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Brexit and its Effects on the English Private International Law

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1. Introduction

The world, and especially Europe, has been consumed by the uncertainty of Brexit following the 24th of June 2016 Referendum.[1] The captivation of Brexit is understandable, the political and legal worlds have collided, lawyers are now forced to address the political reality of the situation whereas political scientists have had to become lawyers very quickly.[2] The United Kingdom (UK)[3] has been a member of the European Union (EU) for nearly forty years. This duration as a Member State has undoubtedly left a huge impact on many aspects of the UK, most notably on its Private International Law (PIL) of contract. The most famous and revered English judge, Lord Denning, described the impact on the English law since the UK joined the European Community as follows:[4]

> "When we come to matters with a European element. . . we must no longer speak or think of English law as something on its own. We must speak and think of community law, of community rights and obligations, and we must give effect to them. . . . The Treaty, with the regulations and directives covers many volumes. The case law is contained in hundreds of reported cases both in the European Court of Justice and in the national courts of nine. Many must be studied before the right result can be reached. We must get down to it."

The observations of Lord Denning could not have been more astute. English PIL is no longer 'English' law. Its civil and commercial core has been overwhelmed and can now be found in European laws.[5] It is safe to say that the English common law rules on PIL have lost their completeness which once gave them application far and wide in Commonwealth countries such as Canada and Australia.[6]

The focus of this minor dissertation is the integration of EU law into the field of English PIL of contract, which is currently governed by the Rome and Brussels Regimes and the effects following Brexit. The EU Regimes aim to create harmonisation in EU Member States concerning PIL issues. Currently, the Rome and Brussels Regimes trump UK domestic laws but following Brexit, they will no longer be applicable. This inevitably begs the question of what is the UK going to do about the vast gap that will now be lingering in English PIL of contract following Brexit. Will the UK revert to the old common law conflict of law rules; convert the

[1] The Referendum results of 51.9% (17,410,742) leave, to the discomfort of the 48.1% (16,141,241) remain. French ""Brexit": a Constitutional, Diplomatic and Democratic Crisis - a View from the Trenches" 2016 (19) *PER / PELJ* 1 2 http://www.scielo.org.za/pdf/pelj/v19n1/56.pdf (15-11-2017).
[2] Barnard "Law and Brexit" 2017 *Oxford Review of Economic Policy* S1 S4.
[3] The UK consists of England, Scotland, Wales and Northern Ireland.
[4] Briggs *Private International Law in English Courts* (2014) preface v.
[5] Briggs (n 4) preface v.
[6] Briggs (n 4) preface v.

existing body of EU laws into domestic legislation; or will the withdrawal agreement as contemplated in Article 50 of the Treaty on European Union[7] (TEU) be the UK's saving grace.

This dissertation proposes to answer the above dilemmas by firstly looking at the formation of the EU and the UK's ascension to the EU. Secondly, evidence will be presented showcasing that there was already opposition to EU laws by UK academics long before Brexit. Thirdly, a discussion surrounding the triggering of Article 50 of the TEU. Fourthly, consideration of English PIL of contract as it stands now with special emphasis on the characteristics of the Rome and Brussels Regimes, followed lastly by a discussion on the Great Repeal Bill and possible further outcomes for English PIL of contracts.

2. Establishment and development of the EU and the UK's accession to the EU

2.1. Establishment and Development of the EU

In order to understand how the UK is going to move forward without the EU, it is important to see the UK's role in the EU and the effects the EU has had on English PIL. The historical background of the EU is rooted in the desire for European countries to cooperate and have harmonisation following the atrocities of the Second World War.[8] For purposes of this minor dissertation we are only interested in the specific efforts made by the EU to harmonise rules of PIL throughout European countries.[9] The origin and materialisation of the EU occurred through the signing of a treaty in Rome, during March 1957. This was the first great step in the harmonisation process, as the Treaty of Rome created the European Economic Community (EEC). The founding Member States were France, West German Federal Republic, Italy, Belgium, Netherlands and Luxembourg.[10] The UK signed the EEC on 1 January 1973 along with Denmark and Ireland, which will be discussed further below.[11] The EEC, especially Article 220, is the origin of EU PIL. Any new Member States had to accede to those conventions created under Article 220 of the Treaty of Rome, and to the protocols on their interpretation by the Court of Justice while entering into any negotiations with Member

[7] European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5 24 December 2002 available at http://www.refworld.org/docid/3ae6b39218.html (16-09-2017) which came into force on 1 November 1993.
[8] McParland *The Rome I Regulation on the law applicable to contractual obligation* (2015) 6.
[9] McParland (n 8) 7.
[10] McParland (n 8) 7.
[11] McParland (n 8) 7.

States to make the necessary adjustments.[12] As time went on the EU progressed further. The drafting of the Maastricht Treaty, formally known as the Treaty on European Union (TEU), which will be discussed below,[13] established the EU as we know it today. Whatever else the Maastricht Treaty represented, it marked the beginning of a new stage in developing a common, EU private law.[14] Under the Maastricht Treaty, the Treaty of Rome was amended and renamed as the Treaty Establishing the European Community (TEC) and the European Economic Community was renamed the European Community. The continued evolution of the EU proceeded with the Treaty of Amsterdam[15] and finally the Treaty of Lisbon.[16] The Treaty of Lisbon amended the Maastricht Treaty, formally the TEU and changed the name (again) of the Treaty of Rome (TEC) to the Treaty on the Functioning of the European Union (TFEU).[17] The TFEU expanded the EU's legislative competencies in civil and judicial matters.[18] This expansion of legislative competencies, allowing the EU to almost dictate to Member States, among other issues, was the foundation for the referendum occurring in the UK, together with the call by politicians for the UK to leave the EU and take back its sovereignty.

2.2. The UK's accession to the EU

As mentioned above, on the 31st of December 1972, the UK became a member of the EEC. As a result of their membership, the UK had to and did participate in various PIL conventions alongside EU Member States and non-Member States.[19] *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry*[20] discusses the implementation of EU treaties into English law. EU treaties by themselves had no power in the UK as they "are not self-executing".[21] The *ratio decidendi* of the case goes on to say that:

> "the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of

[12] McParland (n 8) 7; Article 220 would be renumbered Article 293 by the Treaty of Amsterdam and subsequently repealed by the Treaty of Lisbon.
[13] (n 7).
[14] McParland (n 8) 43.
[15] The European Parliament endorsed the Treaty on 19 November 1997 and eventually the 15 Member States ratified it. This new treaty contained new legislative powers that entirely changed the landscape of European private international law. The Treaty entered into force on 1 May 1999.
[16] McParland (n 8) 65.
[17] Which entered into force on 1 December 2009. McParland (n 8) 65.
[18] McParland (n 8) 65.
[19] Dickinson "Back to the future: the UK's EU exit and the conflict of laws" *2016 Journal of Private International Law* 195 195.
[20] (1990) 2 AC 418 available at http://swarb.co.uk/jh-rayner-mincing-lane-ltd-v-department-of-trade-and-industry-hl-1989/ (22-09-2017).
[21] (n 20) 418.

> Parliament. . . . A treaty is not part of English law unless and until it has been incorporated into the law by legislation".

Accordingly, the European Communities Act of 1972 (ECA) was implemented by the UK Parliament for the accession of the UK into the EEC. The ECA gave international treaties, to which the UK is a contracting party through its affiliation with the EEC, force of law within the UK.[22]

Whist the UK became a Member State and gave effect to EU conventions and regulations in order to aid harmonisation, not all people viewed this as a step in the right direction, especially for English common law.

3. UK's scholars critique of EU laws and harmonisation

The establishment of the EU, which is aimed to achieve the harmonisation of PIL rules across all Member States – who, it must be noted, have completely different legal systems – is a rare and impressive feat. Besides for the EU and to a lesser degree OHADA[23] there are currently no other supranational bodies in the world that can draft legislation for various counties, as all non-Member States are completely sovereign and will legislate and enter into treaties with other countries as they see fit. What the EU has achieved particularly through its PIL Regimes, Rome and Brussels, cannot be seen in a nonchalant manner, however, some English scholars did not share this view when the UK first accessioned to the EU and had to incorporate EU PIL laws. The core issue for the scholars was the abandonment of the English common law, the product of two centuries of judicial endeavour, in favour of the proposed harmonised EU Regimes.[24]

3.1. English Common Law

English common law contained their own English PIL conflict rules, as did all other countries before acceding to the EU. As mentioned above, once a country became a member of the EU they had to take the necessary steps to incorporate and ultimately ensure that they would be governed by EU laws. Dr F A Mann, an influential British scholar, advocated the common law and went further than most critics in defaming the different EU Regimes. He specifically

[22] Introduction of the European Communities Act of 1972.
[23] Organisation for the Harmonization of Business Law in Africa www.ohada.org/index.php/en/ (04-12-2017).
[24] McParland (n 8) 28.

attacked the Rome Convention as one of the "most unnecessary, useless and indeed, unfortunate attempts at unification or harmonisation of the law that has ever been undertaken".[25] Dr Mann believed, "the [Rome] Convention results from a misconceived initiative, would likely corrupt our present [common] law and should be rejected – the sooner the better if insecurity and irritation all over the world are to be avoided."[26]

Lord Wilberforce also famously made a plea in the House of Lords debate on the Contracts (Applicable Law) Act 1990 (1990 Act), which gave the Rome Convention application in the UK stating:

> "[English common law PIL rules] is an excellent body of law built up by judges over the years. It is not criticized in any way. As far as I know there is no demand for the reform of it. . . I can confidentially say that there is no demand for reform of that body of law. It has been formulated in an accessible and convenient form in our textbooks, which are known all over the world. That book [Dicey's *Conflict of Laws*] contains a comprehensive code which deals with all the subjects which come under the heading of conflict of laws."[27]

Underpinning the above scholars' concerns was a long standing English common law preference for leaving PIL to the discretion of judges.[28] Under English common law PIL rules the procedure was highly flexible.[29] This flexible approach represented a judge lead development of common law based on a vast accumulated experience of international trade and commercial disputes that passed through the UK courts.[30] It was also reinforced by the experiences reflected in the persuasive authorities of major Commonwealth countries such as Australia and Canada who adopted the same approach.[31] This meant that the Common law was not codified in statute, unlike that of the EU laws. Statutory intervention was traditionally seen in England as being 'remedial' and the 'legislature provides a statute in the same way that a doctor provides a brace or other surgical appliance to correct some defect in the body'.[32]

In the shadow of the 1990 Act mentioned above, Dr Mann wrote an obituary to the common law's proper law of the contract (which the Rome Convention thereafter dealt with) and remarked that the day the 1990 Act came into force was one which "many lawyers and traders will remember with sadness".[33] He proceeded to write:

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[25] McParland (n 8) 36.
[26] McParland (n 8) 36.
[27] McParland (n 8) 38.
[28] McParland (n 8) 39.
[29] McParland (n 8) 28.
[30] McParland (n 8) 28.
[31] McParland (n 8) 28.
[32] McParland (n 8) 39.
[33] Mann "The Proper Law of the Contract – An Obituary" *London Quarterly Review* (1991) 353.

> "The [1990] Act replaces one of the great achievements of the English Judiciary during the last 140 years or so, an achievement which produced an effective private international law of contracts, was recognised and followed in practically the whole world and has not at any time or elsewhere led to dissatisfaction or to demand for reform . . . [T]he [1990] Act substitutes statutory rules for judicially development experience and thus creates problems of statutory interpretation, where formally there existed flexible and fruitful judicial evolution based on argument and derives from principles, precedents and experience. This is particularly so where, as in the present case, the statute adopts, among other peculiarities, the odious method of interpretation which has become fashionable on the Continent and involves reference to reports by two continental academics [Giuliano and Lagarde]; their distinction is not in doubt, but their familiarity with the experience of the common law and the requirements of practical men is likely to be minimal. The statute, therefore, involves a break not only with English tradition, but also with the law and the development in the countries of the Commonwealth where in the past the English doctrine of the proper law was invariably followed and thus represented a cultural and intellectual tie of considerable strength. Why was it thought right to abandon it in order to assist certain Continental countries to improve their law?"[34]

The UK scholars ultimately saw the developments of EU laws as a warning for the emergence of a super State.[35] This super State will have overarching regulatory powers and governance, and will ultimately diminish national sovereignty and development of national laws.[36]

4. Rome and Brussels Regimes and their particular characteristics

As the UK is a Member State of the EU, both the Rome Regime and the Brussels Regime govern English PIL of contracts. The Rome Regime deals with the law applicable to contractual obligations arising in civil and commercial contracts,[37] whereas the Brussels Regime provides the rules on the jurisdiction of courts and the rules on recognition and enforcement of judgments in civil and commercial matters.[38] Although the Rome I Regulation takes preference over the Rome Convention and the Brussels I Regulation Recast takes preference over the Brussels Convention, a discussion of both the Regulations and Conventions is needed to fully grasp their accumulative effect on English PIL of contracts.

[34] Mann (n 33) 353 - 4.
[35] French (n 1) 2.
[36] French (n 1) 2.
[37] Council Regulation EC 593/2008 http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008R0593 (14-09-2017). Art 1 sets out the scope of the Rome I Regulation.
[38] Regulation (EU) No 1215/2012 http://eur-lex.europa.eu/legal-content/EN/LSU/?uri=celex:32012R1215 (14-09-2017).

4.1. Rome Convention and Rome Regulation

The Rome Convention is an international treaty, which means it is only binding on signatory states to the treaty. With the enactment of the 1972 Act as discussed above, the Act gave international treaties force of law in the UK. The UK then adopted the Rome Convention into domestic law with the enactment of the 1990 Act.[39] A special side note must be made about The Giuliano-Lagarde Report,[40] which accompanied the Rome Convention. The Giuliano-Lagarde Report is used as an interpretive aid by judges and PIL lawyers to provide clarity in ambiguous situations involving PIL questions which the articles of the Rome Convention do not adequately answer. The Rome Convention is not obsolete and is still applicable should a contract have been concluded before 17 December 2008 and a subsequent PIL dispute regarding contractual obligations arises.

The Rome Regulation came into force in 2008 and is applicable to all contracts concluded from 17 December 2008 onwards.[41] Article 24 of the Rome I Regulation provides that:

> "[The Regulation] shall replace the Rome Convention in the Member States, except as regards to the territories of the Member States which fall within the territorial scope of that Convention and to which this Regulation does not apply pursuant to Article 299 of the Treaty."[42]

The Rome I Regulation applies universally on a supranational level, whereas the Rome Convention had to be adopted into domestic law through the 1990 Act.[43] This has the effect that should a contract be concluded after 17 December 2008, the Regulation will apply and not the Convention. The Regulation contains an over reaching collection of rules which trumps the English common law rules that existed prior to the Regimes creation.[44] Consequently, there has been no development of English common law in the UK as the Rome Regime catered for this area.

[39] See specifically section 2(1) which provides the following "Subject to subsections (2) and (3) below, the Convention[s] shall have the force of law in the United Kingdom." This section establishes the force of law of the Rome Convention in England and Wales.
[40] Report on the Convention on the law applicable to contractual obligations by Mario Giuliano (professor, University of Milan), and Paul Lagarde (Professor, University of Paris) [1980] OJ C 281/1 (31 October 1980).
[41] (n 38).
[42] (n 38) art 24.
[43] (n 38) art 2.
[44] Grace "Brexit and its impact on private international law" 2016 5 http://hdl.handle.net/10210/236401 (17-09-2017.

4.1.1. Differences and Similarities of the Rome Convention and Rome I Regulation

4.1.1.1. Freedom of Choice

4.1.1.1.1. The Rome Convention

Party autonomy is contained in article 3 of the Convention which allows parties to either include an express choice of law to govern their contract or for a court through a variety of factors to tacitly imply the applicable law as chosen by the parties.[45] The parties are also allowed to have a chosen law for a part of the contract or for the whole contract in its entirety and may revoke this choice at any stage of the contract.[46]

4.1.1.1.2. The Rome Regulation

The Rome Regulation also allows for party autonomy in a contract, and is contained in article 3(1) which deals with the express choice of law by the parties. The subtle 'upgrade' in the Regulation concerns the tacit choice of law test as compared to the Rome Convention. Where the Rome Convention states that a tacit choice of law can be implied if it is *reasonable* from the terms or circumstances of the contract/case. The Regulation provides more clarity in this area and wording of the Rome Convention has been amended so that the terms or circumstances of the contract/case must *clearly* demonstrate an implied law. The amending of the wording from *reasonable* to *clearly* has led to an increased onus being placed on the particular party alleging an implied law should govern the contract. The increased strictness has the knock-on effect of promoting legal certainty and the legitimate expectations of the parties, which in international contacts is of paramount importance.[47]

4.1.1.2. The Objective Proper Law (including escape clauses)

One of the true pillars of PIL of contracts worldwide is determining what law is to be applied when international contracting parties do not choose an applicable law to govern their contract. This first entails that there is a dispute that has arisen and litigation is initiated by one of the parties, however, there is no express clause in the contract identifying the applicable law to be applied in the event of a dispute. This results in the appropriate court (the correct jurisdiction to hear the matter is also a PIL issue, and is dealt with by the Brussels Regime) having to

[45] Convention EC No 934/1980 eur-lex.europa.eu/homepage.html (27/10/2017) Art 3.
[46] (n 45) Art 3(1) and (2).
[47] Grace (n 44) 6.

determine the applicable law of the contract by taking into account all connecting factors and circumstances of the case.[48] The Rome Regimes both set out the manner in which courts will determine the applicable law of the contract.[49]

4.1.1.2.1. The Rome Convention

Article 4 of the Rome Convention provides the manner in which the applicable proper law of the contract is to be determined, failing an express choice of law by the parties.[50] Article 4(1) states that the court must apply the law of closest connection to the contract.[51] The law of closest connection to the contract involves the process of the court taking into account connecting factors such as the *lex loci contractus* (law of the place where the contract was concluded), *lex loci solutionis* (law of the place where performance took place, in respect of delivery and payment), the type of contract and the domicile and/or habitual residence of the parties. This is not an exhaustive list and some factors carry more weight than others. If the applicable proper law cannot be determined in terms of article 4(1) then there is a presumption in article 4(2) which will be applied. This presumption states that the law of the country where the characteristic performer[52] is habitually resident will be applicable.[53] This presumption is however subject to an escape clause contained in article 4(5), which states that the presumption in article 4(2) will not apply if the "characteristic performance cannot be determined" and "it appears from the circumstances as a whole that the contract is more closely connected with another country".[54]

4.1.1.2.1.1. Application of Articles 4(2) and Article 4(5) in English Courts

There was never consistency in the application of articles 4(2) or 4(5) by EU Member State courts. A major contributor were the English courts, as they would make use of a flexible approach (also known as the weak presumption approach) and apply article 4(5) in cases

[48] Grace (n 44) 6.
[49] Grace (n 44) 6.
[50] Okoli and Arishe "The Operation of the Escape Clauses in the Rome Convention, Rome I Regulation and Rome II Regulation" 2012 *Journal of Private International Law* (volume 8) 513 515.
[51] (n 45) art 4(1).
[52] The Rome Convention does not define the term "characteristic performer". However, "characteristic performance" can be described as "performance for which payment is due". This can be interpreted to mean that the characteristic performer is the party who has the contractual obligation of providing a service. See Giuliano and Lagarde "Report on the Convention of the law applicable to contractual obligations" Official Journal C 282 , P. (31/10/1980) 0001 – 0050 available at https://www.scribd.com/document/39401012/Giuliano-Lagarde-Report-IntTrade (04-01-2018).
[53] (n 45) art 4(2).
[54] (n 45) art 4 (5). Okoli and Arishe (n 50) 515.

where there was an absence of choice of law by the contracting parties.[55] The rationale for this was that the presumption contained in article 4(2), being where the law applicable to the contract would be the place of the characteristic performer, was a foreign concept to English courts.[56] However, the law of the "place of closest connection" in article 4(5) was already established in English common law.[57] It made logical sense for the English courts to apply what they knew in terms of their English common law. English courts used connecting factors such as currency; place of negotiation; residence; and place of payment when determining the place of closest connection to the contract.[58] Out of all the connecting factors, the place of performance (in respect of delivery) is the most important connecting factor under English common law.[59] As a result of the familiarity and the years of judicial discretion allowed in English common law around this particular PIL issue, the English courts would usually overlook the presumption in favour of the escape clause provided in article 4(5).[60]

The use of article 4(5) can be subject to abuse as is evident above, however, as remarked in the *Definitely Maybe v Marek Lieberberg*[61] case, the application of the presumption in article 4(2) was not always ideal. The flexibility and discretion for the courts to rebut the presumption in article 4(2) in favour of the escape clause in article 4(5) allows for the application of a more suitable law with a closer connection to the contract.[62] It does not make sense to strictly apply the presumption when there is no connection between the contract and the habitual residence of the characteristic performer.[63] The other side of the coin is that the flexibility and discretion allowed in article 4(5), allowing the courts to go directly to the escape clause left little need for consideration of the presumption, leading to the abuse of the escape clause whereby article 4(5) would automatically be applied, even if the law of the habitual residence of the characteristic performer could be applicable.[64] This double edged sword permitting each court to either apply article 4(2) or 4(5) created legal uncertainty among English courts and the courts of other Member States, hampering the harmonisation objectives of EU legislation.[65]

[55] *Credit Lyonnais v New Hampshire Insurance Company* (1997) CLC 914. Okoli and Arishe (n 50) 517.
[56] Dicey, Morris and Collins *Conflict of Laws* (2007) 158.
[57] Okoli and Arishe (n 50) 517 - 518.
[58] Okoli and Arishe (n 50) 518.
[59] *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* (2009) ECR I-9687.
[60] *Definitely Maybe v Marek Lieberberg* (2010) 1 WLR 1745 par 7.
[61] *Definitely Maybe v Marek Lieberberg* (n 60).
[62] Grace (n 44) 8.
[63] Intercontainer case ECR I-9687 (n 59) par 12.
[64] Okoli and Arishe (n 50) 519.
[65] Okoli and Arishe (n 50) 519.

The landmark decision in *Intercontainer Interfrigo SC (ICF) v Balkende Oosthuizen*[66] attempted to remedy the legal uncertainty created by English courts in applying the escape clause too frequently (flexible approach) or other Member State courts strictly applying the presumption in order to determine the law applicable to the contract (known as the strict presumption approach).[67] As legal certainty and predictability in commercial contracts is of the utmost importance, the court in *Intercontainer* considered the important role that the application of the presumption in article 4(2) plays. Similarly, the court also regarded that the escape clause in article 4(5) provides justice in individual cases, especially where the habitual residence of the characteristic performer has no connection to the contract.[68] The courts recommendation found that a middle ground between these two approaches could be reached with the application of an intermediary approach.[69]

The intermediary approach provides that the presumption in article 4(2) will only be rebutted where it appears, from all the circumstances as a whole, that another country other than the place of the habitual residence of the characteristic performer is *clearly* more closely connected to the contract.[70] There will always be situations where the phrase "*clearly* more closely connected" could be subjectively interpreted by judges to sway in either the direction of the presumption or the escape clause.[71] Under the intermediary approach judges have the discretion to weigh up the connecting factors and circumstances of the case in order to determine which of these factors has a more significant connection to the contract. If it appears from all the facts and circumstances of the case that the connecting factors are equally significant to the law of the place of the characteristic performer, then article 4(2) should be applied and not rebutted in preference of article 4(5).[72]

4.1.1.2.2. The Rome I Regulation

The abuse by the English courts of the escape clause in the Rome Convention as outlined above, led to the Rome I Regulation containing strict provisions rather than presumptions.[73] In the Rome I Regulation, the contract must first be classified in terms of article 4(1) in order to determine which law would be applicable to the contract.[74] The exception to article 4(1) can

[66] *Intercontainer* (n 59).
[67] Okoli and Arishe (n 50) 519, 522.
[68] *Intercontainer* (n 59) par 58, 61.
[69] *Intercontainer* (n 59) par 59.
[70] *Intercontainer* (n 59) par 61.
[71] Okoli and Arishe (n 50) 523.
[72] Okoli and Arishe (n 50) 524.
[73] Okoli and Arishe (n 50) 529.
[74] (n 28) art 4(1)(a)-(g) lists the different categories.

now be found in article 4(2).[75] Article 4(2) provides that, in instances where the contract cannot be classified in terms of the list provided in article 4(1) or the elements of the contract are covered by more than one category in the list, then the contract shall be governed by the law of the habitual residence of the characteristic performer.[76] The escape clause is now under article 4(3) of the Rome I Regulation with the only modification between the escape clause in the Rome I Regulation and the Rome Convention being the change of the wording "*law of the place more closely connected*" in the latter to "*manifestly more closely connected*" in the former. The escape clause will apply where the law cannot be determined under the articles 4(1) and 4(2) above. The implication of the escape clause is to discard the applicable rules set out in articles 4(1) and 4(2) in situations where the law of the country is manifestly more closely connected and would be more appropriate. Furthermore, the rule provided in article 4(4) of the Rome I Regulation should not be confused with article 4(3). Article 4(4) does not discard the provisions of article 4(1) and 4(2); it applies as a mechanism of locating a country that has the closest connection with the contract.[77]

4.1.1.2.2.1. Application of Article 4 of the Rome I Regulation in practice

The escape clause in the Rome I Regulation follows the intermediary approach as outlined above in the *Intercontainer* case.[78] Articles 4(1) – 4(4) of the Rome I Regulation establishes predictability and uniformity in the determination of the applicable law in international commercial contracts, especially in situations where parties failed to choose a governing law.[79] Some authors however believe that article 4 seems to unfairly advocate the application of certainty (favouring the strict presumption approach) over the application of flexibility and justice in individual cases.[80] The Rome I Regulation has however taken strides forward in establishing uniformity and legal certainty in international commercial contracts. This raises the question that when Rome I Regulation is incorporated into UK law, will it be amended to a position where English courts can again favour judicial discretion and flexibility over strict uniform rules.

[75] (n 38) recital 19.
[76] Okoli and Arishe (n 50) 529.
[77] (n 38) art 4(4) states "law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected". See Okoli and Arishe (n 50) 529 – 530.
[78] Intercontainer (n 59).
[79] Okoli and Arishe (n 50) 535.
[80] Ferrari and Leible Rome I Regulation: *The Law Applicable to Contractual Obligations in Europe* (2009) 27. Unfairness may take place when the court favours the law of one party over another; see Okoli and Arishe (n 50) 535.

Lastly, the Rome I Regulation does not have the provision of severing part of the contract from the rest of the contract unlike the Convention which contained the concept of *depecage*.[81]

5. Jurisdiction and the Recognition and Enforcement of Judgments in the EU and UK.

5.1. Brussels Convention and Brussels I Regulation Recast

The Brussels Convention and Brussels I Regulation Recast deal specifically with jurisdiction and the recognition and enforcement of judgments in EU Member States. The Brussels I Regulation Recast takes preference over the Brussels Convention, but the Brussels Convention will still be applicable to Member States which are excluded from the Brussels I Recast, but fall within the territorial range of the Brussels Convention.[82]

5.1.1. Recognition and Enforcement of Foreign Judgments

With regard to the recognition and enforcement of foreign judgments, the Brussels I Recast provides for the principle of reciprocity. This means that Member States will automatically recognise and enforce judgments of other Member States without having to register the foreign judgment first.[83] All current 28 Member States have different laws and legal systems, the convenience of not having to register a foreign judgment affords predictability and certainty among contracting parties, as there is no concern regarding the enforceability of the judgment.

5.1.2. Applicable Jurisdiction to hear the matter

In respect of the determination of the applicable jurisdiction, party autonomy takes preference under the Brussels I Regulation Recast. Typically the plaintiff must always institute action in the forum where the defendant is domiciled but where a court has exclusive jurisdiction or the parties have submitted in the contract for a specific court to have jurisdiction over that particular contract, then such a court will have jurisdiction regardless of the domicile of the defendant.[84] In situations where there is no exclusive jurisdiction or submission to jurisdiction,

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[81] where a different law (other than the proper law of the entire contract) may govern one part of the contract. Depecage applies where the severed part of the contract is deemed independent from rest of the contract and a more appropriate law is established to govern this independent section.

[82] art 68 states "[Brussels I Recast applies] except as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 355 of the TFEU superseded the Brussels Convention".

[83] art 36. See also Allen and Overy "Brexit – legal consequences for commercial parties: English jurisdiction clauses – should commercial parties change their approach?" 2016 Specialist paper No. 2 1 available at www.conflictoflaws.net.

[84] (n 38) art 24 and 25.

then the general rule under article 4 states that if the defendant is domiciled in a particular Member State, the court of that Member State shall have jurisdiction.[85] The major differentiation between the Brussels I Regulation Recast and Brussels Convention is the approach taken to the court *first seized*. The Brussels Convention contained provisions which were abused by defendants who would initiate the same proceedings in multiple courts and wait for the issue of jurisdiction to be determined by the court *first seized*. This lead to lengthy delays and frustrated parties. The Italian courts were typically chosen by defendants as they are notorious for being a slow-moving jurisdiction. As a result, this delay tactic became known as the *Italian torpedo effect*.[86] The *Italian torpedo effect* paved the way for articles 31-33 of the Brussels I Regulation Recast which provides that a court must stay proceedings in a situation where the proceedings are *lis pendens* before another court.[87]

5.1.3. The Lugano Convention

As a member of the EU, the UK is also bound to the Lugano Convention.[88] The Lugano Convention applies to all the EU Member States, including Denmark, Norway, Switzerland and Iceland (non-Member States). The Lugano Convention is not part of the Brussels Regime, however, it enforces a similar regime to the Brussels I Regulation Recast in matters regarding jurisdiction and the recognition and enforcement of judgments in international commercial contracts. Although the UK is a contracting state of the Lugano Convention, the Brussels I Regulation Recast takes precedence and only non-Member States who are contracting parties to the Lugano Convention will be bound by its provisions.[89]

The Rome and Brussels Regimes catered aptly for any PIL issues that arose. Both Regimes were amended continuously and many of the best legal minds applied themselves to severe PIL issues in order to cater for uniformity and harmonisation among Member States. Regardless of the advancement made above, Brexit means Brexit, and the process started with the triggering of article 50 of the TEU.

[85] (n 38) art 4.
[86] https://www.lexology.com/library/detail.aspx?g=8c7b00c4-80dd-43e4-89f3-fdd453a19420 (05-12-2017).
[87] Grace (n 44) 16.
[88] The Lugano Convention on the jurisdiction and the enforcement of judgements in civil and commercial matters (2007/712/EC).
[89] (n 88).

6. Triggering Article 50 of the Treaty on European Union (TEU)

6.1. Article 50

The UK is the first Member State under the current European regime to exit the EU, thus there is no precedent for the UK to follow under the provisions of the Treaty on the European Union (TEU).[90] Article 50 of the TEU governs the process should a Member State wish to leave the EU, and reads as follows:[91]

> "Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements."

This is followed by article 50(2) TEU, which provides that:

> "the Union shall negotiate and conclude [a withdrawal] agreement with that State."

Lastly, article 50(3) TEU:

> "The Treaties shall cease to apply to the State in question … two years after the notification [of its intention to withdraw], unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."

6.2. Interpretation of Article 50

The short and seemingly insignificant article 50 has caused much debate in the UK. When one reads article 50 the literal interpretation allows for a Member State to leave unilaterally, without actually negotiating a withdrawal agreement with the EU as the obligation is placed solely on the EU and not on the exiting Member State.[92] However a unilateral withdrawal was clearly not the preferred option envisaged by the drafters of article 50 and the assumption can be made that it was drafted in such a way to be used as a tool to discipline the negotiators and avoid unnecessary bargaining or procrastination should a Member State want to exit the EU.[93]

The two-year period allowed to complete negotiations is far too short given the complexity and intricacies that need to be ironed out between the EU and the UK. The UK political parties are still trying to determine amongst themselves who should be at the helm of the Brexit ship and

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[90] Wessing "Brexit – the potential impact on the UK's legal system" available at https://unitedkingdom.taylorwessing.com/download/article-brexit-uk-legal-system.html (3-10-2017).

[91] Barnard (n 2) S4.

[92] Łazowski "Unilateral withdrawal from the EU: realistic scenario or a folly?" 2016 *Journal of European Public Policy* 1294 1296.

[93] Łazowski (n 92) 1296.

lead the negotiations. Furthermore, at the time of writing this dissertation, the UK and EU are currently in a deadlock regarding the withdrawal agreement. Fortunately for the UK, article 50 does not regulate for how long the two-year period could be extended and how many times the European Council can extend it.[94]

6.3. Procedure triggering Article 50

The issue of who could effectively trigger article 50 has even been contested in the UK courts.[95] Ultimately, it was decided by the High Court[96] and finally by the Supreme Court[97] in an eight to three majority that the Brexit proposal must be presented and debated in Parliament, before article 50 can be triggered by the Government. Nevertheless, the triggering of article 50 was done on 29 March 2016, when Sir Tim Barrow, the Permanent Representative of the United Kingdom to the European Union, delivered the withdrawal letter to Donald Tusk, president of the European Council.[98]

6.4. Timing of the Triggering

The timing of the triggering of article 50 by the UK also leaves much to be desired. During the two-year period allowed to negotiate the withdrawal agreement, the French, Dutch, and German domestic elections are scheduled.[99] This means key politicians from those jurisdictions will be firmly focused on their own domestic issues and elections, which will hamper and ultimately frustrate the negotiation process.

6.5. Can Brexit and the triggering of Article 50 be stopped?

Lastly, what if the UK public and politicians realise that they have made a grave error and still want to be a part of the single market and the EU. Can the triggering of Article 50 be stopped and Pandora's box be closed. In *R (Miller) v Secretary of State for Exiting the European Union*[100] the UK Government concede that once Article 50 is triggered, it cannot be reversed.

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[94] Łazowski (n 92) 1296.

[95] *Gina Miller in R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768, http://www.bailii.org/ew/cases/EWHC/Admin/2016/2768.html. Also see Barnard (n 2) S6.

[96] *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 http://www.bailii.org/ew/cases/EWHC/Admin/2016/2768.html.

[97] [2017] UKSC 5, https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf.

[98] Letter sent by Theresa May to Donald Tusk triggering article 50.

[99] Barnard (n 2) S6.

[100] *R (Miller) v Secretary of State for Exiting the European Union* (n 96).

However, Sir David Edward – a former British judge of the European Court of Justice – stated "It is absolutely clear that you cannot be forced to go through with [the Article 50 process] if you do not want to: for example, if there is a change in Government".[101] His views were supported by Professor Derrick Wyatt:[102]

> "There is nothing in the wording to say that you cannot [stop the Article 50 process]. It is in accord with the general aims of the Treaties that people stay in rather than rush out of the exit door. There is also the specific provision in Article 50 to the effect that, if a State withdraws, it has to apply to rejoin de novo. That only applies once you have left. If you could not change your mind after a year of thinking about it, but before you had withdrawn, you would then have to wait another year, withdraw and then apply to join again. That just does not make sense. Analysis of the text suggests that you are entitled to change your mind".

However, both Sir David Edward and Professor Derrick Wyatt drew a distinction between the law, which was clear, and the politics surrounding Brexit, where common sense of politicians is replaced by inflated egos and propaganda is spewed out by political parties in the hope of obtaining votes, and with that, power.[103]

7. The Great Repeal Bill and Various Position Papers

7.1. The Great Repeal Bill

The triggering of Article 50 allows the UK a two-year grace period to negotiate a withdrawal agreement with the EU. After the two-year period ends, no EU legislation, such as the Rome and Brussels Regimes, will be applicable in the UK. Subsequently, the Department for Exiting the European Union (DExEU) was formed and is responsible for overseeing negotiations to leave the EU and establishing the future relationship between the UK and EU.[104] The DExEU's first major contribution was publishing the white paper, Legislating for the United Kingdom's Withdrawal from the European Union,[105] or the so called Great Repeal Bill (GRB).

The first few pages of the GRB are a valiant attempt at trying to inspire hope, a sense of pride and reaffirm that the UK has made the correct decision to leave the EU. The Prime Minister's foreword states that the UK is going to "negotiate a new deep and special partnership with the

[101] Barnard (n 2) S8.
[102] Barnard (n 2) S8.
[103] Barnard (n 2) S8.
[104] https://www.gov.uk/government/organisations/department-for-exiting-the-european-union (04-01-2018).
[105] https://www.gov.uk/government/publications/the-repeal-bill-white-paper (04-01-2018).

European Union"[106] and this will "provide business, the public sector and everybody in our country with as much certainty as possible".[107] The foreword by the Secretary of State for DExEU, Rt Hon David Davis MP, goes on to mention that at the heart of the decision to leave the EU was the UK's sovereignty:

> "A strong, independent country needs control of its own laws. That, more than anything else, was what drove the referendum result: a desire to take back control. The Great Repeal Bill will repeal the European Communities Act 1972 on the day we leave the EU. The UK Parliament will unquestionably be sovereign again. Our courts will be the ultimate arbitrators of our laws."[108]

An important aspect mentioned by David Davis, is that the GRB will repeal ECA, which as mentioned above is the legislation that initially elevated the UK to a Member State of the EU.

7.2. General Outcomes of the Great Repeal Bill

What is outlined above will invariably require a creative and innovative solution. So how is the UK going to achieve this special relationship and create the much-needed certainty – especially for London, as it is the economic hub of Europe – and take back control, its laws and its sovereignty? The short answer is that UK will "convert the 'acquis' – the body of European legislation – into UK law at the moment [the UK] repeal[s] the Europeans Communities Act".[109] The same rules and laws which apply on the day before Brexit will apply on the day after Brexit. A key point that has been made throughout this minor dissertation is how EU law has become so integrated in UK law. The Government has even admitted that if the GRB does not convert existing EU law into UK domestic law at the same time as repealing the ECA, the UK's statute book would contain significant gaps once they left the EU.[110]

7.2.1. Creation of Secondary Legislation

An important attribute of the GRB is that it will create the powers to make secondary legislation. The ability to create secondary legislation enables corrections to be made to laws that would otherwise no longer operate appropriately following Brexit and so that the UK's legal system

[106] White Paper Legislating for the United Kingdom's Withdrawal from the European Union (2017) 3 available at https://www.gov.uk/government/publications/the-repeal-bill-white-paper/legislating-for-the-united-ingdoms-withdrawal-from-the-european-union (02/12/2017).
[107] (n 106) 4.
[108] (n 106) 8.
[109] (n 106) 3.
[110] (n 106) 13.

as a whole continues to function correctly outside the EU.[111] The ability to create secondary legislation sounds great, however, secondary legislation is more commonly referred to as Henry VIII clauses. Henry VIII clauses do not require the full scrutiny of Parliament which effectively means that the Government, will have power to amend laws as they see fit whether the UK Parliament has agreed or not.[112]

At this stage it is not possible to predict how every law is to be corrected by secondary legislation; the amendments that may be required depend on the outcome of the negotiation and the ultimate withdrawal agreement (should there be one).[113] The UK Government has estimated an astounding and frightening figure of between 800 and 1000 statutory instruments that will have to be drafted to make the necessary corrections to the newly incorporated EU law.[114] In most cases, corrections made by secondary statutory instrument will need to be made before the UK leaves the EU, so as to ensure they have a functioning statute book on the day of their withdrawal, but as stated above this will depend on the outcome of negotiations and the contents of the withdrawal agreement.[115]

7.2.2. The Court of Justice of the European Union and the Great Repeal Bill

As a Member State of the EU, the UK is subject to the jurisdiction and decided case law of the Court of Justice of the European Union (CJEU), which is the highest court in the EU relating to matters of EU laws. The GRB makes it clear that after leaving the EU, this will bring an end to the jurisdiction of the CJEU in the UK. The GRB will not provide any role for the CJEU in the interpretation of any *post* Brexit UK laws and the GRB will not require UK domestic courts to consider the CJEU's jurisprudence following Brexit.[116] The volumes of CJEU jurisprudence will however not be completely neglected, as the GRB provides that any question as to the meaning of EU derived law, will be determined in the UK courts by reference to the CJEU's case law as it exists on the day the UK leaves the EU.[117] The intention here is to create legal certainty at the point of departure of the UK from the EU, but not to cast in stone the past decisions of the CJEU. Historic CJEU case law will therefore be given the same binding, or precedent, status in the UK courts as decisions of their own Supreme Court.[118] However, the Supreme Court may depart from one of its decisions or that of its predecessor, the House of

[111] (n 106) 13.
[112] Barnard (n 2) S9.
[113] (n 106) 17.
[114] (n 106) 18.
[115] (n 106) 24.
[116] (n 106) 13.
[117] (n 106) 15.
[118] (n 106) 15.

Lords, "when it appears right to do so".[119] Any new CJEU judgments given after Brexit will most likely be persuasive and no longer binding on UK courts.

7.2.3. Conflict between post Brexit primary UK law and EU derived laws

Lastly, the GRB proposes that where there is a conflict between the newly incorporated EU derived law and any primary legislation passed after Brexit, the newer legislation passed after Brexit will take precedence over the EU derived law the UK will have preserved.[120] The GRB will also enable domestic law to be drafted once the UK has left the EU to reflect the content of any withdrawal agreement under Article 50.[121]

7.3. Further Position Papers by DExEU and the EU

7.3.1. DExEU

The DExEU released a further paper titled Providing a Cross-Border Civil Judicial Cooperation Framework: A Future Partnership Paper.[122] The paper sets out that the UK has a shared interest with the EU in ensuring the new arrangements are thorough and effective, in particular, citizens and businesses need to have continuing confidence as they interact across borders; which country's courts would deal with any dispute; which laws would apply; and know that judgements and orders obtained will be recognised and enforced in neighbouring countries, as it currently stands in the EU.[123]

The position paper speaks of civil judicial cooperation which is effectively the legal framework that would govern the interaction between different legal systems in cross-border situations. More so, this framework provides rules to determine what the Rome and Brussels Regimes cater for, such as which countries' courts will hear civil and commercial cases raising cross-border issues, such as jurisdiction or applicable law or whether a judgment obtained in one country will be recognised and enforced in another.[124]

[119] (n 106) 16.
[120] (n 106) 17.
[121] (n 106) 13.
[122] Providing a cross-border civil judicial cooperation framework: a future a partnership paper (2017) https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper (03-12-2017).
[123] (n 122) 2.
[124] (n 122) 2.

The reason for the close cooperative relationship between the legal systems of the UK and the EU is because of the single market.[125] Many EU corporations have established businesses in the UK and the companies across the EU choose to use English law to govern their contracts.[126] Research indicates that English law governs around 40 per cent of global commercial arbitrations.[127] Common contractual clauses such as which courts will have jurisdiction and which countries law will apply, support business confidence and trade, and minimises the potential for delaying tactics in the event of a dispute.[128] As mentioned above, once the UK leaves the EU they will incorporate into their domestic law the Rome I Regulation and Brussels I Regulation Recast. By incorporating existing EU law, the UK hopes to provide a coherent legal framework for the UK and EU business to trade and invest with confidence across borders.[129]

7.3.2. European Commission

As the Brexit negotiations process is a two-way street, it is not only the DExEU who have published papers. The European Commission published a position paper on Judicial Cooperation in Civil and Commercial Matters[130] which has at its core the following:

> "The Withdrawal Agreement [between the UK and EU in terms of article 50] should ensure that the relevant provisions of Union [EU] law on jurisdiction, recognition and enforcement applicable on the withdrawal date continue to govern judicial proceedings and procedures in civil and commercial matters pending on the withdrawal date. The relevant provisions of Union [EU] law applicable on the withdrawal date should continue to apply to choices of forum and choices of law made prior the withdrawal date. Judicial cooperation procedures that are ongoing on the withdrawal date should continue to be governed by the relevant provisions of Union [EU] law applicable on the withdrawal date".[131]

[125] The single market refers to the EU as one territory without any internal borders or other regulatory obstacles to the free movement of goods and services. A functioning single market stimulates competition and trade, improves efficiency, raises quality, and helps cut prices. The European single market is one of the EU's greatest achievements. It has fuelled economic growth and made the everyday life of European businesses and consumers easier.

[126] (n 106) 4.

[127] Based on responses to the 2010 International Arbitration Survey: Choices in International Arbitration, Queen Mary, University of London, 2010.

[128] (n 106) 5.

[129] (n 106) 6.

[130] Position paper on Judicial Cooperation in Civil and Commercial Matters (2017) available at https://ec.europa.eu/commission/publications/position-paper-judicial-cooperation-civil-and-commercial-matters_en.

[131] (n 130) 2.

The UK's response to the EU's position paper[132] above essentially agrees with the EU, in that existing EU laws will govern all issues relating to applicable law of a contract, jurisdiction, choice of court agreements, and the recognition and enforcement of judgments up until the withdrawal date.

The real issue is how the UK and EU will move forward post Brexit. The best solution is to have all PIL issues ironed out before the two-year period ends, but that like with most things in life, is easier said than done. The UK will want to have the best of both worlds, in that they will want to be completely sovereign of the EU's legislation and binding precedents of CJEU, but still benefit as they did while a Member State through the single market. From the EU's perspective, they could see this as a perfect opportunity to play 'hard ball' with the UK and set a precedent of making negotiations and withdrawal agreements for any future Member State defectors cumbersome, inefficient and potentially hamper a country financially before it exists the EU.

8. The Future of the EU and UK

Many are doubting whether the present UK Government, under the leadership of Theresa May, can technically deliver the legislation required to affect the Brexit plans in time for the 30 March 2019 deadline.[133] As it is uncertain that the UK can negotiate a Brexit agreement before article 50 TEU causes it to leave the EU, the risk of the UK leaving without an agreement remains prevalent.[134] What then will be the future of English PIL of contracts following Brexit. The following suggestions may come to fruition.

8.1. Adoption of Rome I Regulation.

As we know, the UK will convert the Rome I Regulation into domestic law upon its exit from the EU. This would most certainly work as the Rome I Regulation is unilateral in its application and doesn't require any form of reciprocity from other Member States of the EU.[135] Adoption of Rome I Regulation would ensure that the same rules apply in the UK regarding the choice of law of a contract as in the rest of the EU, however, this is still not a full proof plan.

[132] (n 122) annex A 10.
[133] Fitchen "The PIL consequences of Brexit" 2016 available at http://www.nipr-online.eu/upload/documents/20171006T120337-NIPR%202017-3_Fitchen.pdf (04-01-2018) 411 412.
[134] Fitchen (n 133) 412.
[135] Fitchen (n 133) 418.

Interpretations regarding the meanings of provisions could differ between the English courts and the CJEU.[136] Recital 6 of the Rome I Regulation states:

> "The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable…"[137]

As there could be different interpretations and judgments between EU courts and English courts this undermines the aim of Recital 6.[138]

Another issue could be if secondary legislation is enacted to amend the newly incorporated Rome I Regulation. Such amendments could change article 4 by a decision to revert to a situation under the Rome Convention, where the weak presumption and escape clause in the Rome Convention are utilised. English courts had a tendency not to comply with the application of article 4(3) as maintained in the Rome I Regulation, rather English courts would deploy the escape device in situations where the place of performance differs from the habitual residence of the seller (characteristic performer).[139] This takes the EU right back to what it aimed to remedy with the enactment of the Rome I Regulation.

8.2. Adoption of the Brussels I Regulation Recast

English law and their various specialised courts are known throughout the commercial world and this reputation is a major contributing factor for the jurisdictional choice and applicable law for the contract being English.[140] There is however a real risk that with the departure of the UK from the EU that an English judgment will not be readily enforceable in the continuing EU. This has led to some lawyers in EU Member States to state that commercial litigation that would have come to English courts will now be diverted to other European centres of international litigation.[141] Recently, Belgium plans to set up a new English language based commercial court, the Brussels International Business Court (BIBC), to take cases away from the courts and tribunals in London.[142]

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[136] Swoboda "Brexit & conflict of laws: part 3" available at https://internationalandtravellawblog.com.
[137] (n 37).
[138] Swoboda (n 136)
[139] *Definitely Maybe v Marek Lieberberg* (n 60).
[140] Mukarrum "BREXIT and English Jurisdiction Agreements: The Post-Referendum Legal Landscape" 2016 *European Business Law Review* 989 993.
[141] Mukarrum (n 140) 990.
[142] http://conflictoflaws.net/2017/eu-member-state-sees-opportunities-in-brexit-belgium-is-establishing-a-new-english-language-commercial-court/ (04-01-2017).

The Importance of enforcing judgments throughout the EU was a pivotal component of Brussels I Regulation Recast. Although the UK is going to incorporate the Brussels I Regulation Recast into domestic law, this doesn't entail that there will be automatic and parallel recognition by EU Member States of UK judgments, and *vice versa*. The UK cannot enact domestic legislation or amend the provisions of the newly domesticated Brussels I Regulation Recast to unilaterally force the remaining EU Member States to recognise and enforce judgments from the UK.[143] This would be akin to South Africa enacting legislation to unilaterally force the EU to recognise and enforce South African judgments – it just won't happen. It also seems highly unlikely that the UK would unilaterally offer jurisdictional access, *lis pendens* privileges and automatic recognition and enforcement to the EU if the EU does not reciprocate.[144] Although the UK will incorporate the Brussels I Regulation Recast into domestic law they are still missing the key component of reciprocity and without that, everything they do domestically would be futile, unless an agreement can be reached with the EU.

8.2.1. Alternative option to Brussels I Recast Regulation

The academic Mukarrum advances some practical solutions if the primary objective of the jurisdiction clause in a contract is to obtain a judgment that can be enforced throughout the EU, the three most important are as follows:[145]

8.2.1.1. Non-Exclusive Jurisdiction

Parties could give non-exclusive jurisdiction to the English courts.[146] This safeguard allows the parties' choice of jurisdiction in the contract but will also allow the position to be reconsidered at the time when legal proceedings are instituted.[147] If the English judgment is enforceable in the EU and *vice versa*, then the English court can be used, but if an English judgment is not enforceable in the EU, it will allow the use of other courts.[148] Cross broader finance contracts typically make use of this variant.[149]

[143] Fitchen (n 133) 419.
[144] Fitchen (n 133) 419.
[145] Mukarrum (n 140) 993.
[146] Mukarrum (n 140) 994.
[147] Mukarrum (n 140) 994.
[148] Mukarrum (n 140) 993.
[149] Keyes and Marshall "Jurisdiction Agreements: Exclusive, Optional and Asymmetrical" 2015 *Journal of Private International Law* 345.

8.2.1.2. Arbitration

The second option is to make use of Arbitration. Arbitration is already commonly used if enforcement is critical and the other party has assets in a jurisdiction where an English judgment will not be enforceable. The extensive reach of the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards,[150] which has 157 contracting states including the EU as a whole, provides for the enforcement in participating states of an arbitral award given in another participating state.[151]

8.2.1.3. Hague Convention on Choice of Courts Agreements

The final option is that of the Hague Convention on Choice of Courts Agreements (the Hague Convention).[152] The EU, Mexico and Singapore have all signed and ratified this Convention. The Hague Convention has very similar characteristics to that of the Brussels I Regulation Recast. The three most important provisions for our purposes being that the court of a Contracting State to the Hague Convention designated in an exclusive jurisdiction agreement shall have jurisdiction to decide the dispute to which the agreement applies, unless the agreement is null and void under the law of that State.[153] A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive jurisdiction agreement applies.[154] Lastly a judgment given by a court of a Contracting State designated in an exclusive jurisdiction agreement shall be recognised and enforced in other Contracting States.[155]

When the UK leaves the EU it will no longer be a party to the Hague Convention through the EU. However, given the political support that the then Labour Government gave to the Hague Convention when it was being negotiated between 2003 and 2005, together with the support the Conservative/Liberal Democrat coalition government gave to the Hague Convention when the Council of the European Union decided to approve the Hague Convention in 2014, it seems almost certain that post Brexit the UK will attempt to remain a party to the Hague Convention.[156] The Hague Convention therefore embodies all the main criteria of the Brussels

[150] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 4739.
[151] Mukarrum (n 140) 995.
[152] The Hague Convention on Choice of Courts Agreements available from https://www.hcch.net/en/instruments/conventions/full-text/?cid=98 (04-01-2018).
[153] (n 152) Art 5.
[154] (n 152) Art 6.
[155] (n 152) Art 8.
[156] Mukarrum (n 140) 998.

I Regulation Recast and will allow for reciprocity with the EU without having to negotiate separate treaties with the EU and non-Member States.

8.3. Brussels and Lugano Conventions

The possible use of the Brussels and Lugano Conventions as alternatives for the UK after Brexit is unlikely.[157] The Lugano Convention is too heavily influenced by the CJEU, from which the UK is actively trying to move away from.[158] Furthermore, should the UK want to become a contracting party of the Lugano Convention this would require unanimous consent from all current contracting parties – being the EU, Denmark, Iceland, Norway, Switzerland – which is unlikely to happen.[159] Similarly, in relation to exclusive jurisdiction agreements the Brussels Convention and Lugano Convention will both allow for the *Italian torpedo effect* if a *first seized* non-chosen court in a Contracting State to the Brussels or Lugano Convention is hearing the matter.[160] Lastly, the UK's proposed GRB concerns the re-application of *current* EU law into domestic legislation; the revival of the Brussels Convention would be inconsonant with this policy.[161]

9. Withdrawal Agreement – the Holy Grail

The best solution to Brexit would be a well drafted withdrawal agreement, which would come into effect on the day the UK leaves the EU. The EU's stance however is that the EU only wishes to negotiate PIL's rules concerning the UK and EU after Brexit when the UK is officially a non-Member State.[162] Fitchen advances that:

> "The tenor of the EU's opening position from the pre-negotiation material appears to be as follows; as the UK has opted to leave the EU it has also opted to leave the EU's PIL, it follows that there is no reason for the UK to participate further in any EU PIL post withdrawal other than in relation to the sort of protective transitional arrangements proposed by the EU [in the Position Paper on Judicial Cooperation in Civil and Commercial]".[163]

[157] Mukarrum (n 140) 992.
[158] Mukarrum (n 140) 992.
[159] Fitchen (n 133) 21.
[160] Mukarrum (n 140) 991.
[161] Fitchen (n 133) 424.
[162] See Recommendation for a Council Decision authorising the Commission to open negotiations on an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, plus draft Annex 1, both 3 May 2017 COM (2017) 218 final. Aspects of the Annex 1 document were revised before it was accepted in Brussels, 22 May 2017 XT 21016/17 ADD 1 REV 2 BXT 24; subsequent references to Annex 1 refer to the 22 May 2017 revised version. And see Fitchen (n 133) 421.
[163] Fitchen (n 133) 421.

Neither the EU nor the UK seem to be making compromises. Regarding the CJEU, the EU struggles with the effects of a return to sovereignty by the UK while the UK will not budge on its consistent drawing of a red-line concerning the jurisdiction of the CJEU over UK laws and courts.[164] Both the EU and the UK must take cognisance of the PIL areas that require negotiation and compromises. Although the UK will be a non-Member State, the 40 years it has been a part of the EU carries significant weight as there is still a need for continuation of EU law within the UK post Brexit. The UK is to compromise just as much by potentially allowing but not *requiring* the oversight of the CJEU *in the UK*.[165]

10. Conclusion

One cannot help but think that the UK has let its ego get the better of them regarding Brexit. The age-old sayings of don't count your chickens before they hatch; don't cook the sauce before catching the fish; the way to cook a rabbit is to first catch the rabbit; punching above your weight is how you get injured; and lastly pride goeth before the fall, hold real value when analysing how Brexit has unfolded thus far. The UK finds itself in a precarious and uncertain future and one cannot help get the feeling that they are scrambling to find their footing in Europe and the world at large.

This dissertation started with the words of Lord Denning as he spoke of the vastness of EU regulations, directives and case law and how they have become intertwined with English laws. His sentiments of "we must get down to it" again come to fruition as the UK faces a massive uphill battle to make Brexit work economically, politically and legally. PIL is but a small part of the exit negotiations the UK and EU must have in the coming months. But the UK's decision to incorporate the existing body of EU into domestic laws is by no means the ideal answer. The Rome I Regulation, while not requiring reciprocity will invoke issues concerning interpretations and there is a real likelihood that the UK will revert to its weak presumption rules and make frequent use of the escape clauses, especially when matters involve an English element.

The beating heart of the Brussels I Regulation Recast is the concept of reciprocity. The UK as a non-Member State of the EU following Brexit would have to look at the Hague Convention in order to obtain reciprocity with EU Member States and non-Member States. The Hague

[164] Fitchen (n 133) 422.
[165] Fitchen (n 133) 432.

Convention was given even more credibility with China, a major economic trading country, signing the Hague Convention on 12 September 2017, although they have not yet ratified this Hague Convention. Although the Hague Convention has not come into force in China, a Shanghai High Court has already relied on the Hague Convention to deliver a judgment thereby showcasing their commitment.[166] Overall, the best solution for both the EU and UK going forward is a well drafted withdrawal agreement. Concessions will have to be made on both sides and whether this will happen only time will tell. That leads us to the only certain factor about Brexit, it's uncertainty.

[166] http://conflictoflaws.net/2017/chinese-courts-made-decision-taking-into-account-of-the-hague-choice-of-court-convention/ (05-12-2017).

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