

Jurisdiction, Enforcement and the Conflict of Laws in Cross-Border Commercial Disputes: What Are the Legal Consequences of Brexit?¹

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Abstract

This article considers the impact of Brexit on the conflict of laws rules in England and Wales in relation to jurisdiction, enforcement of judgments, choice of law and the future role of the European courts and their judgments.

The Present Position and Withdrawal from the European Union

The United Kingdom's membership of the European Economic Community ("EEC") and subsequently the European Union ("EU") resulted in fundamental changes to English (and Scottish) law concerning four aspects of cross-border civil and commercial disputes involving countries that now form the EU. These are, first, the rules to determine which Member State's courts should have jurisdiction over a dispute (including the viability of choice of forum clauses) and the enforcement of a judgment obtained in one Member State elsewhere in the EU.² Those rules were, first, the subject of an international convention, but then promulgated in directly effective EU regulations. Secondly, because the UK has become a part of the EU legal order,³ it has necessarily adopted EU law on the conflict of laws concerning disputes relating to both contractual and non-contractual obligations.⁴ In the latter two cases these conflict of laws rules apply to all cross-border disputes, not just those involving EU Member States.

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¹ We are not the first to consider this issue. See: e.g. Andrew Dickinson, *Back to the Future: The UK's EU Exit and the Conflict of Laws* 12 *Journal of Private International Law* 195 (2016); Sara Masters QC and Belinda McRae, *What does Brexit Mean for the Brussels Regime?* 33 *Journal of International Arbitration*, Special Issue 483–500 (2016).

² There are other rules concerning the procedures for cross-border dispute resolution, such as those concerning service of proceedings (Regulation (EC) 1393/2007) and evidence (Regulation (EC) 1393/2001). This article is not concerned with those particular matters.

³ By virtue of the Treaty of Amsterdam, 1997, legislative competence in respect of such matters as recognition and enforcement of civil and commercial matters and conflict of laws provisions was transferred from individual states to the EU. Council Regulation (EC) No. 44/2001, ("Brussels I").

⁴ These are principally in tort or delict.

In English law, the rules governing jurisdiction and enforcement with regard to EU Member States⁵ are presently governed by Regulation (EU) No. 1215/2012 of the European Parliament and of the Council, known as ‘Brussels I Recast’ and which we shall call ‘B1R’.⁶ In addition, the Lugano Convention 2007, which has direct effect in English law by virtue of the UK being a Member State of the EU,⁷ governs issues of jurisdiction and enforcement as between, on the one hand, EU Member States, and, on the other, Norway, Iceland and Switzerland. The English conflict of laws rules relating to contractual obligations are presently governed by Regulation (EC) No. 593/2008 of the European Parliament and of the Council, known as ‘Rome I’. The English conflict of laws rules relating to non-contractual obligations are presently governed by Regulation (EC) No. 864/2007 of the European Parliament and of the Council and, whilst promulgated before Rome I, is known as ‘Rome II’.

This article considers the impact of Brexit on these three legal regimes, together with a question which is intimately bound up with them: namely, what, if any, is the post-Brexit role of the Court of Justice of the European Union (“the CJEU”) and that of its past and future judgments and those of the CJEU’s predecessor, the European Court of Justice (“ECJ”)? The two courts (which we will refer to as “the European Court”) have given many judgments on the interpretation of B1R (and the preceding regimes) and have also interpreted the two applicable law Regulations. What part will they play in the post-Brexit UK legal order?

It is not the purpose of this article to attempt any detailed analysis of how the process of the UK leaving the EU, or Brexit for short, will actually come about. It is clear that nothing can happen until the UK government invokes Article 50 of the Treaty on European Union (“TEU”), which permits any Member State to withdraw from the EU “*in accordance with its own constitutional requirements*”.⁸ Article 50(2) of the TEU provides that once a Member State that wishes to withdraw has notified the European Council of such an intention, there will then be negotiations between that state and the European Council, which should lead to a “*withdrawal agreement*”.⁹ Article 50(3) states 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 ... unless the European Council, in agreement with the*

⁵ Originally Denmark was not included, but she has given notice that B1R will be implemented: [2014] OJ L240/1.

⁶ The B1R replaced “Brussels I”, which had, itself, replaced the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968, which was given the force of law in the UK by section 2(1) of the Civil Jurisdiction and Judgments Act 1982 (“the CJA”).

⁷ Treaties concluded by the EU bind Member States in accordance with Arts. 216 and 217 of the Treaty on the Functioning of European Union (“TFEU”) such that there is no requirement for domestic implementation. In this regard, it is worth noting that the TFEU was originally the Treaty of Rome, which has, of course, been continuously updated. The last consolidation was published in the Official Journal of the European Union on 26 October 2012, which included all the changes made by the Treaty of Lisbon in 2007.

⁸ There is considerable controversy over what these “*requirements*” might be in the case of the UK, which is beyond the scope of this article.

⁹ This is the phrase used in Art. 50(3).

Member State concerned, unanimously decides to extend this period". "The Treaties" are defined in Article 1 of the TEU as being the TEU itself and the TFEU. Thus, if either a "withdrawal agreement" is concluded within the two year period after Article 50 is invoked by the UK, or (in default of an extension of time in which to negotiate) at the end of that two year period, those two Treaties "will cease to apply" to the UK.

Article 288 of the TFEU states that "a regulation shall have general application. It shall be binding in its entirety and directly applicable to all Member States". It would seem therefore, that, according to EU law, upon a "withdrawal agreement" being concluded or at the end of the two-year period, Article 288 would cease to apply to the UK because it would cease to be a Member State. The three Regulations identified above are all regulations made under "the Treaties" and thus would, as a matter of EU law, cease to apply to the UK upon one or other of the events mentioned above. Similarly, the Lugano Convention 2007 will cease to have effect because the UK did not independently sign or ratify it; it was signed and ratified by the EU on behalf of all Member States.¹⁰

Section 2(1) of the European Communities Act 1972, in its present form, gives legal effect to "all such rights, powers, liabilities, obligations and restrictions from time to time created or arising under the Treaties". Section 1(1) of the 1972 Act defines "Treaties" and that term includes the TEU and TFEU. Logically, as a matter of construction of section 2(1), once the "Treaties" have ceased to have any effect in the UK under the terms of the Treaties, there are no rights, powers, liabilities, obligations or restrictions created or arising under the Treaties that effect the UK to which legal effect can be given within the UK. Therefore, as a matter of UK law, under the terms of the 1972 Act itself, neither "the Treaties", nor any regulation or convention made under them, will have any effect in the UK unless expressly incorporated by UK law. As a result, upon Brexit occurring, both as a matter of EU law and UK law, the Treaties (and regulations / conventions made under them) can have no effect in UK, unless some other legislative step is taken to give them effect.

It follows that, in the absence of any agreement between the UK and the EU within the 2 year period after Article 50 is invoked, all three Regulations identified above and the Lugano Convention 2007 will cease to have effect in the UK, as a matter of both EU and UK law. The major consequential question, in relation to each aspect identified above, then becomes: what regime will apply by default? For each of the three aspects we will first consider what we think is the default position upon Brexit and then, in relation to each, we will make our tentative suggestions as to whether the default regime is satisfactory or some other regime should be agreed or adopted. Lastly, we will consider the position of the European Courts and their jurisprudence post-Brexit.

¹⁰ See fn 7 above.

Jurisdiction and Enforcement: Default Position

As indicated above, the default position upon Brexit will be that neither B1R nor its predecessor regulation, Brussels 1, will have the force of law in the UK. However, section 2(1) of the CJA remains in force. It states that “*the Brussels Conventions*¹¹ shall have the force of law in the United Kingdom and judicial notice shall be taken of them”. As is well known, the Brussels Convention was concluded in 1968 by the original six member states of the EEC. Its object was to facilitate the enforcement of judgments in civil and commercial matters amongst Member States. It did so by creating rules to determine which court in those states would have jurisdiction to hear and determine disputes between parties domiciled in Member States and by creating further rules for the recognition and enforcement of judgments given by the court that had jurisdiction in accordance with the Brussels Convention’s rules. A protocol concluded in 1971 gave the ECJ jurisdiction to interpret the Brussels Convention. Amendments were made to Brussels Convention in 1978 at the time that the UK, together with the Republic of Ireland and Denmark, entered into an Accession Convention with the original six Contracting States. Further amendments to the Brussels Convention were made as other countries acceded to what had by then become the European Communities and was to become the EU.¹² Article 66 of the Brussels Convention states that it is concluded for an unlimited period and the UK has always remained a contracting party to it.

When Brussels 1 was agreed in 2000, it noted, in Article 68, that as between the member states of the Economic Community, with the exception of Denmark,¹³ the new regulation would “*supersede the 1968 Brussels Convention*”. The Brussels Convention thus continued to apply as between Denmark and the other Member States of the Economic Community. It also continued to apply to territories of those Member States that were within the scope of the Convention but excluded from Brussels 1 by virtue of Article 299 of the Maastricht Treaty.¹⁴ Accordingly, it was necessary to continue to give the Brussels Convention the force of law in the UK at that stage. Despite the fact that, in 2005, Denmark entered into an agreement with the other Member States of the EC to participate in Brussels 1, the Brussels Convention was

¹¹ This is plural because s1 (1) CJA, as amended, defined the Brussels Convention and the Lugano Convention – see below – together with the 1971 Protocol to the 1968 Convention, the 1973 Accession Convention and the 1989 and 1996 Accession Conventions as being “the Brussels Conventions”.

¹² Those amendments were given the force of law in the UK by SI 1990/2591.

¹³ This is because when Denmark had become a Member State of the EC in 1992, it opted out of numerous aspects of the Maastricht Treaty 1992, including those parts giving the EC competence to deal with justice matters. Therefore, when the legislative competence to create directly effective regulations on jurisdictional matters was passed to the EU by the Treaty of Amsterdam, it did not bind Denmark; hence, Brussels 1 had no effect in Denmark. See also paras 21 and 22 of the preamble to Brussels 1. The UK, which had also opted out of the “justice” elements of the Maastricht Treaty, had given specific notice under a Protocol that it wished to take part in Brussels 1, as is recognised in para. 21 of the preamble of Brussels 1.

¹⁴ Paragraph 23 of the preamble and Art. 68 of Brussels 1.

still required in relation to those territories excluded from Brussels 1, as noted in paragraph 23 of the preamble and Article 68.

There are similar provisions in B1R, which indicate that the Brussels Convention continues to have a limited application, although Article 68 of B1R stipulates the general rule that, as between “*the Member States*”, B1R will “*supersede*” the Brussels Convention. Thus, paragraph 9 of the preamble to B1R notes that the Brussels Convention continues to apply to the territories which fall within the territorial scope of the Brussels Convention but which are excluded from B1R by virtue of Articles 52 of TEU and Article 355 of TFEU, which define the territorial scope of those treaties, together called “*the Treaties*”.¹⁵ The territorial scope of the Treaties extends to a number of overseas territories of Member States, but does not include territories known as the French Overseas Collectives¹⁶ and to Aruba, which is a non-metropolitan part of the Kingdom of the Netherlands. Thus, although the current practical significance of the Brussels Convention is virtually nil,¹⁷ it has been necessary to continue to give it the force of law in the UK to facilitate continued application as between the UK and some outposts of former European empires.

When Brexit occurs, what will be the position of the Brussels Convention, assuming section 2(1) of the CJA remains in force, at a time when both B1R and Brussels 1 must cease to have any effect in the UK under both EU and UK law?

The key issue will be the effect of Art. 68 of Brussels 1 and the B1R on the operation of the Brussels Convention. That can be broken down into two sub-issues. First, the effect of Art. 68 on s.1(4) of the CJA and its impact on the applicable rules of jurisdiction under UK law and, secondly, the effect of Art. 68 as a matter of public international law and its impact on whether EU Member States are bound to recognise and enforce judgments handed down in the UK under the rules of the Brussels Convention.

In relation to the first issue, it is clear from the continued application of the Brussels Convention to a number of territories that it exists as a matter of public international law. Thus, there is still a convention to which section 2(1) of the CJA can sensibly give the force of law in the UK such that its provisions as to jurisdictional rules will apply. However, the current scope of its application is circumscribed by section 1(4) of the CCJA,¹⁸ which states that any question as to the applicability of Brussels 1 or the Brussels Convention is to be decided in accordance with Article 68 of Brussels 1. In our view, there are two possible constructions of the effect of s. 1(4) of the CJA upon Brexit. First, that the reference to Article 68 of Brussels 1 becomes nugatory because the court presumes that Parliament did not intend that the UK’s conflict of laws rules be dictated by the provision of a regulation to which it is no longer a party; on this construction, s. 1(4) can simply be read down as meaningless

¹⁵ The point is reiterated in Art. 68 of B1R.

¹⁶ New Caledonia, French Polynesia, Mayotte, Wallis and Futuna Islands, St Pierre & Miquelon.

¹⁷ Briggs, *Civil Jurisdiction and Judgments*, §3.02 (6th Ed, Oxford University Press 2015).

¹⁸ Inserted by Art. 4 and Sch. 2 para. 1(c) of the Civil Jurisdiction and Judgments Order, SI 2001/3929.

such that section 2(1) of the CJA applies without qualification and the rules contained in the Brussels Convention apply. Alternatively, the application of the Brussels Convention continues to be governed by Article 68 of Brussels 1, despite the fact that the UK is no longer a party to that regulation, whereby the application of the Brussels Convention will turn on what Article 68 of Brussels 1 means when it states that as between Member States Brussels 1 Regulation “*supersedes*” the Brussels Convention. On this construction, once Brussels 1 and B1R cease to have any effect in the UK, our view is that the terms of Article 68 suggests that Brussels 1 / the B1R will no longer “*supersede*” the Brussels Convention because the UK will no longer fall within the qualification of “*as between Member States*”. Thus, under the terms of the CJA, the Brussels Convention will apply as a matter of UK law under section 2(1) without the previous limitation noted in section 1(4).

It thus follows that under both constructions of section 1(4), and so far as the UK courts are concerned, the jurisdictional rules would be as set out in the Brussels Convention as incorporated by the CJA. Procedural aspects of this regime would be covered, as now, by Part 6 of the English and Welsh Civil Procedure Rules and their equivalent in Scotland and Northern Ireland. They would require amendment to take account of the fact that B1R no longer applied, but that would be a purely domestic law change and would be a comparatively straightforward task.

The second issue, i.e. whether other EU Member States would be bound by judgments entered under the Brussels Convention, is more complex because it requires an assessment of the public international, as opposed to domestic, law status of the Brussels Convention. In our view, upon Brexit, the Brussels Convention revives as between the UK and the EU Member States such that the latter will be bound to recognise and enforce judgments under the Brussels Convention. This is primarily because the wording of Article 68 of Brussels 1 and B1R. The wording “*as between the member states...supersedes*” does not evince an intention impliedly to terminate the Brussels Convention but rather to suspend its application for so long as the Regulations apply.¹⁹

In the event that Member States are not bound by the Brussels Convention, the argument then turns to whether the individually negotiated bilateral conventions entered into between EU Member States, which pre-date the Brussels Convention, were, themselves, terminated by the Brussels Convention.²⁰ The resolution of this argument depends on each individual bilateral treaty entered into and its interaction with the Brussels Convention, which is beyond the scope of this article. The key point to note here is that the non-application of the Brussels Convention would spell the demise of a single European regime and the uniformity that accompanies it. This would be most a unattractive position.

¹⁹ In this regard, we agree with the analysis of Dickinson, p 204–205, and Masters and McCrae, p 493.

²⁰ The UK entered into such conventions with France, Belgium, the Federal Republic of Germany, Austria, Italy and the Netherlands. The judgments entered by foreign courts under these conventions were enforced in the UK under the Foreign Judgments (Reciprocal Enforcement) Act 1933.

If the Brussels Convention does continue to bind EU Member States this leads to a further issue: whether the Brussels Convention regime applies to states that became Member States of the EU *after* Brussels 1 came into force; the argument being that they were never a party to the Brussels Convention, rather only to Brussels 1, and thus would not be bound to recognise and enforce judgments entered under it.²¹ In this regard, no EU Member State has expressly acceded to the Brussels Convention since the 1996 Accession Convention added Austria, Finland and Sweden, no doubt because Article 68 of Brussels 1 and B1R state that they supersede the Brussels Convention. Would all of the current Member States of the EU be subject to its rules as between each of them and the UK, or would only those that were a party to the Brussels Convention immediately before Brussels 1 came into force, plus Denmark, be bound by it?

Article 63 of the Brussels Convention stipulates:

*“The Contracting States recognize that any State which becomes a member of the European Economic Community shall be required to accept this Convention as a basis for the negotiations between the Contracting States and that State necessary to ensure the implementation of the last paragraph of Article 220 of the Treaty Establishing the European Economic Community.”*²²

In our view, that provision still has force between the contracting states because the Convention still exists as an international law instrument. This article would appear to be an agreement between existing contracting states to procure that any new Member State accepts that it would be bound by the Brussels Convention. This is consistent with the terms of Article 68 of both Brussels 1 and B1R which both make clear that Member States intend that the Brussels Convention will continue to apply as between Member States and the territories that were excluded from those regulations under the TEU and TFEU. It is arguable, therefore, that all the more recent EU Member States²³ have (at least) impliedly adhered to the Brussels Convention for the purposes of dealing with jurisdiction and enforcement involving a territory not covered by the Regulations, so that it applies as between the UK and all EU Member States upon the B1R and Brussels 1 ceasing to apply.

²¹ As at 1 March 2002, when Brussels 1 came into force, the contracting parties to the Brussels Convention were the original six EEC member states (Belgium, Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands) and those states that had acceded to the EC and the Brussels Convention since then, *viz.* Austria, Denmark, Finland, Greece, Ireland, Portugal, Spain, Sweden and the UK. The remaining current Member States of the EU only acceded to the Brussels 1 regime after 2001.

²² The Treaty of Rome 1957. The last bullet point of Art. 220 stipulates that Member States will, so far as is necessary, enter into negotiations with each other with a view to securing of the benefit of their nationals “*the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts and tribunals and of arbitral awards*” and the preamble to the Brussels Convention features a very similar phrase.

²³ Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Malta, Slovakia and Slovenia (2004); Bulgaria, Romania (2007) and Croatia (2013).

There can be no certainty about these arguments, however.²⁴ If there were any doubt about this, or, indeed, if there were any doubt about the UK courts being able to establish jurisdiction on the basis of the Brussels Convention's rules, it seems inevitable that the matter would ultimately have to be tested in the CJEU. This is because both the UK and the other Member States (or at least some of them) are a party to the 1971 Protocol conferring jurisdiction on the European Courts to interpret the Brussels Convention and that Protocol remains in force. To that extent, Brexit would not mean Brexit because the UK courts would still be subject to the decisions of the CJEU unless the UK unilaterally denounces its ratification of the 1971 Protocol. Even that step, if possible, would lead to problems if a court of a Member State refused to enforce a UK judgment given in a case where jurisdiction was founded on the Brussels Convention's rules, because there would then be no means by which the UK court could impose its view.

Similar problems arise about the default jurisdictional and enforcement regime that would be in force as between the UK and the states that are parties to the two successive Lugano Conventions of 1988 and 2007. The history of these conventions is also well known. In 1988, the Member States of what was then the EC concluded the Lugano Convention on jurisdiction and the enforcement of judgments with Member States of the European Free Trade Association ("EFTA"). Its aim was to extend the principles and rules of the Brussels Convention to the EFTA states and to strengthen legal and economic co-operation in Europe.²⁵ The Lugano Convention was ratified by the then 12 current Member States of the EC and the six members of EFTA.²⁶ It was ratified by the UK in 1991 and came into force in 1992 as a result of the Civil Jurisdiction and Judgments Act 1991.²⁷ Its provisions were identical to those of the Brussels Convention as modified up to 1998. By Article 62(1)(b) of the Lugano Convention 1988, states other than existing or future Member States of the EEC or EFTA could, through an existing Contracting State, be invited to accede to the Convention, provided there was unanimous agreement of the existing signatory states and the Contracting States referred to in Article 60(a) and (b).

The ECJ did not have jurisdiction to give judgments on the interpretation of the Lugano Convention, even though its terms were substantially the same as those of the Brussels Convention as amended by the Accession Conventions of 1978 and 1989. Instead, by Article 1 of the Second Protocol it was agreed that:

"The courts of each Contracting State shall, when applying and interpreting the provisions of the Convention, pay due account to the principles laid down by any

²⁴ The contrary argument is put persuasively in Dickinson, *op cit* fn 1 at 205–6.

²⁵ Preamble to the Lugano Convention.

²⁶ At the time these were Austria, Finland, Sweden, Iceland, Norway and Switzerland. The first three are now members of the EU. Adhesion to the Lugano Convention 1988 was not compulsory for EFTA states; thus, when Lichtenstein joined EFTA in 1991, it did not accede to it.

²⁷ Section 1, adding section 3A to the CJJA. Section 3A(1) stipulated "*The Lugano Convention shall have the force of law in the United Kingdom, and judicial notice shall be taken of it*".

relevant decision delivered by courts of the other Contracting States concerning provisions of this Convention”.

Article 2 of the Second Protocol provided for a system of exchange of information concerning judgments delivered pursuant to the Lugano Convention and the Brussels Convention, through a central body, which would be the Registrar of the ECJ. It is worth noting that there is nothing in this Protocol which obliges courts of Contracting States of the Lugano Convention to abide by judgments of the ECJ on issues of interpretation of provisions in the Brussels Convention that are identical or similar to those in the Lugano Convention. Nor is there anything that requires any reference to the European Courts for a preliminary ruling on issues of interpretation.

When work began on amendments to the Brussels Convention in 1997 it was contemplated that there would be parallel amendments to the Lugano Convention. Negotiations on the latter were held up because the European Commission insisted that, once the Amsterdam Treaty was in force (in 1999), it had sole legislative competence to enter into a Convention with the EFTA states and the individual Member States of the EC had none.²⁸ The matter was referred to the ECJ for its opinion and it concluded that the Commission’s view was correct.²⁹ The second Lugano Convention, concluded in 2007, was thus between the EU (acting for all Member States) and the current members of EFTA, less Lichtenstein.³⁰ The Lugano Convention 2007 was not given the force of law in the UK by making an amendment to the CJA (save as to various consequential matters) because it was considered that it took direct effect in the UK as an EU treaty.³¹ Article 69(6) of the Lugano Convention 2007 stipulates that (subject to Article 3(3) of Protocol 2),³² the Lugano Convention 2007 “shall replace” the Lugano Convention 1988.

The wording of the Lugano Convention 2007 follows that of Brussels 1. Protocol 2 deals with the issue of the “uniform interpretation of the Convention”. The preamble recognises that the CJEU has jurisdiction to give rulings on the interpretation of Brussels 1 and also that it has jurisdiction concerning the Lugano Convention 2007 “as regards [its] application by the courts of the Member States of the [EU]”. The preamble expresses a desire to prevent “divergent interpretations” of Brussels 1 and the Lugano Convention 2007 whilst acknowledging “full deference to the independence of the courts”. Article 1(1) of Protocol 2 requires that any court applying and interpreting the Lugano Convention 2007 must pay “due account” to the principles laid down “by any relevant decision concerning the provisions” in the 1988 Lugano Convention 1988, the Brussels Convention and Brussels 1 “by the courts of the States bound by this Convention and by the [CJEU]”. By Article 1(2), courts of Member

²⁸ TFEU Arts 2(1) and 3(2).

²⁹ Opinion 1/03 [2006] ECR I-114, paras 134–173.

³⁰ It entered into force between the Member States of the EU and Norway on 1 January 2010 and subsequently between the EU and Switzerland and Iceland as well.

³¹ See fn 7 above.

³² Art. 3(3) of Protocol 2 maintains the existing system of exchange of information about judgments on the Convention that was set up under the Lugano Convention 1988.

States remain obliged to refer matters to the CJEU regarding the interpretation of the Lugano Convention 2007. By Article 2, non-Member States of the EU are entitled to submit statements of case or written observations to the CJEU when a court of a Member State has referred, for a preliminary ruling, a question of the interpretation of the Lugano Convention 2007 or Brussels 1. Article 3 provides for the continuation of the system of exchange of information set up by the Lugano Convention 1988.

Following Brexit, as noted above, we think it clear that the Lugano Convention 2007 would cease to have direct effect in the UK because the UK is currently only bound by virtue of being a member of the EU on the basis of Article 216(2) of the TFEU.³³ The UK could become a separate party to the Lugano Convention 2007, a point we consider below. The issue upon Brexit would be the status, if any, of the Lugano Convention 1988. At present, the Lugano Convention 1988 is not a part of UK law because all references to it in the CJA were replaced by references to the Lugano Convention 2007.³⁴ Further, there must be doubts as to whether, as an international law instrument, the Lugano Convention 1988 still exists. Article 69(6) of the Lugano Convention 2007 stated plainly that it “*shall replace*” the earlier convention and the ECJ’s opinion was that the purpose of the Lugano Convention 2007 was to replace the earlier one; but that view is not conclusive. The public international law conventions concerning the effect of treaties³⁵ do not deal specifically with the question of whether one treaty is impliedly terminated where a supra-national body such as the EU has entered into a new treaty on behalf of its Member States with other states, with the intention that the new treaty should “*replace*” a previous one concluded between certain states and some of the Member States of that supra-national body.³⁶ Our tentative view is that the Lugano Convention 1988 has been terminated by all those who are a party to the Lugano Convention 2007, including the UK. Thus, following Brexit it would not make legal sense for the UK to attempt give the Lugano Convention 1988 the force of law in the UK by statutory means with the intention of reverting to its rules on jurisdiction and enforcement as between the UK, other Member States of the EU and the other signatories to the Lugano Convention 1988.

Jurisdiction and Enforcement: The Best Outcome?

The EU and the EFTA countries will remain important trading partners of the UK post-Brexit. Cross-border civil and commercial litigation between individuals or companies domiciled in the UK and other EU/EFTA states will continue to be an

³³ This provides that “*Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States*”.

³⁴ Civil Jurisdiction and Judgments Order 2009 SI 2009/3131, Reg 3(2) and Schedule 2 para. 1(c).

³⁵ In particular, the Vienna Convention on the Law of Treaties (1969) and the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (1986).

³⁶ See the discussion in Dickinson, *op cit* fn 1 at page 206.

important element in civil and commercial litigation in the UK and those states.³⁷ It will continue to be important to be able to enforce judgments across borders. Thus, in our view, it will remain important to have common rules on jurisdiction and enforcement across as wide a group of states as possible. The only questions are: which would be the best regime for the UK and how is it to be achieved?

B1R made significant changes to Brussels 1 for which the UK had pressed heavily and which commentators agree were for the better.³⁸ Four matters are particularly important.

First, Article 1(1)(d) of Brussels 1 stated that “*the Regulation shall not apply to arbitration*”, but gave no further explanation or elaboration, nor was there any mention of “*the arbitration exclusion*” in its recitals. The laconic nature of the stated exclusion had given rise to problems about its scope and also about the validity of the juridical weapons used by English courts to enforce arbitration agreements.³⁹ B1R has not altered the terms of Art. 1(1)(d) but there is a new recital 12 at the outset of B1R, which deals elaborately with the arbitration exclusion.⁴⁰ As London is a leading arbitration centre, this expanded explanation is to be welcomed because it has opened the possibility that anti-suit injunctions may be used in certain, limited, circumstances.⁴¹

Secondly, the new Article 25 of the B1R has enlarged the ambit of the old Article 23. The new rule permits the enforcement of jurisdiction clauses in agreements between parties “*regardless of their domicile*”, whereas Article 23 had applied only when one of the parties, at least, was domiciled in a Member State. Thus, the EU regime permits the enforcement of an English jurisdiction clause even if neither party has any link to the UK, save for the fact that they have agreed that the English court should have jurisdiction over their disputes.⁴² This change added an important protection to English jurisdiction clauses in contracts where neither party had any connection with the EU and has dispensed with the need to obtain permission to serve out of the jurisdiction in such cases.⁴³

³⁷ For an example of cross-border litigation brought in England but involving companies domiciled in Luxemburg, Cyprus (EU), Switzerland (Lugano Convention state) and the British Virgin Islands in which there were issues about jurisdiction see: *Joint Stock Company “Aeroflot Russian Airlines” v. Berezovsky* [2013] 2 Lloyd’s Rep 242.

³⁸ See for example Briggs, *Civil Jurisdiction and Judgments*, §1.13; Briggs, *The Brussels Ibis Regulation Appears on the Horizon* 2 L.M.C.L.Q. 157–166 (2011).

³⁹ Most notoriously, the ECJ’s rejection of the English court’s use of the anti-suit injunction as a means of enforcing arbitration agreements when a party started proceedings in the court of a Member State in breach of the arbitration clause: *Allianz SpA v. West Tankers Inc* [2009] ECR I–663.

⁴⁰ Recital 12 has the effect of negating the English Court of Appeal decision in *National Navigation Co v. Endesa Generation SA, the “WADI SUDR”* [2010] 1 Lloyd’s Rep 193.

⁴¹ *Re Gazprom OAO* [2015] 1 Lloyd’s Rep 610.

⁴² There are certain conditions that have to be fulfilled as set out in Art. 25. The only substantive prohibition, if those conditions are fulfilled, is if the jurisdiction agreement is held to be “*null and void as to its substantive validity*” under the law of the state chosen to have jurisdiction.

⁴³ See the English and Welsh Civil Procedure Rules, r. 6.33(2)(b)(v).

Thirdly, the rules relating to *lis pendens* have been modified in the new Articles 29 to 31. The new Article 31(2) ensures that where a court is given jurisdiction under an Article 25 exclusive jurisdiction agreement and is “seised” of a matter, then if a party attempts to bring an action in another court, that later court must stay the action to enable the first court to decide its jurisdiction. This reverses the ECJ’s unfortunate decision in *Erich Gasser GmbH v. MISAT*⁴⁴ and should end the notorious ‘Italian torpedo’ procedure intended to cripple or sink legitimate proceedings founded on an English exclusive jurisdiction clause.

Fourthly, the new provisions in Articles 33 and 34 permit a court in a Member State to stay proceedings in favour of a court in a non-Member State, a ‘third state’, if certain pre-conditions are fulfilled. To a limited extent the provisions meet the well-founded criticisms of the ECJ’s decision in *Owusu v. Jackson*,⁴⁵ where the strict application of the Brussels I jurisdictional rules had produced an utterly impractical result. This, along with the third change noted above, particularly benefits the English courts.

In our view, therefore, there would be considerable benefits if the UK could continue to participate in the regime established by B1R. Two issues arise: first, what are the mechanics for doing so, and, secondly, will this mean that the UK would have to be subject to the jurisdiction of the CJEU? Whereas there would be no legal, and probably little political, opposition to adherence to the B1R rules as such, we imagine that there could be much political reluctance to agree to a submission to the CJEU on matters of interpretation of B1R.

As to the mechanics, we think that the solution would lie in a bilateral treaty or convention between the UK and the EU,⁴⁶ acting through the European Commission, along the lines of the EC-Denmark Agreement of 2005⁴⁷ whereby Denmark adhered to Brussels I. By the proposed treaty, the UK would adhere to the terms of B1R, thus leading to minimum disruption with the present regime and enabling the UK to take advantage of the many improvements in B1R in which, as noted above, the UK played such a prominent role in drafting. The relevant terms of the new treaty would be given the force of law in the UK by a suitable amendment to the CJA.

There are, however, some difficulties with this apparently simple, Gilbertian,⁴⁸ solution. First, it would be in the interests of both the UK and all other Member States that there should be unanimous agreement on any further amendments to B1R. Thus the UK would have to ensure that it had the right to take part in those negotiations

⁴⁴ [2005] 1 QB 1.

⁴⁵ [2005] QB 801.

⁴⁶ Because Denmark has not ‘opted in’ to the EU having competence to legislate with other states on justice matters, the treaty would actually have to be with the EU and Denmark.

⁴⁷ The “Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters”: see [2005] OJ L299/62.

⁴⁸ Cf *Iolanthe* Act II where the problem was solved by the removal of the word “not” in a law.

despite not being a Member State.⁴⁹ Secondly, the UK would wish to preserve its right to decide itself on whether to enter independently into other international conventions on jurisdiction, such as the Hague Convention on Choice of Court Agreements. Thirdly, the parties would have to resolve the issue of the jurisdiction of the CJEU on issues concerning the interpretation of the terms of the new EU-UK treaty. Under Article 6(1) of the EC-Denmark Agreement, to which Brussels 1 is annexed and is deemed part of the agreement, the courts of Denmark are obliged to refer issues of interpretation of the agreement (and so Brussels 1) to the CJEU in the same circumstances in which any court of another Member State would be obliged to do so in respect of the interpretation of Brussels 1. Denmark may request that the CJEU give a ruling on the interpretation of Brussels 1 and it can submit observations in a case before the CJEU on an aspect of Brussels 1.⁵⁰ However, “*under Danish law*” the Danish courts need only take “*due account*” of CJEU decisions on both Brussels 1 and the Brussels Convention,⁵¹ although the Commission is given the right to bring proceedings against Denmark for non-compliance with the agreement.⁵² It must be likely that the EU would, at least, demand the same regime to apply to the UK. The re-introduction of supremacy of the CJEU on these matters and the tutelage of the Commission may be politically unacceptable to some. If so, then the solution might be to adopt the provisions of Articles 1 and 2 of Protocol 2 of the Lugano Convention 2007. However, they do not deal with the issue of possible amendments to what is now B1R.

If that were not possible, then the next best solution would be for the UK enter into a treaty with the EU and EFTA states to adhere to the Lugano Convention 2007. This is less satisfactory because it does not contain the improvements brought about by B1R. Articles 70(1)(c) and 72 set out the mechanism for adherence in the case of a state which is neither a Member State of the EU or an EFTA state. By Article 72, the unanimous consent of the existing contracting parties is needed for the adherence of a non-member state. However, we imagine that the European Commission would give consent on behalf of the EU states and it seems doubtful that other existing contracting parties would refuse to permit the UK to adhere to the convention.

⁴⁹ Compare the EC-Denmark agreement Art. 3(1) which stipulated that Denmark would not take part in the adoption of amendments to Brussels 1. All it could do was notify its intention to apply them, which it did.

⁵⁰ Art. 6(3) and (4) respectively.

⁵¹ Art. 6(2). It is worth noting that subsequent to EU-Danish Agreement, however, Denmark accepted the supremacy of the CJEU through its lack of objection to the TFEU and the consequent effect of Art. 6(6); see *The Commissioners for Her Majesty's Revenue & Customs v. Sunico ApS* Case C-49/12, §28. On the assumption that the “*due account*” test were to be the agreed test, the UK courts might apply such a test as it has developed under s.2 (1) of the Human Rights Act 1998 in relation to decisions of the European Court of Human Rights: see *R (Alconbury) v. Sec of State for the Environment Transport and the Regions* [2003] 2 AC 295 at para. 26 per Lord Slynn of Hadley, with whom the other law lords agreed.

⁵² Art. 7(1).

Conflict of Laws in Contract and Tort: The Default Position Post-Brexit

As we have already noted, in default of any agreement, Rome I and Rome II would cease to have any effect in the UK post-Brexit. What would be the default position with regards to the conflict of laws rules to be applied by courts in the UK in relation to contractual and non-contractual obligations respectively?

Prior to Rome I coming into force, issues of conflict of laws concerning contractual obligations were determined according to the Rome Convention 1980,⁵³ which had been given the force of law in the UK by section 2 of the Contracts (Applicable Law) Act 1990 (“the 1990 Act”).⁵⁴ By section 3(1) of the 1990 Act, issues as to the meaning and effect of the Rome Convention were to be referred to the ECJ upon the same basis as the 1971 Protocol to the Brussels Convention. By section 3(2) “*judicial notice shall be taken of any decision of, or expression of opinion by, the European Court on any such question*”. The terms of section 3 of the 1990 Act make it clear that the ECJ’s decisions on the meaning of the Rome Convention were to be binding on UK courts. This is to be contrasted with the position of the ECJ and CJEU under the two Lugano Conventions. When Rome I came into force, the 1990 Act was disappplied by new sections 4A and 4B, which were added by a statutory instrument.⁵⁵ Section 4A stipulates that “*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*”. Once Brexit occurs, no issues relating to contractual obligations will fall to be determined under Rome I, so that the 1990 Act will have full force and effect again.

The same will apply in relation to the choice of law rules concerning “*non-contractual obligations*”, which are currently determined by Rome II.⁵⁶ Prior to that coming into effect, the choice of law rules in tort were governed in the UK by the provisions of Part III of the Private International Law (Miscellaneous Provisions) Act 1995 (“the 1995 Act”). Those statutory reforms to the common law rules were the fruit of a joint Law Commission and Scottish Law Commission report of 1990.⁵⁷ The 1995 Act did not, therefore, give the force of law in the UK to any international convention on the topic, although the Law Commissions’ report had taken account of conflict of laws rules in many European countries and the delict jurisdiction provisions in the Brussels Convention.⁵⁸ When Rome II came into force, Part III of the 1995 Act was disappplied (in the same way as the 1990 Act), by virtue of sections 15A

⁵³ This was an EC convention whose full title is ‘The EC Convention on the law applicable to contractual obligations’ (Rome 1980).

⁵⁴ Two provisions, in Arts 7(1) and 10(1)(e), were not given statutory force, as noted in section 2(2) of the 1990 Act. The Act applied to all parts of the UK and Northern Ireland and section 2(3) applied the Rome Convention to different parts of the UK regardless of Art. 19(2).

⁵⁵ SI 3064 of 2009 added s.4A and SI 410 of 2009 added s.4B. They were made pursuant to s.2 (2) of the European Communities Act 1972.

⁵⁶ Apart from the choice of law rules concerning defamation actions which are still governed by the common law.

⁵⁷ Law Commission Report 193 and Scottish Law Commission Report 129.

⁵⁸ Art. 5(3).

and B, which were added to the 1995 Act by statutory instrument.⁵⁹ Thus when Rome II ceases to have effect in the UK, Part III of the 1995 Act will apply again in the UK as a whole.

Conflict of Laws in Contract and Tort: What is the Best Solution Post-Brexit?

In our view, there can be no doubt that the best solution would be to amend the 1990 and 1995 Acts so as to incorporate Rome I and II into UK domestic law. In such circumstances, the relevant terms of each Regulation would be set out in a schedule to each Act, just as those of the Brussels Convention were scheduled to the CJJA. In the main, the terms of both Regulations are well regarded by those who practice in this area. There is no significant differences between the provisions of the Rome Convention and Rome I. The chief difference between Rome II and Part III of the 1995 Act is that the former focuses on the location of the harm of the tort, whereas the latter focuses on the location of the constituent elements of the tort.⁶⁰ Rome II also deals with certain specific torts and the approach to determining the applicable law of each, whereas section 11(2) of the 1995 Act is more limited in scope. Overall, the Rome II regime is a more certain and predictable regime. There are some difficulties in the application of some provisions of Rome II,⁶¹ but none that should lead the UK to reject those terms.

The only contentious issue could be the extent to which UK courts should have regard to prior and future decisions of the CJEU on the interpretation of the provisions of Rome I and II. We consider the legal significance of past decisions of the European Courts in the post-Brexit legal landscape in the UK below. We suggest that the best solution would be to add provisions to the 1990 and 1995 Acts so as to stipulate that the UK courts should have due regard / account to decisions of the CJEU on the interpretation and application of the two Regulations. This would follow the example of section 2(1) of the Human Rights Act 1998 in relation to the European Convention on Human Rights and mirror the likely position under any EU-UK agreement to adhere to the B1R Régime⁶² and/or the Lugano Convention 2007.

⁵⁹ The Law Applicable to Non-Contractual Obligations Regulations: SI 2986 of 2008 for England, Wales and Northern Ireland and SI 404 of 2008 for Scotland. These were made pursuant to s.2(2) of the European Communities Act 1972.

⁶⁰ In both cases, such law is disapplied where another law is substantially more appropriate: see s.12 of the 1995 Act and Art. 4(3) of Rome II.

⁶¹ By way of example, the decision of the CJEU in the two *Ergo Insurance cases* C-359/14 and C-475/14 (handed down in December 2015), on the applicable law in relation to rights of contribution between insurers is less than pelucidly clear.

⁶² Based on the terms of Art. 6 of the Danish Agreement.

The Jurisprudential Standing of Decisions of the European Courts Post-Brexit

We assume for the purposes of this discussion that, post – Brexit, section 3(2) of the European Communities Act 1972 will be repealed. Thus, UK judges will not have to take judicial notice of “*the Treaties, of the Official Journal of the European Union and of any decision of, or expression of opinion by the European Court*” on any question as to the meaning or effect of any of the Treaties,⁶³ or as to the validity, meaning or effect of any EU instrument, including the three Regulations with which we are particularly concerned. In the absence of any legislation on the topic, that would still leave open the question of the jurisprudential standing of any decision of the European Courts that had been given before Brexit on the meaning or effect of any of the Regulations, to the extent that they remained part of the law of the UK. There is a further issue as to the jurisprudential standing of future CJEU decisions on the three Regulations, which would, again, depend on whether there was any legislation on the topic.

On the first issue, if, post-Brexit, a term of a particular EU regulation was a part of UK law, (even if it is not embodied in an EU-UK agreement as we envisage for the jurisdiction and enforcement regime), any prior decision of the European Courts should generally remain binding on UK courts, for reasons of logic and practicality. If a certain provision in a regulation has been given a particular interpretation by the European Courts at a time when that interpretation was binding on the UK courts, then, if the same term is used in the post-Brexit legislation, it is logical to continue to give it the same interpretation. In practice, parties will have been advised, and acted, on the interpretation as propounded by the European Courts. In the interests of certainty, that interpretation should be respected. In our view, courts below the Supreme Court should therefore always be obliged to follow the interpretation given by the European Courts prior to Brexit. However, even the CJEU changes its view on the interpretation of EU instruments, just as the House of Lords and Supreme Court have changed their views on interpretation of statutes or statutory instruments. Thus, in the post-Brexit era, if the CJEU’s interpretation of a particular provision was challenged in the Supreme Court, it should be free to express a different view if it felt compelled to do so and having taken due regard / account of the European Court’s interpretation.

A particular problem could arise in respect of cases which had been started before Brexit but were pending before the UK courts after Brexit. It seems to us that, on conflict of laws issues, the courts should apply the law as it stood at the time that the cause of action arose or the parties made their choice of law. In relation to jurisdiction, the courts should apply the law at the time when the particular jurisdictional rule relied on became effective. This is not necessarily the same point in time for all rules.⁶⁴ The reason for applying those rules as they existed at the relevant time is that the

⁶³ As defined, see section 1(1) of the 1971 Act.

⁶⁴ Thus, under B1R, the basic rule in Art. 4 applies when the proceedings are started whereas under the contract rule, in Art. 7(1), it may be at the time the contract was concluded or at some later time when performance was undertaken. Under the tort rule, in Art. 7(2), jurisdiction will be determined when and where the harmful event occurred.

parties will have accrued those legal rights, whether they be substantive (in the case of conflict rules) or procedural (in the case of jurisdictional rules). To deprive the parties of those accrued rights would be unfair and, possibly, contrary to Article 1 of Protocol 1 of the European Convention on Human Rights.

A comparative study of those states where courts moved from being bound by decisions of the UK House of Lords is instructive. Thus, following Irish independence in 1922, when Article 73 of the 1922 Irish Constitution provided that the laws in force in the territory of the Free State immediately prior to its coming into being were to remain in force until repealed or amended by the Irish Parliament, it was judicially interpreted as meaning that not only pre-1922 Westminster statutes continued in force but also judge made rules of common law and equity made prior to 1922.⁶⁵ In R Keane's contribution to *The Judicial House of Lords 1876 – 2009*⁶⁶ he states that:

“...in the early years of independence, decisions of the House of Lords prior to 1922 were considered binding on all the courts of the Free State, including the Supreme court, as were decisions of the former Court of Appeal ... While the post 1922 decisions of the House of Lords were persuasive precedents only, there was no serious indication initially of the development of a distinctive Irish jurisprudence.”

That position changed following the introduction of the 1937 Constitution. In 1965 the Irish Supreme Court formally adopted a position similar to that set out in the House of Lords Practice Direction of the same year in which it announced that it would not in future have to be bound by its previous decisions.⁶⁷

By way of further example, Australia became a Dominion in 1901 yet its courts still felt bound by House of Lords decisions until the 1960s. Then, in *Skelton v. Collins*⁶⁸ Kitto J noted that the Australian High Court was not strictly bound by decisions of the House of Lords, but had always recognised “and must necessarily recognise their peculiarly high persuasive value” and the opinions delivered, whether dissenting or concurring, must command “our most respectful attention”. In more recent years, the flow of shared “rational persuasion” goes both ways between the Supreme Court of the UK and the High Court of Australia.⁶⁹ A similar process has occurred in New Zealand⁷⁰ and Canada.⁷¹

⁶⁵ See *Mayo-Perrott v. Mayo-Perrott* [1958] IR 336.

⁶⁶ Blom-Cooper QC, Dickson and Drewery, *The Judicial House of Lords 1876–2009*, 300–301 (Oxford University Press, 2009).

⁶⁷ *Practice Statement (Judicial Precedent)* [1966] 1WLR 1234 (HL).

⁶⁸ (1966) 115 CLR 94, para. 14.

⁶⁹ As noted by M Kirby in *The Judicial House of Lords 1876–2009*, p 344–345.

⁷⁰ See *Barker v. Barker* [1924] NZLR 1078; *Jackson v. Jackson* [1924] P 19; *Corbett v. Social Security Commission* [1962] NZLR 878; *Ross v. McCarthy* [1970] NZLR 449; *Bognuda v. Upton & Shearer Ltd* [1972] NZLR 741; *North Island Wholesale Groceries Ltd v. Hewin* [1982] 2 NZLR 176, 195.

⁷¹ See Sharpe, *The Judicial House of Lords 1876–2009*, p 352–359.

We cannot predict with certainty whether the CJEU will play any part in the future in interpreting UK laws that embody Rome I, Rome II, or B1R; nor can we predict the future approach of Supreme Court judges to the jurisprudential force of past and future CJEU decisions. The matter may be dealt with by treaties or legislation, as in the case of the EC-Denmark Agreement, the Lugano Convention 2007, and in section 2(1) of the Human Rights Act 1998. Alternatively, it may simply be left open to the Supreme Court to fashion its own approach. In our view, it is in the interests of all to have a high degree of uniformity of approach to both jurisdictional rules and conflict of laws rules across the UK, the EU and the EFTA states and, indeed, any other states that wish to have a common system of such rules. But inflexible uniformity is not, necessarily, best. So we think that much can be learned from the experience of those courts formerly bound by House of Lords authority but then liberated to reach decisions independently. Whether or not a test of due regard / account is to be adopted, we suggest the right approach is that (save as discussed above) CJEU judgments should, at least initially, be persuasive but not binding. The beauty and strength of the common law has always been its ability to draw on the full spectrum of intellectual thought whether that be from domestic courts, foreign courts or from jurists. As to the latter, Lord Goff of Chieveley, a master in so many areas of the law, not least the conflict of laws, once said when commenting on the role of jurists in fashioning the law:

*“For jurists are pilgrims with us on the endless road to unattainable perfection; and we have it on the excellent authority of Geoffrey Chaucer that conversations among pilgrims can be most rewarding.”*⁷²

We hope that Brexit will provide English courts with the flexibility to give judgments based on principle, which are fashioned by rational persuasion and influenced by the full spectrum of sources, including decisions of the CJEU, leading to intellectually strong and durable decisions.

⁷² *Spiliada Maritime Corporation v. Cansulex Ltd* [1987] AC 460 at 488C.