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Brexit: A New Era for Recognition and Enforcement of English Judgments in Europe or Turning Back the Clock? Lessons to Be Learned From the Swiss Example*

Sarah Gabriel, Sandrine Giroud, Benoît Mauron and Vlad Meerovich[†]

Introduction

The position of England and Wales as the leading jurisdiction for cross-border litigation has been placed in question following the United Kingdom's notification of its intention to leave the European Union on 29 March 2017 ('Brexit'). The notification marked the beginning of what was initially intended to be a two-year time frame, ending on 29 March 2019, in which to negotiate a withdrawal agreement. Yet, at the time of writing, the terms of the UK's secession from and future relationship with the EU remain unknown. Unsurprisingly then, Brexit and the EU-UK negotiations to date have generated a great deal of concern, with some forecasting the end of London's dominance of international high-value litigation. In particular, the uncertainty over what regime will govern the twinned issues of jurisdiction and recognition and enforcement of judgments

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[†] Sarah Gabriel is a partner with Peters & Peters, London (sgabriel@petersandpeters.com); Sandrine Giroud is a partner with LALIVE, Geneva (sgiroud@lalive.law); Benoît Mauron is a counsel with LALIVE, Geneva (bamauron@lalive.law); and Vlad Meerovich is a senior associate with Peters & Peters, London (vmeerovich@petersandpeters.com).

in civil and commercial matters between the UK and EU Member States continues to provide ground for pessimism among the UK legal community.

In the first part of this article, we provide an overview of key milestones in and the current status of the discussions between the EU and the UK on the terms on which Brexit will be implemented and outline the legal framework governing the situation during the transition period in respect of judicial cooperation in civil and commercial matters. We also discuss the Swiss example, showing how third-party states are adjusting to this impending paradigm shift and associated opportunities. In the second part, we recall the benefits of bilateral or multilateral agreements in the context of judicial cooperation, and then consider the options that are in principle available to the UK in respect of: (1) jurisdiction; and (2) recognition and enforcement of judgments in civil and commercial matters. Given the UK Government's declared intention to rejoin the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the '2007 Lugano Convention'),¹ we discuss the position from the perspective of a Lugano Convention Contracting State, namely Switzerland, which has effectively cooperated with its European partner states on this basis for almost ten years.

What are the milestones and current status of discussions?

On 19 March 2018, the UK and the EU agreed at political level to a transition phase between the UK's withdrawal and the entry into force of an arrangement governing future relations. The transition period – which currently consists of the UK undertaking to continue applying EU law (including newly promulgated provisions) and subjecting itself to the Court of Justice of the EU (CJEU) jurisdiction – is scheduled to end on 31 December 2020.² It is however contingent upon the parties agreeing the withdrawal agreement. On 19 June 2018, the parties issued a joint statement on the progress of negotiations in respect of the draft withdrawal agreement, announcing that the text of what was then Article 63 of the

1 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 30 October 2007, published in the Official Journal on 21 December 2007, OJ L 339, pp 3–41.

2 Art 126 of the Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018.

draft agreement has been agreed.³ This provision, now Article 67 in the final draft agreed at the level of negotiators on 14 November 2018 (the ‘Draft Withdrawal Agreement’),⁴ provides, *inter alia*, that the existing regime, including Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (the ‘Brussels I Recast Regulation’) shall continue to govern the position in respect of legal proceedings instituted before the end of the transition period. Pursuant to Article 129 of the Draft Withdrawal Agreement, the UK will be bound by the existing international agreements concluded by the EU during the transition period. A footnote to Article 129 adds that the EU will notify the other parties to these agreements that during the transition period, the UK is to be treated as a Member State for the purposes of these agreements. Of course, there is no guarantee of the outcome until such time as the Draft Withdrawal Agreement is ratified, and so uncertainty continues, even in respect of the position during the transition period.⁵

Looking beyond the transition period, the EU leaders have to date expressed interest only in a limited area to be open to judicial cooperation in the realm of civil law. On 23 March 2018, the European Council issued guidelines on the framework for the future EU-UK relationship,⁶ which appear to confine the prospects of EU-UK cooperation in the civil judicial area principally to family law: ‘The future partnership should

3 Joint statement from the negotiators of the European Union and the United Kingdom Government on progress of negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union, 19 June 2018 available at https://ec.europa.eu/commission/sites/beta-political/files/joint_statement.pdf accessed 7 March 2019.

4 Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators’ level on 14 November 2018 https://ec.europa.eu/commission/files/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-agreed-negotiators-level-14-november-2018_en accessed 21 November 2018.

5 On 14 November 2018, the UK Cabinet of Ministers approved the Draft Withdrawal Agreement (PM’s statement on Brexit: 14 November 2018 www.gov.uk/government/speeches/pms-statement-on-brexite-14-november-2018 accessed 7 March 2019). On 25 November 2018, the Draft Withdrawal Agreement was endorsed by the European Council www.consilium.europa.eu/en/meetings/european-council/2018/11/25/ accessed 7 March 2019. On 15 January 2019, after five days of debate, the UK House of Commons voted against the Draft Withdrawal Agreement, with MPs voting 432 to 202 to reject the Draft Withdrawal Agreement www.parliament.uk/business/news/2019/parliamentary-news-2019/meaningful-vote-on-brexite-resumes-in-the-commons accessed 7 March 2019.

6 The European Council (Art 50) guidelines on the framework for future EU-UK relationship, 23 March 2018 available at www.consilium.europa.eu/en/press/press-releases/2018/03/23/european-council-art-50-guidelines-on-the-framework-for-the-future-eu-uk-relationship-23-march-2018 accessed 21 November 2018.

include ambitious provisions on movement of natural persons, based on full reciprocity and non-discrimination among Member States, and related areas such as coordination of social security and recognition of professional qualifications. In this context, options for judicial cooperation in matrimonial, parental responsibility and other related matters could be explored.⁷

The UK Cabinet of Ministers met at Chequers on 6 July 2018 to agree a proposal for the UK's future partnership with the EU.⁸ Notwithstanding that the Chequers proposal was collectively adopted by the Cabinet, the Secretaries of State for Exiting the European Union and for Foreign and Commonwealth Affairs resigned on 8 and 9 July 2018 respectively citing their opposition to the Chequers proposal. On 12 July 2018, the UK Government published a white paper elaborating its vision of the future partnership as set out in the Chequers proposal (the 'White Paper').⁹

On the subject of cooperation in the civil judicial area, the White Paper said that the UK will be seeking to: (1) rejoin the 2007 Lugano Convention that currently binds EU Member States and Iceland, Norway and Switzerland;¹⁰ and (2) explore a new bilateral agreement with the EU, which would cover 'a coherent package of rules on jurisdiction, choice of jurisdiction, applicable law, and recognition and enforcement of judgments in civil, commercial, insolvency and family matters', seeking to build 'on the principles established in the Lugano Convention and subsequent developments at EU level in civil judicial cooperation between the UK and Member States' and reflecting 'the long history of cooperation in this field based on mutual trust in each other's legal systems'.¹¹

Non-EU states (so-called 'third-party states'), such as Switzerland, would likely wish to follow this path and conclude a similar framework agreement at a bilateral level with the UK, or would act autonomously to preserve the existing regime should a framework agreement not be reached. These discussions encompass the enforcement of judicial decisions in commercial

7 Para 10 of the European Council Guidelines. The Political Declaration on future EU-UK relations endorsed by the European Council on 25 November 2018 similarly confines the civil EU-UK judicial cooperation to family law (para 58 of the Declaration <http://data.consilium.europa.eu/doc/document/XT-21095-2018-INIT/en/pdf> accessed 7 March 2019).

8 HM Government, *Statement from HM Government*, 6 July 2018 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723460/CHEQUERS_STATEMENT_-_FINAL.PDF accessed 21 November 2018.

9 HM Government, *The Future Relationship Between the United Kingdom and the European Union*, 12 July 2018, Cm 9593 www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union accessed 21 November 2018.

10 OJ L 339, 21 December 2007, pp 3–41.

11 Paras 128 and 145–148 of the White Paper, Cm 9593.

matters. Third-party states are not formally prevented from having these discussions with the UK until Brexit takes place. Although until Brexit takes place, the UK is deprived of authority to conclude international treaties on ‘European topics’, a power that rests exclusively with the EU pursuant to Article 3(1) (e) of the Treaty on the Functioning of the European Union,¹² Article 129(4) of the Draft Withdrawal Agreement expressly permits the UK to negotiate, sign and ratify international agreements in areas of exclusive competence of the EU during the transition period, provided those agreements do not enter into force during the transition period.

As an illustration of steps taken by third-party states to anticipate Brexit, Switzerland has decided to adjust its ‘Mind the Gap Strategy’, which was adopted in October 2016 with a view to ‘safeguard[ing] the existing mutual rights and obligations until the Brexit and extend them (‘Mind the Gap’ strategy), if need be’.¹³ On 25 April 2018, the Swiss Government outlined the next steps of its action plan in that respect,¹⁴ stressing that it wishes to ensure that the existing mutual rights and obligations between Switzerland and the UK will continue to apply after the UK leaves the EU. In furtherance of the plan, Switzerland and the UK reached agreements concerning citizens’ rights on 20 December 2018¹⁵ and trade continuity on 11 February 2019.¹⁶ The agreements do not cover judicial cooperation in civil and commercial matters.

While the UK Government has declared its intention to remain a party to the 2007 Lugano Convention, its ability to do so in respect of EU Member States lies in the hands of the EU. The UK is not a contracting party to

12 OJ C 326, 26 October 2012, pp 1–390.

13 ‘The United Kingdom leaving the European Union (Brexit) and the “Mind the Gap” strategy of the Swiss government’, Mission of Switzerland to the European Union, Federal Department of Foreign Affairs www.eda.admin.ch/missions/mission-eu-brussels/en/home/key-issues/brexit.html accessed 30 April 2018.

14 Press release of the Swiss Federal Council ‘Federal Council agrees next steps in Switzerland–UK relations’ dated 25 April 2018 www.admin.ch/gov/en/start/documentation/media-releases.msg-id-70536.html accessed 30 April 2018.

15 Agreement between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation on Citizens’ Rights following the Withdrawal of the United Kingdom from the European Union and the Free Movement of Persons Agreement published on gov.uk on 20 December 2018 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767003/Agreement_between_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_and_the_Swiss_Confederation_on_citizens__rights_following_the_withdrawal_of_the_United_Kingdom_from_the_European_Union_and_the_Free_Movement_of_Persons_Agreement.pdf accessed 7 March 2019.

16 Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation of 11 February 2019 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/780200/CS_Swiss_4.2019_FTA.pdf accessed 7 March 2019.

the 2007 Lugano Convention: it is bound by it through membership of the EU and Brexit will terminate the UK's membership of both the EU and the 2007 Lugano Convention.¹⁷ If the UK is to rejoin the 2007 Lugano Convention in its own right, under Article 72(4) of the Convention, the EU will have to acquiesce to the accession. In particular, the UK will not be able to circumvent this process by rejoining the European Free Trade Agreement (EFTA), as Article 69(1) of the 2007 Lugano Convention provides that it shall be open for signatures only to '[...] States which, at the time of the opening for signature, are Members of the European Free Trade Association'.

What are the prospects of a treaty in the area of civil judicial cooperation?

It is not difficult to envisage how the absence of an effective jurisdiction and enforcement of judgments regime between the EU and UK will damage the attractiveness of England and Wales as a destination for the resolution of cross-border disputes. It is reasonable to expect commercial parties to hesitate in designating English courts in jurisdiction clauses if there is a risk that English jurisdiction clauses will not be respected in the EU; if the EU *lis pendens* rules do not apply to automatically stay proceedings in EU Member States when the same proceedings are already a foot in England; and if interim and/or final judgments of English courts are more difficult to enforce in the EU.¹⁸

The assumption underpinning the more pessimistic (for the UK) prognosis that the EU has much to gain from London's diminished role in the European judicial market by opening up an opportunity for EU Member States, such as Belgium, France, the Netherlands and Sweden,¹⁹ or, with their declared ambitions for the creation of international courts²⁰ to capture a share of this market and little to lose because English courts do not require reciprocity to enforce foreign judgments has been challenged. Both the Brussels I Recast Regulation and the 2007 Lugano Convention protect the defendants domiciled in EU Member States from litigation in England and Wales, save for limited circumstances. If the UK becomes a

17 Andrew Dickinson, 'Back to the future: The UK's EU Exit and the Conflict of Laws' (2016) *Journal of International Private Law* 195 at 198.

18 Bar Council Brexit Working Group, *The Brexit Papers* 2nd edn, March 2017, p 32.

19 Adrian Briggs, *Secession from the European Union and Private International Law: the Cloud with a Silver Lining*, Lecture to the Commercial Bar Association, 24 January 2017, p 15.

20 Tom Moseley, 'Why English Courts are Opening in the EU', 28 February 2018 www.bbc.com/news/uk-politics-42979920 accessed 21 November 2018.

third-party state for the purposes of these instruments, such defendants would lose their 'jurisdictional defensive shields'. There is ample interest in Europe, it is argued, in preserving the shield against English jurisdiction for the EU and UK to reach an agreed arrangement in this area.²¹

On the other hand, this bargaining tool may not weigh as much as appears at first glance: UK judgments rendered on the basis of common law jurisdiction may indeed be difficult to enforce in some or all European states for lack of sufficient connection between the UK courts and the parties or the subject matter of the dispute. Taking the example of Switzerland, Swiss courts seised of an application for recognition and/or enforcement of judgments issued by courts in third-party states must review whether the issuing court had jurisdiction pursuant to autonomous criteria set out under Swiss conflict of law rules. Accordingly, judgments issued by a court with exorbitant territorial jurisdiction shall not be recognised/enforced in Switzerland. Of course, what exorbitant territorial jurisdiction means will differ from state to state, depending not least on their formal bilateral relationship with the UK. While there are bilateral conventions between the UK and some key European states that predate the UK's membership of the EU (notably with Austria, Belgium, France, Germany, Italy, the Netherlands and Norway) their application post Brexit is unclear and will have to be determined by the national courts of the respective countries.²² There are many countries outside the EU, notably the US, where courts have a record of recognising UK judgments, even absent a bilateral agreement.

Surely, such a treaty can only benefit citizens and businesses across both the UK and EU. It is not far-fetched to suggest that prospective litigants prefer to have a greater choice of venues that can hear their disputes and to choose among them based on factors such as cost, speed, flexibility and transparency of the process, as well as the experience and expertise of the judiciary. Having to choose a second-best venue because it produces judgments that can travel further afield cannot be congruent with interests of court users in Europe. This ought to provide sufficient hope that a workable solution can be achieved, even if that solution is the 2007 Lugano Convention, provided, of course, that greater political issues and obstacles can be overcome by the negotiators.

21 See n 19 above pp 18 and 22.

22 There is also the possibility of reviving the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. However, it has been authoritatively argued that the application of the convention is conditional on the UK remaining a member of the EU. Professor Jonathan Harris, Brexit and International Commercial Litigation, Inn Group Lecture, 9 October 2018.

Options available regarding jurisdiction

Jurisdiction rules with respect to the choice of court clauses are particularly relevant to the concerns of commercial entities that, but for the intervention of Brexit and resulting uncertainties, would have automatically designated English courts as having jurisdiction to determine their disputes. If London's downfall is predicated on choices made by commercial parties, it is logical to focus on the area where the parties have the greatest freedom to designate a dispute resolution forum.

The greatest amount of optimism, so far as London's prospects are concerned, can legitimately be held in the field of cross-border jurisdiction involving commercial contracts that designate English courts as the dispute resolution venue. In this domain, cross-border private international law is the most developed given the needs of commercial parties and recognised authority of the party autonomy principle, at least in business-to-business transactions, where it is not unreasonable to expect parties to bargain on an equal footing.

The EU is a party to three instruments regarding jurisdiction, which are in principle available to the UK to accede to after Brexit: (1) Brussels I Recast Regulation (1215/2012); (2) the 2007 Lugano Convention; and (3) the Convention of 30 June 2005 on Choice of Court Agreements (the 'Hague Choice of Court Convention'). We will review in turn the advantages of each of these instruments based on their recognition and enforcement regime.

The Brussels I Recast Regulation

The current position between the EU and UK is governed by Brussels I Recast Regulation, in force from January 2015. Article 25 of the Brussels I Recast Regulation governs jurisdiction agreements. Pursuant to Article 25(1), if the parties have agreed that a court of a Member State shall have jurisdiction over disputes relating to a particular legal relationship, then, provided certain formalities are met, that court will have jurisdiction. Importantly, the rule applies irrespective of the parties' domicile:²³ a party domiciled in Argentina can enter into a contract with a party domiciled in Burkina Faso that includes a clause requiring any legal proceedings to be brought in London, and this choice will be respected by the courts throughout the EU.

Thus, Article 31(2) provides that where a court of a Member State on which an agreement confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as

²³ Unless the 2005 Hague Choice Convention applies.

the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement. If the court designated in the agreement has established its jurisdiction, then any court in the Member State shall decline jurisdiction in favour of that court. Furthermore, the regulation's *lis pendens* rule (Article 29) – where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, 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 – is expressly postulated to be without prejudice to Article 31(2). In other words, the court chosen by the parties will have priority regardless of which court was first seised.²⁴ It is also worth noting that a practical effect of the recast Article 25 of the Brussels I Recast Regulation in England and Wales has been to widen the constituency of defendants that can be served outside of the English courts' jurisdiction without first obtaining the court's permission.²⁵

While not wholly without criticism, the Brussels I Recast Regulation is generally considered to be the most advanced framework on jurisdiction and recognition and enforcement of judgments in civil and commercial matters. In March 2017, the Bar Council Brexit Working Group recommended that the UK Government should enter into an agreement based on the 2005 Denmark-EU jurisdiction Agreement.²⁶ That agreement provides that the Brussels I Regulation and its successor shall under international law apply to the relations between the EU and Denmark.²⁷ The UK Government has not articulated, at least not publicly, why it is not pursuing this option. The Denmark-EU agreement provides the CJEU with the interpretative authority over both the agreement and regulation. Such a role for the CJEU is not currently politically acceptable in the UK and, we speculate, a lesser role for the CJEU is not acceptable to the EU.

The 2007 Lugano Convention

The 2007 Lugano Convention is the successor to the Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments

24 Introduced into the regulation to diffuse the 'Italian torpedo' abuse of the *lis pendens* provision in the predecessor regulation.

25 Pursuant to CPR r.6.33(2)(b)(v), the claimants are only required to include form N510 with the service pack.

26 Bar Council Brexit Working Group. *Ibid* 34.

27 On 17 July 2018, in the course of oral evidence session before the Justice Sub-Committee of the House of Lords Select Committee on the European Union, Lucy Frazer MP, Parliamentary Under-Secretary of State, Ministry of Justice stated that the UK could not expect to join Brussels regulations as a non-member state.

in civil and commercial matters (the ‘1988 Lugano Convention’),²⁸ and is often referred to as the ‘revised Lugano Convention’. As such, it is a parallel instrument to the Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the ‘Brussels I Regulation’).²⁹ Similarly, the 1988 Lugano Convention is a parallel agreement to the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version) (the ‘Brussels Convention’),³⁰ signed between the six original Member States of the European Community and successively by the new States that acceded to the European Community, along with certain members of EFTA, namely Iceland, Norway and Switzerland.

Under the 2007 Lugano Convention, the CJEU’s role is more circumscribed. Protocol 2 of the 2007 Lugano Convention (Protocol 2) requires courts applying and interpreting the convention to ‘pay due account’ to the relevant decisions of the CJEU. Protocol 2 lays down a specific mechanism to ensure similar interpretations of the revised Lugano Convention and Brussels I Regulation. Protocol 2 not only commands a uniform interpretation of the 1988 Lugano Convention and the 2007 Lugano Convention among their contracting parties, but also calls for a coordinated interpretation of the 2007 Lugano Convention and Brussels I Regulation. As such, Protocol 2 is only one illustration of the principle of parallelism that has guided the parties to the Brussels/Lugano regime to ensure the conformity between the Brussels and Lugano instruments.

First, the contracting parties to the 2007 Lugano Convention must ‘be aware’ of the CJEU’s case law regarding the Brussels Convention and Brussels I Recast Regulation as of 30 October 2007 (date of signature of the 2007 Lugano Convention), as well as the case law of the courts of the contracting parties to the 1988 Lugano Convention until that date – in particular, that of the EFTA states (Preamble Protocol 2). These decisions must be deemed an authentic interpretation of the 2007 Lugano Convention. Additionally, Article 1(1) of Protocol 2 foresees that, from the date of signature of the 2007 Lugano Convention, the adjudicating authorities of the EFTA Member States, as well as the CJEU, have the obligation to demonstrate a reciprocal consideration of their courts.

Under the 1988 Lugano/Brussels Conventions, the new system places no importance on the hierarchical rank of the adjudicating authority or on the size of a state. What matters is the strength of the arguments brought

28 [1988] 88/592/EEC.

29 [2001] OJ L 12/1.

30 [1998] OJ C 27/1.

forward. In this respect, it is worth mentioning that Article 2(2) of Protocol 2 in connection with Article 23 of the Protocol on the Statute of the CJEU³¹ gives a right of intervention before the CJEU to non-EU Member States in specific cases. Switzerland, for example, used this tool to file observations before the CJEU in a matter brought by Lithuania concerning the scope of the Brussels I Regulation in the area of international arbitration (enforceability of an anti-suit injunction issued by an arbitral tribunal seated in another EU Member State).³² To a certain extent, this can be considered as a balancing mechanism to the direct jurisdiction of the CJEU to issue case law.

As we have noted at the start, the UK Government intends to rejoin the 2007 Lugano Convention after Brexit. If the UK were to rejoin the 2007 Lugano Convention, similar principles would apply as in the Brussels I Recast Regulation. However, as with the original Brussels I Regulation, the scope of the 2007 Lugano Convention is somewhat narrower. Thus, English exclusive jurisdiction clauses will be recognised by the courts of EU Member States, Iceland, Norway and Switzerland if at least one of the parties is domiciled in a Contracting State (Article 23(1)). As Article 27 of the 2007 Lugano Convention on *lis pendens* generally applies the court first seised rule and is not made subject to the provisions in Article 23(1) of the 2007 Lugano Convention, torpedo actions initiated before a court of another Contracting State despite such choice of forum clause with a view to protracting litigation cannot be avoided under current CJEU case law.³³

It is to be noted that in cases in which neither of the parties is domiciled in a Contracting State, the 2007 Lugano Convention does not require the chosen court to accept jurisdiction. Whether or not to accept jurisdiction in such cases is a matter for the chosen court and its domestic conflict of law rules. As a result, if the parties elected a forum in a Contracting State, the validity of the clause shall be examined by a court of any Contracting State pursuant to its domestic rules. However, the 2007 Lugano Convention contains a mechanism, which provides that the courts in other Contracting States that would have jurisdiction but for the choice of court clause according to their domestic rules may assert jurisdiction notwithstanding the clause only if the chosen court has declined jurisdiction (Article 23(3)).

31 [2010] C 83.

32 Public statement from the Swiss Government of 30 September 2014 www.bj.admin.ch/bj/fr/home/aktuell/news/2014/2014-09-30.html accessed 18 October 2018; see Judgment of the CJEU of 13 May 2015, Case C536/13, '*Gazprom*' OAO v *Lietuvos Respublika*, EU:C:2015:316.

33 Judgment of the CJEU of 9 December 2003, Case C-116/02, *Erich Gasser GmbH v MISAT Srl*, EU:C:2003:657; Judgment of the CJEU of 27 April 2004, Case C-159/02, *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA*, EU:C:2004:228.

To give full and proper effect to Article 23(3) in practice, it has been persuasively argued that any court in a Contracting State other than the chosen court, even if seised first, should dismiss the claim or at least stay the proceedings before them pending the decision of the chosen court whether or not to accept jurisdiction.³⁴ Of course, whether or not they will do so is a separate matter and it cannot be excluded that they will not by drawing from the settled case law of the CJEU declaring torpedo actions admissible despite a choice of jurisdiction clause in favour of a court of another Contracting State in cases where the parties are domiciled in Contracting States.³⁵

Moreover, regardless of whether the parties to the English exclusive jurisdiction clause are domiciled in a Contracting State, domestic rules of the Contracting States will apply with procedural specificities. As an example, in matters falling within the scope of the 2007 Lugano Convention, Swiss law does not prohibit litigants from resorting to certain forum running tactics by way of Swiss negative declaratory relief proceedings to ascertain that the forum first seised is Switzerland. In a recent decision, the Swiss Federal Supreme Court held, in particular, that Swiss negative declaratory relief proceedings are now generally admissible in international matters when their initiation aims at securing a Swiss forum.³⁶ This decision was issued in relation to a dispute where the alleged creditor, a legal entity incorporated in England, was about to seise the London High Court of Justice of an action against its alleged debtors, themselves seated in Switzerland and England. It is all the more relevant as the Swiss Federal Supreme Court gave due regard to the case law of the CJEU on the Brussels I Regulation but considered that it was irrelevant for the resolution of the case at hand, which it found posed questions falling outside the scope of the 2007 Lugano Convention (eg, whether the party has a sufficient and legitimate interest to act).³⁷ This decision confirms that the 2007 Lugano Convention leaves parties at liberty to resort to forum optimisation tactics and run to the forum that may be most appropriate to their case or most inconvenient for the adverse party.

34 U Magnus in U Magnus and P Mankowski (eds), *Brussels I Regulation*, 2nd edn, Munich 2012, Art 23 N 54 (p 464) and references.

35 Judgment of the CJEU of 9 December 2003, Case C-116/02, *Erich Gasser GmbH v MISAT Srl*, EU:C:2003:657; Judgment of the CJEU of 27 April 2004, Case C-159/02, *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA*, EU:C:2004:228.

36 Decision of the Swiss Federal Supreme Court of 14 March 2018 4A_417/2017.

37 Decision of the Swiss Federal Supreme Court of 14 March 2018 4A_417/2017, para 3.2.

The 2005 Hague Choice of Court Convention

On 13 September 2018, the UK Government published Guidance on handling civil legal cases that involve EU countries if there is no Brexit deal (the 'Guidance').³⁸ The Guidance confirmed that, so far as the issue of exclusive jurisdiction clauses are concerned, the UK would take the necessary steps to formally rejoin the 2005 Hague Choice of Court Convention in its own right.³⁹ It is anticipated that the 2005 Hague Choice of Court Convention would come into force across the UK by 1 April 2019. Under Article 31(1), the 2005 Hague Choice of Court Convention takes effect on the first day of the month that follows a period of three months after ratification. On 28 December 2018, the UK deposited the accession instrument, declaring that the UK accedes to the 2005 Hague Choice of Court Convention in its own right with effect from 1 April 2019.⁴⁰

The essence of the 2005 Hague Choice of Court Convention is that the court chosen by the parties has, and cannot decline to exercise, jurisdiction on the ground that the dispute should be decided elsewhere (Article 5). Except for certain specific circumstances, the not-chosen courts in other Contracting States are required to suspend or dismiss proceedings brought before them (Article 6) and to recognise and enforce the decision of the chosen court without review of the merits of the judgment (Article 8). Notably, the 2005 Hague Choice of Court Convention does not apply to interim measures (Article 7).

The 2005 Hague Choice of Court Convention is open for signature to any state.⁴¹ The EU⁴² is a party along with Mexico, Montenegro and Singapore. Article 26 governs the position where there is an overlap between the EU rules (ie, Brussels I Recast Regulation) and the 2005 Hague Choice of Court Convention. In essence, where one or more parties is resident in a Contracting State that is not a member of the EU, the 2005 Hague Choice of Court Convention will apply.

Once the UK ratifies the 2005 Hague Choice of Court Convention, the EU Member States will have to give effect to an English exclusive jurisdiction clause under the convention where one party is resident in England, Mexico,

38 See www.gov.uk/government/publications/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brex-it-deal/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brex-it-deal accessed 7 March 2019.

39 Convention of 30 June 2005 on Choice of Court Agreements www.hcch.net/en/instruments/conventions/full-text/?cid=98 accessed 14 January 2019.

40 The Depositary Communication is available at www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1318&disp=resdn accessed 7 March 2019.

41 Art 27.

42 The Hague Choice of Court Convention is accordingly binding on all EU Member States (including Denmark).

Montenegro or Singapore. However, if all parties are resident in non-Contracting States and have concluded an English exclusive jurisdiction clause, the EU Member States will not be bound to uphold such a clause either by the 2005 Hague Choice of Court Convention or Brussels I Recast Regulation;⁴³ in the Argentina-Burkina Faso example above, domestic rules of the signatory states will apply. In these circumstances, the general prohibition on the English courts recognising foreign courts' judgments made in breach of jurisdiction clauses contained in section 32 of the Civil Jurisdiction and Judgments Act 1982 will also apply.

Switzerland is not currently a signatory to the 2005 Hague Choice of Court Convention, although our understanding is that it is not averse to joining it in due course. In the event of a no-deal Brexit, civil justice cooperation between Switzerland and the UK will be subject to their respective domestic laws. If Swiss courts are first seised, they are not required to automatically decline jurisdiction and refer the parties to the foreign court chosen by the parties on the face of their agreement, nor are Swiss courts required to stay the proceedings pending a decision on jurisdiction by the foreign court. Only in the case of prior *lis pendens* before the foreign court would Swiss courts stay the proceedings if it is foreseeable that the foreign court will render a decision capable of being recognised in Switzerland within a reasonable time.⁴⁴ Swiss courts shall then dismiss the proceedings once they are presented with a foreign decision capable of being recognised in Switzerland.⁴⁵ This opens, of course, the door to forum running tactics that parties may exploit.

Options available regarding recognition and enforcement

The Brussels I Recast Regulation

The Brussels I Recast Regulation provides for a comprehensive regime on recognition and enforcement of judgments. A Member State is required

43 *Dicey, Morris & Collins on the Conflict of Laws*, 3rd Cumulative Supplement to the 15th Edition, p 126, para 12-024, suggest that the Brussels I Recast Regulation at least permits the EU Member States to give effect to an exclusive jurisdiction clause in favour of a non-Member State court. Support for this position can be found in recitals 23 and 24 of the regulation, which deal with the circumstances when the courts of member states should take into account proceedings pending before the courts of third states in the interests of the proper administration of justice. Recital 24 specifically states that that assessment 'may also include consideration of the questions whether the court of the third State has exclusive jurisdiction in the particular case in circumstances where a court of a Member State would have exclusive jurisdiction'.

44 Art 9(1) of the Private International Law Act (PILA).

45 Art 9(3) of the PILA.

to recognise a judgment given in another Member State without imposing any special procedure (Article 36(1)) and enforce it without requiring a declaration of enforceability if the judgment is enforceable in the Member State of origin (Article 39). The Brussels I Recast Regulation also governs the availability of protective measures foreseen by the domestic law of each Member State, whether they be sought in support of a final judgment in the 'exporting' Member State (Article 40) or on a provisional basis in support of ongoing proceedings there (Article 35).

The 2007 Lugano Convention

While the 2007 Lugano Convention's provisions on recognition and enforcement of final judgments are broadly similar to the Brussels I Recast Regulation (Article 33 and 38), its provisions on interim remedies appear to be more onerous to the parties. Significantly, by contrast to the Brussels I Recast Regulation (Article 42(2)(c) Brussels I Recast), *ex parte* interim measures issued by a court of a Lugano Contracting State can as a rule not be enforced abroad pursuant to the 2007 Lugano Convention, unless the defendant was subsequently heard (or was granted the possibility to be heard) after issuance of the measure and was thus able to challenge the measures.⁴⁶ Still, if the right to be heard of the defendant is respected, the 2007 Lugano Convention is an effective tool to passport English World Freezing Orders (WFOs) into Switzerland.⁴⁷ By contrast, Swiss domestic law does not allow for the recognition and enforcement of foreign *ex parte* interim measures, thus depriving litigators of an effective tool to secure their client's claims by importing such orders into Switzerland when the foreign injunction was issued by a non-convention court.

Article 31 of the 2007 Lugano Convention may, however, be used to remedy this situation as it allows for applications for interim (including *ex parte*) measures to be made in a Contracting State pursuant to the domestic rules of this state in support of proceedings in another Contracting State.

In the absence of an international cooperation agreement, Swiss courts would apply Swiss domestic rules on enforcement and would enforce a final UK judgment provided that the UK court had jurisdiction over the dispute pursuant to autonomous criteria set out under Swiss conflict of law rules. Pecuniary disputes where jurisdiction was asserted on the basis of a choice of court agreement would fall into this category provided that the judgment is not contrary to public policy. However, English judgments

⁴⁶ See Judgment of the CJEU of 21 May 1980, Case 125/79, *Bernard Denilauler v SNC Couchet Frères*, EU:C:1980:130.

⁴⁷ Sandrine Giroud, 'Do You Speak Mareva? How Worldwide Freezing Orders are Enforced in Switzerland' (2012/2013) 14 *Yearbook of Private International Law* 443.

made *ex parte* and ordering interim measures (eg, WFOs) would not be eligible for recognition and enforcement in Switzerland. Pending the end of the English proceedings on the merits, a party to the same may apply for an interim (including *ex parte*) remedy before the Swiss courts, which will assert jurisdiction if the measure is to be enforced in its jurisdiction. A choice of court agreement in favour of English courts will not prevent a Swiss court from ordering such an interim remedy.

Conclusion

For decades, the UK has been one of the main resolution centres for cross-border commercial disputes, at least in Europe if not worldwide. This dominant position can be explained by various factors, among which are the use of the English language and the flexibility afforded by the common law regime offering tailored solutions to extraordinary disputes. A major factor has also been that UK judgments are easily enforceable throughout Europe thanks to the Brussels I Recast Regulation and the 2007 Lugano Convention. Losing the benefit of this facilitating legal framework will likely diminish the attractiveness of the UK courts, while reinstating powers such as anti-suit injunctions currently forbidden under the Brussels regime.⁴⁸ However, the 2007 Lugano Convention has proven overall to be almost as efficient and, as the example of Switzerland has shown, a workable alternative. What the future holds remains largely unclear, even to the brightest legal minds. A lot of political dust needs to settle before legal clarity prevails. The possibility for the UK to enter into bilateral agreements in specific cases with entry into force after the transition period will hopefully accelerate this process.

⁴⁸ Judgment of the CJEU of 27 April 2004, Case C-159/02, *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA*, EU:C:2004:228.