the intention of the UK in relation to civil judicial cooperation after the end of the transition period. The UK points out that it will seek an agreement with the EU, which would allow for 'close and comprehensive cross-border civil judicial cooperation on a reciprocal basis, which reflects closely the substantive principles of cooperation under the current EU framework'.⁷ The UK also intends to incorporate Rome I and II into domestic law, as neither requires reciprocity for their operation. However, at the same time the UK emphasises that Brexit will bring an end to the direct CJEU jurisdiction in the UK. The UK has confirmed that it will seek to join the 2005 Hague Convention.⁸ Indeed, in preparation for a no-deal Brexit, the UK government took steps to ensure the continued application of the 2005 Hague Convention. For example, on 28 December 2018, the UK deposited its document of accession to the Hague Conference, although the UK also subsequently suspended its application three times.⁹ It did so once due to the ratification of the Withdrawal Agreement leading to the UK withdrawing its accession documents (as the current regime of EU law will be applicable during the transition period).¹⁰ The UK is expected to finally accede in

⁴ Withdrawal Agreement art 129.

⁵ HM Government, 'Providing a Cross-Border Civil Judicial Cooperation Framework - a Future Partnership Paper' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639271/Providing_a_cross-border_civil_judicial_cooperation_framework.pdf> accessed 29 March 2020.

⁶ HM Government, 'Enforcement and Dispute Resolution - a Future Partnership Paper' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639609/Enforcement_and_dispute_resolution.pdf> accessed 29 March 2020.

⁷ HM Government (n 5) point 18.

⁸ HM Government (n 5) points 21-22.

⁹ First until 13 April or 23 May 2019, and then until 1 November 2019.

¹⁰ See the UK Document of Accession to the Convention on Choice of Agreement from 28 December 2018, available at:

September 2020 with a view to joining immediately after the end of the transition period. If no other agreement is entered into between the UK and the EU, the 2005 Hague Convention would come into force for the UK 'on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession'.¹¹

With regard to the relationship with the EFTA states, on 28 January 2020 the UK together with Norway, Iceland and Lichtenstein signed the EEA EFTA Separation Agreement, based to a great extent on the provisions of the Withdrawal Agreement. However, the Separation Agreement does not cover civil judicial cooperation as this is governed by the 2007 Lugano Convention. The UK government has expressed on multiple occasions its intention to continue to participate in Lugano and received support from the EFTA states on its intention to accede in its own right after the transition period.¹² Consequently, the UK deposited its application to accede to the Convention on 8 April 2020.¹³ It is worth mentioning that, even though the 2007 Lugano Convention allows for the adherence of non-EU or non-EFTA members, it requires unanimous consent of all signatories to this accession.¹⁴ While Iceland, Norway and Switzerland expressed their support, the EU and Denmark (as a separate contracting party to the 2007 Lugano Convention) to date have withheld their consent to the UK's accession. The EU argument against the UK's accession to the Convention is linked to the fact that all current signatories are fully or substantially part of the EU single market. While the UK aims to leave the EU single market, the EU would not easily consent to the accession of the only state that is outside it.¹⁵

3 Legal framework for civil justice and judicial cooperation in cross-border commercial matters

3.1 EU law

<https://treatydatabase.overheid.nl/en/Verdrag/Details/011343/011343_Notificaties_13.pdf> accessed 29 March 2020.

¹¹ 2005 Hague Convention art 31(2)(a).

¹² GOV.UK, 'Support for the UK's Intent to Accede to the Lugano Convention 2007' <www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007> accessed 29 March 2020.

¹³ The notification was issued by the Swiss Federal Department of Foreign Affairs on 14 April 2020 and is available at: <https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autres-conventions/Lugano2/200414-LUG_en.pdf> accessed 27 September 2020.

¹⁴ See 2007 Lugano Convention arts 70-72.

¹⁵ See for example Anna Pertoldi and Maura McIntosh, 'UK Applies to Join Lugano Convention from End of Brexit Implementation Period' (*Lexology, Litigation Notes Blog*, 28 April 2020) <<https://www.lexology.com/library/detail.aspx?g=e93b7bec-6652-4a5f-be1c-996a3777ff09>> accessed 27 September 2020 and Louise Merrett, 'Farewell Lugano?' (*UK in a Changing Europe*, 7 May 2020) <<https://ukandeu.ac.uk/farewell-lugano/>> accessed 27 September 2020.

Civil justice cooperation between Member States, covering both civil and commercial¹⁶ matters having cross-border implications, is built on the principle of mutual recognition and intends to facilitate free movement in the EU by providing legal certainty and therefore predictability. At the core of the current EU legal framework are the rules that determine which court would have jurisdiction over a dispute and the law applicable to the matters in dispute. In addition, it provides for the rules which simplify the reciprocal recognition and enforcement of judgments between EU Member States. Rules on jurisdiction and recognition of foreign judgments in civil and commercial matters are harmonised in the collection of EU legislative instruments forming the so-called Brussels Regime.¹⁷ Recognition and enforcement of judgments were first achieved through the 1968 Brussels Convention.¹⁸ The 1997 Treaty of Amsterdam was a major step forward in the process of harmonisation in the area of judicial cooperation. Thereafter, Articles 61 and 65 EC conferred upon the EU the power to enact laws necessary for judicial cooperation in civil matters.¹⁹ Article 81 TFEU provided the basis for the adoption of the Brussels I Regulation in 2001 and the Brussels I Recast Regulation in 2012.²⁰ New regulations superseded the Brussels Convention and provided for some substantial improvements to the legal framework to further facilitate the recognition of judgments and to further enhance access to justice. For instance, Brussels I Recast permitted the enforcement of jurisdiction clauses in contracts regardless of the domicile of the parties, which is important protection, especially for English jurisdiction clauses commonly used in international agreements.²¹

Regarding the choice of law rules, the first step was taken in 1980 with the adoption of the Rome Convention on the law applicable to contractual obligations,²² which was superseded by the Rome I Regulation²³ (covering applicable law in contracts) and the Rome II Regulation²⁴ (covering applicable

¹⁶ These are, for example, monetary claims between private parties and/or companies or non-monetary matters from the area of family, employment, intellectual property law.

¹⁷ Sara Masters and Belinda McRae, 'What Does Brexit Mean for the Brussels Regime?' (2016) 33(7) *Journal of International Arbitration* 483.

¹⁸ See 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version) [1998] OJ C 27, where the contracting parties are: Belgium, France, Italy, Germany, Luxemburg, the Netherlands, Denmark, the United Kingdom, Republic of Ireland, Spain, Greece, Austria, Finland, and Sweden.

¹⁹ This competence is now provided for in Articles 65 and 81 TFEU.

²⁰ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L012 and 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 [2012] OJ L351/1.

²¹ Richard Aikens and Andrew Dinsmore, 'Jurisdiction, Enforcement and the Conflict of Laws in Cross-Border Commercial Disputes: What are the Legal Consequences of Brexit?' (2016) 27(7) *European Business Law Review* 913.

²² Rome Convention on the law applicable to contractual obligations [1980] OJ L266/1.

²³ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L177/6.

²⁴ 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 [2007] OJ L199/40.

law in non-contractual obligations in civil and commercial matters), although Denmark did not take part in the adoption of either instrument. Rome I contains rules for determining the governing law of contractual obligations, which must be applied by all EU Member States and applies to contracts concluded after 17 December 2009.²⁵ The Rome Convention continues to apply to contracts entered into before 17 December 2009. Rome II enables parties involved in international business to influence which law will govern their non-contractual obligations by contractually agreeing a choice of law. In case of dispute, it provides for greater predictability for the parties that know in advance the basis and extent of their liability, limitation periods and grounds for damages under the applicable law.

3.2 International law instruments

The Convention of 30 June 2005 on Choice of Court Agreements (2005 Hague Convention) may well become significant for the UK after Brexit as an international law treaty on civil judicial cooperation. The Convention was entered into by the EU on behalf of the Member States in 2005 (pursuant to the Treaty of Lisbon which gave the EU competence to conclude international treaties). However, the territorial and material scope of the 2005 Hague Convention is quite limited. It only covers jurisdiction and enforcement issues when parties have agreed on an exclusive jurisdiction clause, which confers jurisdiction on the courts of the contracting states (the EU Member States, Mexico, Singapore and Montenegro).²⁶

Lastly, it is important to mention the 2007 Lugano Convention, unifying the rules on jurisdiction and enforcement of judgments in civil and commercial matters between the EU Member States and the European Free Trade Association ('EFTA') states except Lichtenstein (ie Norway, Switzerland and Iceland).²⁷ The 2007 Lugano Convention superseded the Lugano Convention of 1988 and expanded the applicability of the Brussels I Convention since EFTA states were not eligible to sign it.

3.3 UK law²⁸

Direct applicability of the provisions of EU law with direct effect was ensured in the UK through the European Communities Act 1972.²⁹ Therefore, EU regulations had direct effect in the UK, without the need for incorporation into the domestic legal system.³⁰ Consequently, EU regulations create rights

²⁵ Rome I art 28.

²⁶ 2005 Hague Convention art 1(1).

²⁷ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L339/3.

²⁸ For the purposes of this paper, this means the law that applies to the United Kingdom as a whole even though it is acknowledged that there are three legal systems that exist within the territory of Great Britain and Northern Ireland (English & Welsh, Scottish and Northern Irish).

²⁹ European Communities Act 1972.

³⁰ European Communities Act 1972 s 2(1).

for individuals on which they can rely in the UK courts. Other legislative instruments, such as EU directives, require implementation into national law. As most of the legislative acts in the area of civil judicial cooperation took the form of regulations, they are directly applicable to the UK until the UK's exit date. In order to end the primacy of EU law in the UK and to repeal the European Communities Act 1972 on the exit date, the UK Parliament adopted the European Union (Withdrawal) Act 2018³¹ which was further amended by the European Union (Withdrawal) Act 2020 ('EUWA'),³² whereby Section 1A of the EUWA saves the effect of most of the European Communities Act 1972 for the duration of the transition period.

4 Legal basis during the transition period

The Withdrawal Agreement provides clarification with regard to the applicability of the EU legal framework between the UK and EU-27 during and after the transition period. Articles 66 to 69 deal with judicial proceedings in civil and commercial matters that are ongoing on or after the transition period, clarifying whether the provision of EU law would apply to such proceedings.³³ By virtue of the Withdrawal Agreement, most EU law during the transition period will continue to apply to the UK as usual, including the regime for civil judicial cooperation in civil and commercial matters. The UK will be also bound by the international agreements (including the 2005 Hague Convention and the 2007 Lugano Convention) concluded by the EU on behalf of its members.³⁴ Article 66 of the Withdrawal Agreement deals with the applicability of EU law on governing law, namely Rome I and II. It stipulates that Rome I will continue to apply to contracts concluded before the end of the transition period, whereas Rome II will continue to apply in respect of events giving rise to damage, where such events occurred before the end of the transition period. English governing law clauses will remain valid and enforceable in the EU. As to the validity and enforceability of jurisdiction clauses, Article 67 of the Withdrawal Agreement stipulates that the Brussels I Recast Regulation will apply to legal proceedings instituted before the end of the transition period and in respect of recognition and enforcement of judgments given in legal proceedings instituted before the end of the transition period. Furthermore, jurisdiction agreements between the parties based in the EU and EFTA and the enforcement of judgments will fall under the 2007 Lugano Convention.

The basic principles of the Brussels regime will be maintained, which means the general requirement of recognition and enforcement of the judgments handed down by the courts of the EU-27 in the UK, and vice versa. The *lis pendens* rule codified in Article 29 of the Brussels I Recast Regulation

³¹ The European Union (Withdrawal) Act 2018.

³² The European Union (Withdrawal) Act 2020.

³³ Article 126 of the Withdrawal Agreement stipulates that the transition or implementation period shall start on the date of the entry into force of the Agreement and end on 31 December 2020 and it can be extended for up to one to two years.

³⁴ Withdrawal Agreement art 129(1).

will be upheld and will require the court first seised to stay its proceedings in favour of the court which was named in the exclusive jurisdiction agreement. In addition, jurisdiction agreements naming one of the courts in the EU will be valid and enforceable even in situations where the parties are not domiciled in one of the EU Member States.

5 In search of a legal basis after the transition period

In order to analyse the legal basis for jurisdiction, enforcement and recognition of judgments after the transition period, the following factors will need to be taken into account: a) whether there will be an agreement on the UK/EU future relationship covering civil judicial cooperation; b) whether international treaties could provide an alternative legal basis; and, lastly, c) the moment the relevant proceedings were initiated by the parties. As discussed in this paper, the UK government has set out its vision on the applicable civil cooperation framework in various position papers and it seems, at least from these papers alone, the UK's intention is to negotiate an agreement based closely on the current Brussels regime on a reciprocal basis. In addition, it will seek to join the 2005 Hague Convention and continue to participate in the 2007 Lugano Convention.

5.1 No agreement on future relationship

Although the Withdrawal Agreement was adopted and both parties are expressing the will to negotiate the terms of the future relationship, the possibility of a so-called no-deal scenario is still on the table, meaning that the UK and the EU will not agree on the framework of a future relationship and trade deal. At the end of the transition period, EU primary and secondary law in the field of civil judicial cooperation will no longer apply to the UK. Most of EU law in the area took the form of EU regulations and by definition has direct effect in the Member States without the need for transposition into the domestic legal order. The UK gave direct effect to this law through the European Communities Act 1972, which was repealed on exit date by virtue of the EUWA. However, a 2020 amendment to the EUWA retained the effect of most of EU law during the transition period. The EUWA is a legal instrument that intends to provide a functioning statutory framework to the UK domestic system after Brexit. On the one hand, it converts EU law existing before the exit date into UK domestic law, with this law subject to amendment or repeal when the UK deems it necessary thereafter. On the other hand, the EUWA does not permit EU law enacted after Brexit to become part of the UK's legal regime.³⁵ 'Retained EU law', as defined by the EUWA, would include the Rome I and II Regulations on the law applicable to contractual and non-contractual obligations. However, to allow these rules to operate effectively in the UK after exit day, the UK government adopted the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019, which would come into force at the end of transition. In

³⁵ Sionaidh Douglas-Scott, 'The Constitutional Implications of the EU (Withdrawal) Act 2018: A Critical Appraisal' (2019) Queen Mary School of Law Legal Studies Research Paper 299/2019, 1 <<https://ssrn.com/abstract=3316710>> accessed 29 March 2020.

respect of the EU legal framework on recognition and enforcement of judgments, the UK intends to revoke the European regime.³⁶ The jurisdiction and the enforcement of foreign judgments in the UK will be determined by the rules of common law, which currently governs situations outside the European legal system (such as judgments from US courts), or the 2005 Hague Convention when it applies.

One crucial effect of a no-deal Brexit relates to the framework on recognition and enforcement of English judgments abroad. The basic principle under the Brussels I Recast Regulation and the 2007 Lugano Convention is very simple – every judgement from the court of another Member State or Lugano State must be recognised and enforced.³⁷ The default provision of the direct enforcement of judgments between EU Member States will no longer apply to the UK and the cross-border enforcement of English judgments would require application in each Member State pursuant to their national regime.³⁸ The case law of the CJEU has binding effect on the UK courts by virtue of the European Communities Act 1972. The no-deal scenario effectively means that the CJEU's jurisdiction would cease to apply to any past interpretation and future decisions on EU law concerning civil justice cooperation in civil and commercial matters. Whether UK courts will still rule in line with the CJEU's judgments or find inspiration in their future rulings is still unknown, but nothing will oblige them to do so.

Considering the uncertainties surrounding the ratification of the Withdrawal Agreement, the European Commission issued on 18 January 2019 the Notice to Stakeholders on Withdrawal of the United Kingdom and EU Rules in the Field of Civil Justice and Private International Law, outlining legal repercussions when the UK becomes a third country.³⁹ Following the Notice, on 11 April 2019 the EC published Q&As related to the United Kingdom's withdrawal from the European Union in the field of civil justice and private international law.⁴⁰ Both the EC Notice and Q&A documents discuss the consequences of not adopting the Withdrawal Agreement on exit day (31 January 2020). However, the guidance by analogy can serve as an indicator of the EU's position on the implications if both parties do not reach agreement on civil cooperation before the end of the transition period. The EC Notice advises stakeholders that for proceedings to enforce the UK judgement commenced as of the end of the transition period in the EU-27, the current

³⁶ The UK government adopted the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 on 4 March 2019 (The UK Civil Jurisdiction and Judgments Regulations). These Regulations will revoke, among others, the Brussels I Recast Regulation and the 2007 Lugano Convention (as implemented in the domestic system).

³⁷ Trevor C Hartley, *Civil Jurisdiction and Judgements in Europe. The Brussels I Regulation, the Lugano Convention, and the Hague Choice of Court Convention* (OUP 2017) 298.

³⁸ Giesela Rühl, 'Judicial Cooperation in Civil and Commercial Matters After Brexit: Which Way Forward?' (2018) 67 *International & Comparative Law Quarterly* 115.

³⁹ Commission, 'Notice to Stakeholders on Withdrawal of the United Kingdom and EU Rules in the Field of Civil Justice and Private International Law' (18 January 2019) ('The EC Notice').

⁴⁰ Commission, 'Questions and answers related to the United Kingdom's withdrawal from the European Union in the field of civil justice and private international law (11 April 2019) ('The EC Q&A').

regime will no longer apply. It will be the rules of the domestic laws of the Member State in which enforcement is sought that will govern the process, unless an international convention (such as the 2005 Hague Convention) has relevance.⁴¹

5.2 Scenarios for a future relationship for judicial cooperation

In recent years, various models at different ends of the spectrum have been put forward as to a post-Brexit relationship with the EU. Most, if not all, of which raise the legal challenges presented below.

5.2.1 Unilateral application of EU law by the UK (The example of Denmark)

One of the simplest solutions would be the unilateral application by the UK of the European legal regime on judicial cooperation. However, this could only be possible in respect of EU law, which does not require reciprocity in its application, for instance Rome I and II. In addition, as CJEU jurisdiction in the UK on the interpretation of EU law will cease to apply, we can expect possible divergence in interpretation of the rules, as the UK courts will not be obliged to follow CJEU judgments. When it comes to the Brussels regime, different commentators give the example of the application of the Brussels I Recast Regulation by Denmark as a potential solution. However, as pointed out by many, this option has potential drawbacks.⁴² Firstly, it would require the agreement of the EU, as the Brussels I Recast Regulation requires reciprocity in its application. Further, the UK would take part in decisions on any potential reforms or amendments to the Regulation, as it would cease to be an EU Member State and would lose its place at the negotiation table. Lastly, Denmark needs to give ‘due account’ to the CJEU judgments when applying the Brussels I Recast Regulation and refer to it any questions on the interpretation.⁴³ As bringing an end to the supremacy of the CJEU over the UK is one of the UK government’s red lines, the ‘Danish solution’ seems to be very unlikely.

5.2.2 Lugano Convention 2007 – the EFTA model

The 2007 Lugano Convention is in force between all EU Member States, Iceland, Norway, Switzerland and Liechtenstein, and contains rules on jurisdiction and enforcement of judgments between these countries. The agreement was largely based on the Brussels I Convention and extended the applicability of this EU legal instrument to the EFTA states. Since the UK is party to Lugano only by virtue of its EU membership, the application of this treaty will cease to apply upon the exit date. Acceding to the 2007 Lugano Convention through agreement with the EU and EFTA could be one solution, but this option is not without drawbacks. As mentioned previously in this paper, although the 2007 Lugano Convention allows for the adherence of non-

⁴¹ Commission (n 39) 3.

⁴² See Masters and McRae (n 17) 485-488; Rühl (n 38) 119-120.

⁴³ Rühl (n 38) 120.

EU or non-EFTA members, it requires the unanimous consent of existing contracting parties to the accession.⁴⁴ The lack of EU and Danish support renders the UK's accession to the Convention impossible before the end of the transition period. It is also unclear whether the EU/Danish position would evolve at some point, which makes the UK following the EFTA model less plausible. Even if the unanimous consent of the contracting parties could be gained, this model has additional drawbacks. As the Lugano Convention was adopted in 2007 and was based on the Brussels I Regulation, it is not as advanced as the Brussels I Recast Regulation. What would require further reconsideration by the UK in the case of its adherence to the 2007 Lugano Convention is its position towards the CJEU. In order to prevent divergent interpretation, Protocol 2 to the Convention provides for CJEU jurisdiction over the interpretation of its provisions and obliges the courts of the contracting parties when applying these provisions to 'pay due account' to any decision on their application.⁴⁵

Without doubt, one of the biggest advantages of the UK's adherence to the 2007 Lugano Convention would be the continuing application of harmonised rules on jurisdiction and enforcement between the parties to the Convention. Nevertheless, Lugano was not revised to benefit from the improvements to the Brussels I Recast Regulation. These include repealing the *Gasser* case doctrine⁴⁶ and reducing the risk of parallel proceedings in cases where there is an exclusive jurisdiction clause or upholding the EU court's jurisdiction agreements even when the parties are not domiciled in any Member State.⁴⁷ Under Lugano, the court named in the exclusive jurisdiction clause when seised second must stay its proceedings and wait until the court first seised determines whether it has jurisdiction.⁴⁸ Additionally, jurisdiction agreements will be enforceable and effective only if one of the parties falls within the scope of Lugano.

5.2.3 *The UK joins 2005 Hague Convention*

Prior to the end of the transition period, the UK is bound by the 2005 Hague Convention through its EU membership and, in order to continue participation in this treaty after the exit date, the UK would need to accede on its own behalf. Under EU law, the Brussels I Recast Regulation takes priority on issues of

⁴⁴ See further Aikens and Dinsmore (n 21) 915.

⁴⁵ Masters and McRae (n 17) 491; Aikens and Dinsmore (n 21) 911.

⁴⁶ Case C-116/02 *Erich Gasser GmbH v MISAT* ECLI:EU:C:2003:657, where the ECJ confirmed the interpretation of Article 21 of the Brussels Convention as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction.

⁴⁷ Masters and McRae (n 17) 3; Rühl (n 38) 127.

⁴⁸ See the 2007 Lugano Convention art 27: 1. 'Where proceedings involving the same cause of action and between the same parties are brought in the courts of different States bound by this Convention, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. 2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court'.

jurisdiction and enforcement of judgments in civil and commercial matters. Therefore, the 2005 Hague Convention is largely not applicable between the Member States. In addition, what makes the applicability of the provisions of this instrument less appealing and less comprehensive than the current EU regime is its limited scope both as to the contracting parties (the EU Member States, Mexico, Singapore and Montenegro) and as to its subject matter.⁴⁹ It does not accommodate any rules relating to jurisdiction in situations other than exclusive choice of court agreements of the contracting states and does not contain any rules relating to jurisdiction in the absence of choice.

The goal of the 2005 Hague Convention is to enhance the predictability of dispute resolution in the forum chosen by the parties and, in that sense, it is a unique global instrument.⁵⁰ It is true that to some degree the 2005 Hague Convention is similar to the Brussels or Lugano regime. Nevertheless, in addition to the limited scope and practice of use, there are other drawbacks or differences of this instrument. Under the Brussels I Recast Regulation, judgments are enforceable in other Member States without the need for any additional declaration of enforceability. Consequently, such judgments should be treated under the same conditions of enforcement as the judgement handed down in the recognising Member State itself, albeit recognition may be refused on grounds of public policy.⁵¹

Conversely, the 2005 Hague Convention applies to judgments from courts in the countries that are parties to the Convention, and only if the court in which the judgment was handed down has jurisdiction under the choice of court agreement. The court in which the enforcement or recognition is sought is not prevented from determining that the exclusive jurisdiction agreement is valid under its laws and the claim falls into its scope.⁵² Nonetheless, Article 8 of the Convention codifies the general requirement of recognition, and once the conditions prescribed in the rule are satisfied the judgment must be recognised, with no decision on merits permitted. It is also worth mentioning that under the Convention, the procedure for enforcement is governed by the laws of the state addressed, except to the extent that the Hague lays down specific rules. Lastly, the Convention does not contain any general rules on concurrent proceedings like *lis pendens* applicable under Article 29 of the Brussels I Recast Regulation. Article 5(2) states that the court that has jurisdiction should not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another contracting state.

5.2.4 Applicability of 1968 Brussels Convention?

The 1968 Brussels Convention was the first step in the creation of a unified EU system for recognition and enforcement of judgments. The Brussels I

⁴⁹ Masters and McRae (n 17) 496.

⁵⁰ Ronald A Brand, 'Arbitration or Litigation: Choice of Forum after the 2005 Hague Convention Choice of Court Agreements' (2009) 3 *Annals of the Faculty of Law in Belgrade International Edition* 25.

⁵¹ Hartley (n 37) 302-303.

⁵² *ibid* 345.

Regulation superseded the 1968 agreement for the EU Member States, although the Convention was never formally terminated. Therefore, it is open for discussion whether this can provide a solution for the UK. If it does, there are still difficulties with it. First of all, the geographic scope of the Convention is very limited. The countries who acceded to the EU after 1997 never signed the 1968 Brussels Convention. According to some commentators, the scope of the application remains in force for certain Member State overseas territories, yet, in practice, its significance is minimal.⁵³ Additionally, taking into account the subject matter of the 1968 Brussels Convention, it is apparent that it is far less advanced and precise than the Brussels Regulations. For example, one of the differences between the instruments relates to the enforcement procedure. The Brussels I Recast Regulation provides for the general rule of enforcement of judgments between the EU Member States, without the need for an additional declaration or proceedings in the Member States where enforcement is sought. In contrast, the 1968 Convention stipulates that the judgments should be subject to the procedure of enforcement and the order for enforcement, which need to be issued by the enforcing country's courts and governed by its domestic laws.

5.2.5 Revival of Bilateral Treaties

Lastly, in some instances, bilateral treaties may exist between the UK and other Member States which were concluded before EU accession. The Foreign Judgments (Reciprocal Enforcement) Act 1933 incorporated into domestic system certain bilateral agreements, which allowed for the reciprocal enforcement of foreign judgments. The UK concluded six such agreements with countries which are now EU Member States (France, Belgium, Germany, Austria, Italy, the Netherlands).⁵⁴ However, the most significant issue with this option is whether the revival of these agreements is possible at all. Since the Brussels Regulations superseded the treaties covering the same subject matters, it seems that these agreements would need to be reintroduced into the law of the relevant state in order to be effective toward the UK. Nevertheless, the EU has exclusive competence in the area of civil judicial cooperation; therefore, the conclusion of revived agreements or conventions with different EU Member State seems impossible. Even if it were possible, such an arrangement would have only limited territorial scope as only a few EU Member States participated in these treaties.

6 Moment of the commencement of proceedings

The moment at which the parties commence the proceeding or whether the judgment was already handed down in such a case before the end of the transition period can have an impact on the rules applicable to the process and enforcement. Here we can distinguish the following scenarios.

⁵³ Some authors argue that the 1968 Brussels Convention is still in force for the French Overseas Collective and Aruba. See, for instance, Aikens and Dinsmore (n 21) 907.

⁵⁴ Masters and McRae (n 17) 496-497.

6.1 Proceedings initiated before the end of the transition period

The Withdrawal Agreement provides for a clear answer in terms of the legal basis for the enforcement of judgments in proceedings commenced and concluded before the end of the transition period. According to Article 67 of the Withdrawal Agreement, the Brussels regime will continue to apply to such legal proceedings, and UK judgments will continue to be enforced in the EU and vice versa. However, questions remain whether these rules will apply to proceedings which were not concluded or judgments which were not handed down before the end of the transition period. The EU notices from 2019 and the UK Brexit legislation bring some clarity to these points. The EC Notice and Q&As clarify whether and until when EU rules will apply in legal proceedings where one of the parties is UK domiciled and to the recognition and enforcement of judicial decisions issued in the UK. For proceedings pending before the end of the transition period, the EU rules on international jurisdiction will continue to apply. In the case of proceedings initiated on or after the transition period, EU rules will no longer apply. In respect of rules for facilitated recognition and enforcement of judicial decisions issued by the courts of the Member States, the EC made the distinction between *exequated* and *non-exequated* judgments.⁵⁵ In the case of a UK judgment being *exequated* in the EU-27 before the end of the transition period but not enforced, EU law will continue to apply and the judgment can be enforced.⁵⁶ On the other hand, where a UK court judgment has not been *exequated* before the end of the transition period, even though the judgment was handed down or enforcement proceedings were commenced before the transition period, EU law rules will not apply. The same effect would apply to the recognition and enforcement of the judgments where enforcement proceedings are commenced on or after the end of the transition period – here Member State national rules would govern.

The EC Q&A provide for guidance on the *lis pendens* rule codified in Article 29(1) of the Brussels I Recast Regulation. As from the end of the transition period, it will no longer apply to the courts seised in the UK. On the other hand, Article 33 of the Brussels I Recast Regulation will apply where the UK court is first seised.⁵⁷ As previously discussed, the UK Civil Jurisdiction and Judgments Regulations will, from the end of the transition period, revoke the EU legal framework on recognition and enforcement of judgments and amend the legislation that implements these rules into the domestic legal system. Nevertheless, as stated in the Regulations, EU rules will apply to the recognition and enforcement of the judgments handed down by the courts of the EU-27 and EFTA Member States in proceedings initiated before the end of the transition period where the party wished to enforce and recognise such a

⁵⁵ An *exequated* judgment is a judgment that requires additional measures such as a declaration of enforceability in order to be enforced in a country where the party seeks enforcement.

⁵⁶ The EC explained the reason for such an exception in that that such a judgement has already been declared enforceable in the MS by the courts of that MS before the end of the transition period and the mere fact that it was originally handed down by a UK court has become irrelevant. See EC Q&A (n 40) 3.

⁵⁷ EC Q&A (n 40) 2.

judgment in the UK. The instrument in addition allows UK courts after the end of the transition period to decline jurisdiction for the proceedings to which it was seised before the end of the transition period if the court in the EU-27 was subsequently seised ‘if, and only if, it considers that it would be unjust not to do so’.⁵⁸

6.2 Proceeding initiated after the transition period and agreements with an exclusive jurisdiction clause

Given the intention of the UK government and the steps it has taken to join the 2005 Hague Convention, it can be assumed that this international treaty will govern the recognition and enforcement of judgments between the parties after the transition period, unless there is a separate agreement with the EU on civil cooperation. However, the 2005 Hague Convention does not apply to every agreement with an exclusive jurisdiction clause. The Convention does not apply to exclusive jurisdiction agreements concluded before 1 October 2015 (the day on which the 2005 Hague Convention came into force internationally).⁵⁹ In addition, in accordance with its Article 16(1) covering the transitional provision, the Convention will apply only to exclusive choice-of-court agreements concluded after the entry into force for the specific state. This raises some uncertainty as to whether the Convention will apply to agreements with English exclusive jurisdiction clauses concluded before the UK joins the 2005 Hague Convention but after the start of the transition period (and specifically if the EU-27 courts interpret that the 2005 Hague has been in force for the UK since 1 October 2015 or when it rejoins on 1 January 2021).⁶⁰ As a consequence, there is a chance that the recognition and enforcement of English judgments where the choice of court agreement was concluded before the entry into force of the Convention for the UK will fall under the domestic rules of the EU-27. It will be interesting to see how the courts and the CJEU answer this question. Similarly, in the case of the enforcement of judgments from the EU in the UK, where an exclusive jurisdiction agreement in favour of an EU-27 court was concluded before the UK (re)joins the 2005 Hague Convention, there is some doubt as to the applicability of the Convention in that scenario. UK legislation in this regard is rather ambiguous.⁶¹

⁵⁸ The UK Civil Jurisdiction and Judgments Regulations art 93 (2).

⁵⁹ 2005 Hague Convention art 31 (1). See also Hartley (n 37) 43.

⁶⁰ See, for example, Anna Pertoldi, ‘Exclusive English Jurisdiction Agreements Agreed Before No-deal Brexit May Not Come within Hague Choice of Court Convention’ (*Practical Law Dispute Resolution Blog*, 16 May 2019) <<http://disputeresolutionblog.practicallaw.com/exclusive-english-jurisdiction-agreements-agreed-before-no-deal-brexit-may-not-come-within-hague-choice-of-court-convention/>> accessed 29 March 2020.

⁶¹ See, for example, the provisions of the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018. Further on the subject, see Anna Pertoldi and Maura McIntosh, ‘Enforcement of Judgments Between the UK and the EU Post-Brexit: Where Are We Now?’ (*Practical Law Dispute Resolution Blog*, 20 January 2020) <<http://disputeresolutionblog.practicallaw.com/enforcement-of-judgments-between-the-uk-and-the-eu-post-brexit-where-are-we-now/>> accessed 29 March 2020.

6.3 Proceeding initiated after the transition period and agreements with no-exclusive jurisdictions clause

As mentioned previously, assuming no post-transition agreement on civil cooperation between the UK and the EU, the 2005 Hague Convention will most likely apply to the jurisdiction and enforcement of judgments between the parties. However, as the Convention excludes from its scope agreements with non-exclusive jurisdiction clauses, the answer here is rather simple. Regardless of the timing of the commencement of the proceedings after the transition period, the enforcement and recognition of judgments will depend on the domestic rules in the country in which the claimant seeks enforcement. What this means in practice is that for the rules to determine jurisdiction and the enforcement of judgments, the interested parties would need to refer to the system applicable in the UK and the EU-27 for foreign judgments outside the Brussels regime or the 2005 Hague Convention. For instance, recognition of the judgments from the United States. Therefore, it is important for the parties involved in a commercial dispute to understand the position of the relevant state prior to initiating the enforcement proceedings of the English judgment there.

7 Option for parties to consider before the end of the transition period

Brexit's effect on international commercial contracts raises questions on the ability of parties to perform contracts and on the interpretation and enforcement of agreements in the case of cross-border disputes. English contract law is part of the UK's common law, and therefore the impact of Brexit on substantive contract law itself should be very limited. What requires more attention is the question of the enforceability of judgments rendered by the English courts in the EU-27 Member States and the judgments from the EU-27 Member States in the UK. Governing law clauses provide for some certainty over which country's law will govern international agreements. Governing law usually settles questions on a contract's interpretation, validity and non-covered rights and obligations stemming from the agreements. English law has been extensively used in international contracts due to its pro-business approach, predictability and flexibility,⁶² with companies across the EU deciding to govern their contracts by English law. However, for purely domestic transactions, if applicable, some mandatory national rules would prevail. These rules are to prevent the parties from avoiding mandatory national laws by choosing foreign law to govern their agreements.⁶³ In the case of a no-deal Brexit, the UK government intends to incorporate the provisions

⁶² In addition, around 40% of global commercial arbitrations are governed by English law. See HR Government (n 5) point 9.

⁶³ Rome I provides some further clarification of this rule. Article 3(3) of Rome I stipulates that: 'Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement'. However, Article 3(4) provides that: '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'.

of Rome I and II into the domestic framework through the EUWA. It seems that Brexit should not have a great impact on this area as the Rome regime does not rely on reciprocity. However, what can be expected over the years is the possible divergence in interpretation of the rules, as UK courts will not be obliged to follow the CJEU judgments.

One of the biggest effects is the fact that the Brussels I Regulation will cease to be applicable between the UK and the EU-27. Despite the UK government's intention to join the 2005 Hague Convention and the 2007 Lugano Convention, the uncertainties relating to this mean that potentially UK judgments will not so easily be enforceable in the EU. The enforcement of UK judgments in the EU-27 Member States will not be impossible, but will likely become more costly and time consuming. Nevertheless, there is no doubt that the rules will be less predictable once the current jurisdiction and enforcement regime ceases to apply. This will especially be the case if there is no deal on a similar regime in the future and in instances where the 2005 Hague Convention does not apply. National rules on the recognition and enforcement of foreign judgments would come into place.

As long as post-Brexit negotiations remain at an impasse or do not even cover this issue, mutual recognition and enforcement of judgments will eventually fall within the scope of either the 2005 Hague Convention or national private international law rules with unsatisfactory and unpredictable results. While this continues, arbitration could provide an alternative practical solution for well-advised commercial counterparties to adopt to achieve a degree of definition as to where and how their disputes will be resolved. Of course, arbitration is a wholly different method of dispute resolution, with its own rules and logic, and as such could not serve as a solution to the problems presented in this paper. Nevertheless, as described below, arbitration does allow commercial parties to circumvent the post-Brexit legal concerns outlined above, especially when agreed on at the outset of contract negotiations prior to disputes arising (although this is much more difficult to agree on once a dispute has arisen). Parties can already choose arbitration as a form of dispute resolution when concluding new contracts before and after the transition period, before they are in dispute, through agreed dispute resolution clauses in their contracts. Alternatively, if parties are trading on the basis of English law T&C, these terms can be changed unilaterally by the party that imposes these trading terms (the so-called battle of forms concept). In addition, the parties already involved in a legal dispute may also, on the basis of a separate agreement, agree to arbitrate despite a clause with the English court in the main agreement. However, this scenario can prove to be the most challenging, as the parties seeking to resolve a contentious issue may not be willing to find common ground on such an amendment. In the post-Brexit legal reality, the idea of arbitration could prove to be more appealing for parties to international contracts due to the fact that Brexit should not have an effect on arbitration as it is generally regulated by national law and the New York

Convention,⁶⁴ in which all the EU Member States participate. An arbitration decision or award should remain recognised and enforceable throughout the EU on the basis of the New York Convention. Therefore, in order to remove any uncertainties about the enforceability of English court judgments after the end of the transition period, it would be prudent for the parties involved in international agreements to consider amendments to jurisdiction clauses in their contracts to allow for arbitration instead. However, parties should be aware of the relative distinctions between these two means of dispute resolution, as there are distinctions among them, for instance relating to procedure, a party's autonomy, the relative costs, the practice of use in the contracting states or how easy it is to enforce a decision (judgment vs arbitral award).⁶⁵ Arbitration under the New York Convention is used in international commercial contracts as it guarantees compliance with the agreement to arbitrate and the enforcement of the arbitral award itself.⁶⁶ What should be stressed is the fact that the Hague Convention was adopted in 2005 and, until today, its contracting parties are limited to the EU Member States, Mexico, Singapore and Montenegro. In addition, it is practically inapplicable among the EU countries due to the Brussels regime. Therefore, the practice of the procedure and enforcement of judgments under this convention is very limited. We should see what the practice of the EU-27 and UK courts with regard to the 2005 Hague Convention will be in the future, although at the time of writing not much can be said about the timing or the costs of the procedure. Further, it is not certain if the UK will make any declarations, which is possible for states acceding to the Convention, which can limit its application. In comparison, the New York Convention, since its entry into force in 1959, has been widely adopted in the world,⁶⁷ which also means that the practice of enforcing foreign arbitral awards is better established. There are more opportunities to vary the terms of the 2005 Hague Convention (there are three possibilities) as compared to the New York Convention, which in Article X allows only one declaration for the contracting states.⁶⁸

8 Conclusion

The date of 31 January 2020 marked a momentous day in the history of European integration as it was the day the first Member State left the EU. This exit raises a whole range of legal issues which need to be addressed and resolved before the end of the transition period. The consequences on the EU framework for jurisdiction, recognition and enforcement of judgments are of particular interest for private parties involved in cross-border commercial

⁶⁴ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

⁶⁵ For a more detailed legal comparison, see Brand (n 50) 23-35.

⁶⁶ Brand (n 50) 24.

⁶⁷ At the time of writing, there are currently 161 contracting countries. See <<http://www.newyorkconvention.org/countries>> accessed on 29 March 2020.

⁶⁸ Brand (n 50) 33.

agreements. As explored in this paper, the effect of Brexit on this system and the legal basis for further civil cooperation between the UK and the EU-27 depends on whether agreement is reached on a similar regime. Different legal acts determine the basis for proceedings during and after the transition period. The Withdrawal Agreement provides for some clarity on which EU law provisions apply during the transition period. Most EU law during the transition period will continue to apply to the UK as usual and, in accordance with Article 67, this include the regime for civil judicial cooperation in civil and commercial matters. In addition, the EC Notices and the UK Brexit legislation provide for some guidelines on the rules applicable in the transition period and immediately after. However, as discussed in this paper, there is still need for further clarification. The moment of the commencement of proceedings and the status of a judgment (whether it was handed down by a court, *exequatored* or *non-exequatored*) now play an important role for the applicable rules for enforcement, especially during the transition period, whereas this was not relevant to the UK as an EU Member State.

A no-deal exit leaves more uncertainty and complex legal issues that will need to be resolved. On the other hand, it seems that the Rome regime and choice of the governing law system should not be greatly affected by Brexit due to the fact that it does not rely on reciprocity. Nevertheless, the recognition and enforcement of judgments between the UK and the EU-27 raise more pressing questions. While the system requires reciprocity, the simple unilateral application by the UK of EU law in this area would not be sufficient. Therefore, with a lack of agreement on future cooperation in civil and commercial matters, international conventions can provide a legal basis for the jurisdiction, enforcement and recognition of judgments. The UK government intends to accede to the 2005 Hague Convention and the 2007 Lugano Convention. There is no doubt that these instruments will be less predictable once the current jurisdiction and enforcement regime ceases to apply. For instance, the 2005 Hague Convention is less comprehensive than the current Brussels regime as it is limited in scope both regarding the contracting parties (the EU Member States, Mexico, Singapore and Montenegro) and relating to its subject matter. It only applies to the exclusive choice of court agreements of the contracting states and does not contain any rules relating to jurisdiction in the absence of a choice.

In the light of the above considerations, it is noteworthy that enforcement of the UK judgments in the EU-27 Member States and vice versa will not be impossible but will likely become more burdensome. The international regimes for the jurisdiction, recognition and enforcement of judgments are not as advanced and comprehensive as the rules applicable between the EU Member States. There is no solution yet to a whole range of issues related to the recognition and enforcement of judgments presented in this paper; however, in the absence of state action, private parties could resort to other dispute resolution methods, such as arbitration, to achieve a degree of definition as to where and how their disputes will be resolved. Nevertheless, it is important to stress that clear legal rules on which businesses can rely in the case of cross-border disputes affect confidence to trade internationally, and neither the EU-

27 nor the UK would like to see this diminished. Consequently, a deal on civil judicial cooperation would not only be welcome from a commercial perspective, but would also remove legal uncertainty that would arise in the absence of such an instrument.